Defamation Bill [HL], Bill 127 of 1995-96: Parliamentary Privilege

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Clause 14 of the bill, which has its Commons second reading on Tuesday 21 May, alters the law in that it allows Members to waive their Parliamentary privilege in defamation actions so that such actions would not fail because of the terms of Article 9 of the Bill of Rights. This clause, introduced by a Law Lord, was added to the bill during its Lords proceedings. All other aspects of the *Defamation Bill* are considered in Research Paper 96/60, *Defamation Bill [HL], Bill 127 of 1995-96: Law and Procedure,* 16 May 1996.

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Summary

Clause 14 of the *Defamation Bill [HL]*, in the words of the bill's explanatory memorandum; "allows a person to waive, so far as concerns him, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any place out of Parliament, where his conduct in or in relation to proceedings in Parliament is in issue in defamation proceedings." It was moved in the Lords by a Law Lord, Lord Hoffman, from the Cross-Benches, and will be considered by the Commons as part of a Government Bill (although the Lord Chancellor promised a free vote in the Commons on the issue).

The clause was prompted by the failure of the 1995 legal action by Neil Hamilton MP against the *Guardian* for an article containing 'cash for questions' allegations. This arose because of the application of Article 9 of the Bill of Rights 1688, as considered in the 1994 Privy Council case of *Prebble v Television New Zealand*. The thrust of the clause is to allow Parliamentarians to waive any privilege, as under Article 9, so that they can pursue their defamation actions.

The clause has potentially fundamental legal and constitutional implications because it seeks to regulate by statute matters concerning the relationship between the courts and Parliament developed over the centuries, through Article 9 and the law of Parliamentary privilege generally. For example, it seeks by implication to provide a form of statutory definition for 'proceedings in Parliament', a thorny legal and Parliamentary problem, while not touching the equally complex definition of 'impeached or questioned', as in *Pepper v Hart* situations. Again, by allowing waiver of privilege, the clause may be affecting the basis of privilege as something that protects Parliament (and the two Houses) as a whole rather than Members individually. Along with the important recent House of Lords case of *Pepper v Hart*, which allowed resort to Hansard for the purposes of statutory interpretation in limited circumstances, *Prebble* and the present legislative proposal suggest that the constitutional and legal position of Parliament relative to the courts and other external bodies, is coming under close scrutiny. The clause may require interpretation by judges if it comes before them, eg the meaning of 'person' as the one who can exercise the waiver, and the extent, if any, to which the list of activities in *cl 14(5)* relates to ones not currently covered by privilege.

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I Parliamentary Privilege[1]

Parliamentary privilege is regarded as being fundamental to the effective working of Parliament. *Erskine May* defines it thus:[2]

> Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law. Certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual Members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its Members. Other such rights and immunities such as the power to punish for contempt and the power to regulate its own constitution belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity. Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members.

Wade & Bradley neatly summarise the general issues:[3]

> If legislative bodies are to be able to perform their constitutional functions effectively, they must have freedom to conduct their own proceedings without intervention from outside bodies. Parliamentary privilege does not exist for the personal benefit of members of Parliament. 'The sole justification for the present privileges of the House of Commons is that they are essential for the conduct of its business and maintenance of its authority.' The privileges of each House have both external and internal aspects: they restrain interference with the House from outside, thus restricting the freedom of speech and action which those outside the House would otherwise have; they also protect the House from internal attack, for example, from the conduct of members which is an abuse of their position.
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> Privilege is an important part of the law and custom of Parliament. In so far as privilege may affect the position of those outside the House, questions as to the existence and extent of privilege must be settled by the courts. In this sense, except when a privilege has been created by statute, privilege is part of the common law. Since neither House can separately exercise the legislative supremacy of Parliament, neither House can by its own resolution create new privileges. Where a dispute arises as to a matter of privilege, the courts will not enquire into the exercise of privilege, nor into the internal proceedings of either House; but the courts will not allow a House to extend its privileges at the expense of the rights of the citizen. Today the most difficult disputes are likely to involve the issue of whether a particular application of privilege in a new set of circumstances is to be categorised *either* as the legitimate exercise of an existing privilege in changed circumstances or as an attempt to create a new privilege; in the latter case, an Act of Parliament is needed if the law is to be changed.

