New Zealand Law Society
Te Kāhui Ture o Aotearoa

Parliament Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

6 November 2024

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Parliament Bill (**Bill**), which seeks to amalgamate and modernise legislation relating to Parliament, in order to ensure the legislative framework is consistent, clear, and accessible.[1]

1.2 This submission has been prepared with input from the Law Society's Criminal Law, Public Law, and Human Rights and Privacy Committees.[2]

1.3 The Law Society wishes to be heard in relation to this submission.

2 Summary of submissions

2.1 The Law Society supports the Bill, including the proposal to consolidate legislation related to Parliament into a single statute.

2.2 The Law Society has considered whether combining provisions on Parliamentary privilege (currently found in the Parliamentary Privilege Act 2014 (**2014 Act**)) with provisions concerning the administration and funding of Parliament could be perceived as undermining the constitutional significance of parliamentary privilege. We do not consider this to be a serious risk given the clear legislative intention not to modify the constitutional status or substantive effect of the provisions in the 2014 Act,[3] and given the benefits of having all legislation relating to Parliament accessible in a single place.

2.3 The Law Society supports the consolidation and modernisation of the statutes relating to parliamentary funding and administration in Parts 3 to 10 of the Bill. It has identified a small number of provisions in Parts 4, 7 and 8 that could be amended to improve the function, clarity and consistency of the provisions. In particular, the Law Society recommends that the select committee consider:

(a) strengthening the transparency aspects of Part 4 and Schedule 3; and

(b) clarifying the provisions relating to parliamentary security, including the offence provisions.

3 Consolidation of parliamentary legislation (Part 2 of the Bill)

The consolidation of parliamentary legislation

3.1 The Law Society considers that the Bill is to be commended, as it brings together various pieces of legislation currently scattered throughout the statute books. This makes the laws about Parliament and its members easier to find. The law is also modernised and some of the anomalies and contradictions which have developed have been identified and ironed out. While parts of the Bill are detailed and technical, the proposed drafting makes the law easier to understand. As a result, the Bill improves the digestibility of parliamentary law and helps to promote the rule of law.

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1 Explanatory Note of the Bill.

2 More information about these committees is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

3 Departmental Disclosure Statement at page 12.

3.2 There are some risks in combining the law about parliamentary privilege in a Bill that also deals with the administration and funding of Parliament. Matters which are 'proceedings in Parliament' cannot be questioned except by Parliament itself, as distinct from the funding and administration of Parliament, which involves the spending of public money, and should have a level of transparency and public accountability.

3.3 However, the clear way that the Bill has been structured, and the identification of overall purposes, as well as the purposes of the various Parts of the Bill, means possible confusion between the constitutional responsibilities and accountability for funding and administration is likely to be low. In our view, the benefit of being able to access parliamentary law from a single source outweighs potential drawbacks, such as if there were possible disputes about allowances of members of Parliament (**MPs**) being considered privileges of Parliament.

3.4 We note that different approaches are taken internationally. For example, in Australia, the Commonwealth and Queensland have separate Acts dealing with parliamentary administration and parliamentary privilege. In Canada, however, the Parliament of Canada Act 1985 adopts a similar approach to this Bill, by dealing with parliamentary privilege and immunities as well as the administration of Parliament.

3.5 In the Law Society's view, the select committee needs to be satisfied that there is a clear distinction in the Bill about the aspects dealing with parliamentary privilege and immunities (where Parliament is the sole arbiter of issues concerning privilege), and other Parts of the Bill, including the administration and funding of Parliament, where principles of transparency, independence, fairness, efficiency, effectiveness and administrative simplicity are applicable.

Is the meaning of the 2014 Act retained as intended?

3.6 The Explanatory Note of the Bill and the overall purpose provision (clause 3) provide the general policy statement of the Bill is to both "consolidate and modernise" the relevant Acts. Notwithstanding this general statement, the Law Society understands that Parliament does not intend the substance and meaning of the provisions of the 2014 Act to be materially altered by the equivalent provisions in Part 2 of the Bill. This is clear from the legislative material, which we have considered, given that a Court may have regard to such material in seeking to ascertain the meaning of the new proposed Act in due course. The various background materials all disclose an intention to re-enact the existing provisions of the 2014 Act without altering their meaning.[4]

3.7 Accordingly, the Law Society considers the Bill retains the meaning of the 2014 Act as intended. Although not essential, the select committee may consider recording this explicitly in its report.

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4 See, for example: Ministry of Justice *Consistency with the New Zealand Bill of Rights Act 1990: Parliament Bill* (18 July 2024)at [52]; *Regulatory Impact Statement 1: Parliament Bill – Overview* (6 September 2021) at pages 2 and 9.; and the *Departmental Disclosure Statement* at page 12.

Is retaining the same meaning desirable?

3.8 We support the meaning and effect of the 2014 Act continuing without substantive change via this Bill.

3.9 The constitutional importance of parliamentary privilege, its origins, scope, and limits are generally well-known. That is not to say there is no scope for the ongoing development of the meaning and limits of the privilege. Matters relating to parliamentary privilege have been the subject of a range of judicial decisions at all levels of the courts. Examples include in the law of defamation, to which Parliament responded by overruling the *Attorney-General v Leigh* decision expressly in the 2014 Act.[5] Recent overseas decisions also illustrate the contemporary issues raised by Parliamentary privilege, such as where bodies related to (but not themselves) Parliamentary bodies seek to assert the protection of the privilege.[6]

3.10 The law of Parliamentary privilege has also been responsive to development in new areas of the law, for example in respect of declarations of inconsistency cases. In *Attorney-General v Taylor*,[7] the Court of Appeal discussed the scope and limits of parliamentary privilege, and held that the prohibition on impeaching proceedings in Parliament did not prevent the Court from using Parliamentary material or making findings about the rights-consistency of legislation in the context of proceedings seeking a declaration of inconsistency with the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**).

3.11 These cases, all relating to various aspects of parliamentary privilege, illustrate that it is appropriate for the development of the law in this area to continue to be considered by the courts. This in turn supports the conclusion that the Bill appropriately does not seek to alter the substantive law of parliamentary privilege.

4 Salaries, allowances, expenses, and services for members and others (Part 4)

4.1 The Bill proposes changes to the system for funding members' work-related expenses, including more family-friendly options and greater clarity and transparency about the applicable rules. Currently, matters relating to salaries and allowances of MPs is covered in the Members of Parliament (Remuneration and Services) Act 2013 (**MOPRSA**) and associated secondary legislation. That legislation has its genesis in a review undertaken by the Law Commission in 2010.[8] Many of the changes proposed in the bill implement recommendations from a 2020 review of the MOPRSA.[9]

4.2 In the Law Society's view, these changes have a number of positive aspects:

(a) Greater flexibility about provisions relating to family members and dependents (including adult children who have a disability) means there is less of a barrier

5 *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 723.
6 See *Crime and Corruption Commission v Carne* [2023] HCA 28, (2023) 412 ALR 380.
7 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24.
8 Law Commission *Review of the Civil List Act 1979: Members of Parliament and Ministers* (November 2010).
9 *Report of the Speaker of the House of Representatives and the Minister Responsible for Ministerial Services on the review of the operation of the Members of Parliament (Remuneration and Services) Act 2013* (21 July 2020).

for MPs who have those care responsibilities and has the wider benefit to society of supporting a more diverse and inclusive representation.

(b) Having the Speaker determine all travel expenses and accommodation for members creates less confusion by having one authority to determine the issues comprehensively (noting that some expenses currently are determined by the Remuneration Authority). It is more constitutionally appropriate in allowing the Parliament to determine its own affairs.

(c) Specifying the principles relating to the use of funds by recipients in the primary legislation highlights the significance of transparency, openness and responsibility for the expenditure of public funds. Currently these principles are in secondary legislation and the change is consistent with the legal convention that statutes set out the policy and substance of the law, and secondary legislation is limited to the technicalities and detail.