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1 See generally *Erskine May*, 21st ed, 1989, chaps 5-11; J Griffith and M Ryle, *Parliament: Functions, Practice and Procedure*, 1989, chap 3

2 21st ed, 1989, p.69

3 *Constitutional and Administrative law*, 11th ed, 1993, p.224

For the purposes of this Paper, the most important and relevant privilege is that of freedom of speech. "Parliament is a deliberative and legislative assembly, and it may be regarded as an essential characteristic of a free legislature that its Members are able to perform their duties without fear of penalty".[4] Parliamentary privilege is an absolute defence in the law of defamation. Where it does not arise, such as where Parliamentary proceedings are not involved, Members may benefit, as may any other person, from qualified legal (*not* Parliamentary) privilege for actions done or words said or written (eg to Ministers or other public officials or bodies) in the course of their Parliamentary duties.[5] The *Parliamentary Commissioner Act 1967* s10(5) provides absolute legal privilege for communications between MPs and the PCA). Much turns on the definition of the term 'proceedings in Parliament' used in Article 9 of the Bill of Rights.[6]

II The New Zealand *Prebble* Case

Prebble v Television New Zealand [1994] 3 All ER 407, a Privy Council case, concerned a television programme which made serious accusations against a Minister. The facts and decision of the Board are neatly summarised in the law report:[7]

> The defendant, a New Zealand television company, transmitted a programme in which it was alleged that the plaintiff, then the Minister for State-Owned Enterprises in the New Zealand government, had secretly conspired with certain highly placed businessmen and public officials to give the businessmen an unfair opportuniry when certain state-owned assets were privatised to obtain those assets on unduly favourable terms in return for donations to his political party and in particular had improperly manipulated the sale of Air New Zealand to a specific consortium to repay business friends for favours and had then, following his sacking, arranged for incriminating documents and computer files to be either shredded or deleted. The plaintiff brought an action for libel against the defendant, which pleaded justification, including allegations that the plaintiff and other ministers made statements in the House of Representatives which were misleading in that they suggested that the government did not intend to sell off state-owned assets when in fact the plaintiff was conspiring to do so and that the conspiracy was implemented by introducing and passing legislation in the House. The plaintiff applied to strike out those particulars, which it was claimed infringed parliamentary privilege. The judge held that, even though the allegations were made in defence of proceedings brought by a member of the House, they should be struck out as infringing art. 9 of the Bill of Rights (1688), which provided that the freedom of speech and debates or proceedings in Parliament were not to be impeached or questioned in any court or place outside Parliament. The defendant appealed to the Court of Appeal which upheld the judge's

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4 C Munro, *Studies in Constitutional Law*, 1987, p.137

5 eg *Beach v Freeson* [1971] 1 All ER 854 (letter of complaint by a Member to the Lord Chancellor and the Law Society about a local firm of solicitors)

6 This is discussed in Section 5 of this Paper

7 at pp 407-8. It was also concisely summarised by the judge in the *Hamilton* case: see p.16 of this Paper. See the short article by the Clerk of the New Zealand House of Representatives, David McGee, "Parliamentary privilege protected" 1995 *Parliamentarians* 56-7

decision but further held that, in view of the inabiliry of the defendant to deploy all the relevant evidence in support of the plea of justification, it would be unjust to allow the plaintiff to continue with his action and ordered a stay of the plaintiff's action unless and until privilege was waived by the House of Representatives and by any individual member or former member whose words or actions might be questioned in the defence. The Privileges Committee of the House of Representatives thereafter considered the question of waiver but held that the House had no power to waive the privileges protected by art 9. The plaintiff appealed to the Privy Council against the order staying his action. The defendant contended that the principle of parliamentary privilege only operated to protect the questioning of statements made in the House in proceedings which sought to assert legal consequences against the maker of the statement for making that statement or alternatively, that parliamentary privilege did not apply where it was the member of Parliament himself who brought proceedings for libel and the privilege would operate so as to prevent a defendant who wished to justify the libel from challenging the veracity or bona fides of the plaintiff in making statements in the House.