4.3 However, the Law Society considers there is scope for strengthening the transparency aspects of the Bill.

4.4 While the Bill specifies clear principles about openness and transparency applying in the making of determinations and the use of funding and services by members (clauses 68 and 69), access to funding and accountability information remains inconsistent and limited. The Speaker and the parliamentary agencies are not subject to the Official Information Act 1982 (**OIA**) under the Bill, while the Remuneration Authority and the Chief Executive responsible for Ministerial Services are required to make information available in accordance with the OIA. Therefore, any related information on the setting of funding and services by the Speaker cannot be requested under the OIA.[10]

4.5 Currently, the disclosure of expenses is limited to:

(a) accommodation (Wellington and non-Wellington);

(b) travel (air, surface and VIP transport); and

(c) Office of the Clerk-funded inter-parliamentary programme expenses,

and reported on as each individual members' expenses. While commending moves to greater transparency, the Law Commission has noted that this voluntary disclosure regime still lacks transparency – for example, air travel does not distinguish between domestic and international travel, or separately identify travel paid for an MP's spouse or partner or dependent children.[11]

4.6 The Regulatory Impact Statement relating to these aspects of the Bill also refers to Parliament's *Protocol for the release of information from the parliamentary information, communication and security systems* (**Protocol**) which sets out guidance for dealing with requests for information held by parliamentary agencies, and suggest that this Protocol provides for such requests to be made.[12]

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10 *Regulatory Impact Statement 5: Provision of Funding for Members' Work Expenses* (6 September 2021) at [67].

11 Above n 8 at [3.2] - [3.4].

12 Above n 10.

4.7 The Protocol requires the parliamentary agencies to develop guidelines for dealing with requests for information about parliamentary administration (which is not defined) which balance openness and transparency, privacy principles and parliamentary independence. Such guidance must be approved by the Speaker.[13] However, the Protocol and guidance have no formal legal status, and there is no requirement to publicly consult on the content of the guidelines dealing with parliamentary administration, even though they raise issues about the right of the public to access information about the spending of public funds. There is also no requirement to give public notice about the guidelines once they have been developed. The Bill does not appear to provide a statutory basis for making such documents, nor indicate whether the protocol and guidance will continue in some form or what will replace them.

4.8 Greater disclosure of parliamentary administration information is one area where the transparency aspects of the Bill could be strengthened. Inappropriate settings for determining expenses and misuse of funding can have significant consequences for Parliament and cause a public distrust of the institution, which has significant consequences for democracy itself (the United Kingdom's 2009 parliamentary expenses scandal is an example). Many overseas parliaments (including in the UK and Australia) now have administration and funding regimes that are subject to freedom of information laws or transparent disclosure regimes.[14]

4.9 The Law Commission's 2010 report recognised the wider public interests of openness and transparency.[15] The Commission recommended a much wider reform including application of the OIA to information held by the Speaker in their role with ministerial responsibilities for:

(a) the Parliamentary Service and the Office of the Clerk;

(b) the Parliamentary Service Commission; and

(c) the Office of the Clerk in its departmental holdings.[16]

4.10 The Law Commission also recommended the OIA should not apply to:[17]

(a) proceedings in the House of Representatives (which includes select committee proceedings and internal papers prepared directly relating to the proceedings of the House or committees);

(b) information held by the Clerk of the House as agent for the House of Representatives;

(c) information held by members in their capacity as members of Parliament;

(d) information relating to the development of Parliamentary party policies, including information held by or on behalf of caucus committees; and

(e) party organisational material, including media advice and polling information.

13 Clause 12 of the Protocol.
14 Above n 8 at [3.22] – [3.23].
15 Above n 8 at [3.13] – [3.14].
16 Above n 8 at [3.28].
17 Above n 8 at [3.29]

4.11 The Law Society recognises that a wider review of whether the OIA should apply to some types of parliamentary information may be better left to a review of the OIA itself, and supports such a review being undertaken. However, this Bill could be improved by strengthening the requirements about the disclosure of information about members' expenses and providing greater access to information about decision-making in determining such expenses.

4.12 In particular, the transparency aspects of the Bill could be improved by:

(a) Providing more detail about what is required to be reported by the agencies under clauses 18, 19 and 20 of Schedule 3.

(b) Requiring the agency heads to consult with the public once a parliamentary term about the categories of information required to be released.

(c) Providing for a determination to be made by the Speaker (as secondary legislation) on how parliamentary agencies are to deal with requests for information about parliamentary administration relating to matters covered by Part 4 of the Bill (an access and information determination) and applying the principles referred to in clauses 68 and 69 of the Bill. The legislation should also include a requirement for a public consultation process prior to making the access and information determination, as well as public notification.

5 Provisions relating to Parliamentary security (Parts 6 and 7)

5.1 Part 6 of the Bill addresses the Parliamentary Service and other parliamentary bodies, and Part 7 deals specifically with parliamentary security. The Law Society generally supports the approach taken in these Parts, but makes some specific submissions on individual clauses.

Offence to solicit or attempt to influence chief executive (clause 140)

5.2 Clause 140 creates an offence for soliciting or attempting to improperly influence the chief executive of the Parliamentary Service (**chief executive**) or their delegate when they are making an employment decision about an individual employee.

5.3 This offence is comparable to the offence in section 105 of the Crimes Act 1961 to give or offer any bribe to any person with intent to influence any official. However, the penalty in clause 140 of the Bill – a fine of up to $2,000 – is much lower than the corresponding penalty in section 105 of the Crimes Act (imprisonment for a term not exceeding seven years).

5.4 We acknowledge that clause 140 may have been modelled on section 103 of the Public Service Act 2020, which provides that the offence of soliciting or attempting to improperly influence public service leaders carries a penalty of up to $2,000.[18] However, we query whether a penalty akin to that in section 105 of the Crimes Act would be more proportionate and better-suited to the clause 140 offence.

5.5 We also note New Zealand has an obligation under the United Nations Convention Against Corruption (**Convention**) to develop and implement 'coordinated anti-

18 Departmental Disclosure Statement, at page 10.

corruption policies'.[19] Sections 105C, 105E and 105F of the Crimes Act (which provide for bribery and corruption offences which are also punishable by imprisonment for a maximum term of seven years), seek to give effect to New Zealand's obligations under this Convention.[20] We therefore query whether a 'coordinated' response (as required by the Convention) also requires the penalties in clause 140 of the Bill to be consistent with the penalties for similar offences under the Crimes Act.

5.6 We invite the select committee to give further thought to these issues, and to consider whether it would be appropriate to amend clause 140 so the penalty in that provision aligns with the penalties in sections 105, 105C, 105E and 105F of the Crimes Act.

Offence to resist, assault, or obstruct parliamentary security officer (clause 141)

5.7 Clause 141 creates an offence of resisting, assaulting or wilfully obstructing parliamentary security officers, punishable by a fine of $1,000 or 3 months' imprisonment, and is based on section 30 of the Courts Security Act 1999.[21] This offence appears to combine elements of:

(a) section 10 of the Summary Offences Act 1981, which prohibits assault on Police and other officers "acting in the execution of his duty" and is punishable by 6 months' imprisonment; and

(b) section 23 of that Act, which criminalises resisting or obstructing an officer, and has a maximum sentence of 3 months.

5.8 The effect is that assault under clause 141 is subject to a lesser punishment than assault under section 10 of the Summary Offences Act. The committee may wish to consider splitting clause 141 into two separate offences to avoid this discrepancy – i.e., by having:

(a) an offence of resisting or wilfully obstructing parliamentary security officers, which carries a maximum sentence of 3 months; and

(b) a separate offence of assaulting parliamentary security officers, which is punishable by 6 months' imprisonment.

5.9 The proposed offence in clause 141 also includes inciting any person to resist, assault, or obstruct a parliamentary security officer. This appears to be unnecessary, as section 66 of the Crimes Act already provides for this offence.