Held - (1) The basic concept underlying art 9 of the Bill of Rights was the need to ensure so far as possible that a member of Parliament and witnesses before committees of Parliament could speak freely without fear that what they said would later be held against them in the courts. The important public interest protected by the privilege was to ensure that a member or witness, when he spoke, was not inhibited from stating fully and freely what he had to say. That principle, coupled with the wider principle that the courts and Parliament were both astute to recognise their respective constitutional roles and that the courts would not allow any challenge to be made to what was said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges, undoubtedly prohibited any suggestion being made in court proceedings (whether by way of direct evidence, cross-examination or submission) that statements made in the House were lies or were motivated by a desire to mislead and also prohibited any suggestion that proceedings in the House were initiated or carried through into legislation in pursuance of an alleged conspiracy. The fact that the maker of the statement was the initiator of the court proceedings could not affect the question whether art 9 was infringed since the privilege protected by art 9 was the privilege of Parliament itself and an individual member of Parliament could not by waiving his own privilege determine whether or not the privilege of Parliament was to apply or override the collective privilege of the House to be the sole judge of such matters, since they lay entirely within the jurisdiction of the House. If a suggestion in cross-examination or submission that a member or witness was lying to the House were to be allowed, that could lead to exactly the conflict between the courts and Parliament which the principle of non-intervention by the courts was designed to avoid. It followed that the judge had been right to strike out those particulars of the defence which infringed parliamentary privilege .....; *R v Murphy* (1986) 5 NSWLR 18, *Wright and Advertiser Newspapers Ltd v Lewis* (1990) 53 SASR 416 and *Rost v Edwards* [1990] 2 All ER 641 doubted.

(2) A stay of proceedings on the grounds that the exclusion of material on the grounds of parliamentary privilege made it impossible fairly to determine the issue between the parties ought only to be granted in the most extreme circumstances since the effect of a stay was to deny justice to the plaintiff by preventing him from establishing his good name in the courts. On the facts, a stay was not warranted since the burden of the libel related to acts done by members of the government out of the House to which questions of parliamentary privilege had no application and the allegations struck out were comparatively marginal. Accordingly, the stay would be rescinded and to that extent the appeal would be allowed.

Lord Browne-Wilkinson, giving the judgment of the Board, noted the unusual nature of the case in that the action was brought by, rather than against, a Parliamentarian: "the defendants wish to use parliamentary materials not as a sword but as a shield. The question is whether art. 9 precludes such deployment of parliamentary material" [p.410]. He observed that "there is a long line of authority which supports a wider principle, of which art. 9 is merely one manifestation, viz that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges." [p.413]. Having analysed the defendants submissions and an Australian decision, *R v Murphy* (1986) 5 NSWLR 18, which permitted examination of the evidence of a select committee witness, Lord Browne-Wilkinson said [p.415]:

> This view discounts the basic concept underlying art 9, viz the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect.
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> Moreover to allow it to be suggested in cross-examination or submission that a member or witness was lying to the House could lead to exactly that conflict between the courts and Parliament which the wider principle of non-intervention is designed to avoid. Misleading the House is a contempt of the House punishable by the House: if a court were also to be permitted to decide whether or not a member or witness had misled the House there would be a serious risk of conflicting decisions on the issue.

The Board also rejected submissions (based on another Australian case, *Wright and Advertiser Newspapers v Lewis* (1990) 53 SASR 416) that article 9 did not operate to preclude resort to Parliamentary material when the initiator of the legal action was a Parliamentarian [p.416]:

> Although their Lordships are sympathetic with the concern felt by the South Australian Supreme Court, they cannot accept that the fact that the maker of the statement is the initiator of the court proceedings can affect the question whether art 9 is infringed. The privilege protected by art 9 is the privilege of Parliament itself. The actions of any individual member of Parliament, even if he has an individual privilege of his own, cannot determine whether or not the privilege of Parliament is to apply. The wider principle encapsulated in Blackstone's words quoted above prevents the courts from adjudicating on issues arising in or concerning the House, viz whether or not a member has misled the House or acted from improper motives. The decision of an individual member cannot override that collective privilege of the House to be the sole judge of such matters.