Authorisation of the exercise or performance of powers (clause 167)

5.10 Clause 167 empowers the chief executive to authorise parliamentary security officers to exercise or perform their powers and duties in a particular electorate and community office. The Law Society notes that in any prosecution under clause 141 relating to actions at an electorate office, it is likely that all of the matters identified in clause 167(2) would need to be disclosed to the defendant in order to confirm that the officer was acting

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19 United Nations General Assembly *United Nations Convention Against Corruption* A/58/422 (31 October 2003), article 5.

20 Explanatory Note of the Organised Crime and Anti-corruption Legislation Bill (June 2014).

21 *Regulatory Impact Statement 3: Parliament Bill - Operation of the Parliamentary Precinct* (6 September 2021) at [40].

within the scope of their authority. If this is seen to be undesirable, a certificate provision could be introduced, stating that the production of a certificate by the chief executive is proof the officers were authorised to perform their functions. While this is a matter for the select committee, the Law Society considers that the existing position would better protect defendants' fair trial rights including the ability to challenge authorisation.

Search powers (clause 170)

5.11 Clause 170 empowers a parliamentary security officer to ask for consent to searches, and is based on the equivalent provision of the Courts Security Act 1999.[22] One difference is that people are more likely to drive into parliamentary premises than court premises. The Law Society's understanding of clause 170 is that a parliamentary security officer may only ask to search a vehicle with a scanner that does not require touching the vehicle (clause 170(1)(b)) or on reasonable grounds (clause 170(1)(d)). While that is a rational approach, the committee may wish to consider whether the different circumstances of parliamentary and court premises require a different approach.

Powers to seize items and to detain persons (clauses 176, 178 and 179)

5.12 Clause 176 empowers an officer to seize an item detected during a search. Clause 176(2) then provides that the officer *must* detain the person in accordance with clause 178, which in turn provides that the officer must contact the Police to arrange the attendance of a Police officer. However, clause 176(3)(c) envisages the possibility that an item may be lawful to possess, but may nevertheless constitute a threat to the security of Parliament (for example, a protest banner). In those circumstances, we do not consider that an officer should be *required* to detain the person and contact the Police. The Law Society therefore suggests that in clause 176(2)(a), "must" should be changed to "may".

5.13 In order to ensure compliance with the Bill of Rights Act, the Bill should also be augmented by a requirement that parliamentary security officers have a duty within three days to report any use of the powers in clauses 178 and 179 (detention and handcuffing) to the chief executive. This would give a statutory framework upon which would hang operational requirements to ensure training is adequate and major events are known about (noting the Regulatory Impact Statement for this Part of the Bill envisages the provision of training and record keeping).[23] Not all of this need be in legislation, but the Law Society considers the reporting obligation should be in the legislation. Such a provision could perhaps be modelled on section 161(5) of the Civil Aviation Act 2023.

6 Amendments to the Public Finance Act 1989 (Part 8)

6.1 The amendments in the Bill are intended to provide greater parliamentary control over funding arrangements.[24]

6.2 Currently, the funding for the two parliamentary agencies uses the same contestable process that applies to all public sector agencies, with parliamentary funding being

22 Above n 21 at [33].
23 Above n 21 at [53].
24 Explanatory Note of the Bill.

determined based on Government priorities. From a constitutional perspective, this leaves Parliament financially dependent on the Government of the day and could weaken the separation of powers between the legislative and executive branches of Government. The Regulatory Impact Statement for this Part of the Bill provides several examples of where parliamentary agencies sought to improve public engagement with Parliament through streaming select committee proceedings and outreach activities in schools and with community groups, but was not able to obtain funding through the Budget process.[25]

6.3 The Bill provides a new funding model for the parliamentary agencies which is based on the model currently used for Officers of Parliament. Appropriations for each parliamentary agency would be recommended by a parliamentary select committee. The Law Society supports the approach in the Bill as it reflects the separation of powers. Parliamentary agencies are part of the Legislature and it is appropriate to establish a funding model that does not depend on the priorities of the Government of the day.

Ataga'i Esera
Vice-President

25 *Regulatory Impact Statement 4: Parliament Bill – Funding Arrangements for Parliament* (6 September 2021) at [16].