The judges were "acutely conscious" that their view "could have a serious impact on a most important aspect of freedom of speech, viz the right of the public to comment on and criticise

the actions of those elected to power in a democratic society [p.417]:

> If the media and others are unable to establish the truth of fair criticisms of the conduct of their elected members in the very performance of their legislative duties in the House, the results could indeed be chilling to the proper monitoring of members' behaviour. But the present case and *Wright*'s case illustrate how public policy, or human rights, issues can conflict. There are three such issues in play in these cases: first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the courts. Their Lordships are of the view that the law has been long settled that, of these three public interests, the first must prevail. But the other two public interests cannot be ignored and their Lordships will revert to them in considering the question of a stay of proceedings.

The Board concluded "that parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (by direct evidence, cross-examination, interference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House...." [pp 417-8]. They set out limitations to this dictum [p.418]:

> However, their Lordships wish to make it clear that this principle does not exclude all references in court proceedings to what has taken place in the House. In the past, Parliament used to assert a right, separate from the privilege of freedom of speech enshrined in art 9, to restrain publication of its proceedings. Formerly the procedure was to petition the House for leave to produce *Hansard* in court. Since 1980 this right has no longer been generally asserted by the United Kingdom Parliament. [8] A number of the authorities on the scope of art 9 betray some confusion between the right to prove the occurrence of parliamentary events and the embargo on questioning their propriety. In particular, it is questionable whether Rost *v* Edwards [1990] 2 All ER 641, [1990] 2 QB 460 was rightly decided.
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> Since there can no longer be any objection to the production of *Hansard*, the Attorney General accepted (in their Lordships' view rightly) that there could be no objection to the use of *Hansard* to prove what was done and said in Parliament as a matter of history. Similarly, he accepted that the fact that a statute had been passed is admissible in court proceedings. Thus, in the present action, there cannot be any objection to it being proved what the plaintiff or the Prime Minister said in the House ..... or that the State-Owned Enterprises Act 1986 was passed. It will be for the trial judge to ensure that the proof of these historical facts is not used to suggest that the words were improperly spoken or the statute passed to achieve an improper purpose.
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> It is clear that, on the pleadings as they presently stand, the defendants intend to rely on

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8 ["That this House while re-affirming the status of proceedings in Parliament confirmed by Article 9 of the Bill of Rights, gives leave for reference to be made in future Court proceedings to the Official Report of Debates and to the published Reports and evidence of Committees in any case in which, under the practice of the House, it is required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to parliamentary papers be discontinued." The phrase concerning Article 9 was added as a backbench amendment accepted by the Leader of the House. See the debate at HC Deb vols 975, cc 167-197, 3 December 1979 and 991 cc 879-916, 31 October 1980]

these matters not purely as a matter of history but as part of the alleged conspiracy or its implementation. Therefore, in their Lordships' view, Smellie J was right to strike them out. But their Lordships wish to make it clear that if the defendants wish at the trial to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or any other questioning there is no objection to that course.

Lord Browne-Wilkinson then considered the effect of the Board's decision on the progress of the legal action, a matter of direct relevance to the later *Hamilton* case. The New Zealand Court of Appeal had stayed the action unless and until the privilege was effectively waived by both the House of Representatives and any individual Member concerned. The House took the view that it could not waive the privilege, effectively freezing the plaintiffs' action [p.419]:

Their Lordships are of the opinion that there may be cases in which the exclusion of material on the grounds of parliamentary privilege makes it quite impossible fairly to determine the issue berween the parties. In such a case the interests of justice may demand a stay of proceedings, But such a stay should only be granted in the most extreme circumstances. The effect of a stay is to deny justice to the plaintiff by preventing him from establishing his good name in the courts. There may be cases, such as the *Wright* case, where the whole subject matter of the alleged libel relates to the plaintiff's conduct in the House so that the effect of parliamentary privilege is to exclude virtually all the evidence necessary to justify the libel. If such an action were to be allowed to proceed, not only would there be an injustice to the defendant but also there would be a real danger that the media would be forced to abstain from the truthful disclosure of a member's misbehaviour in Parliament, since justification would be impossible. That would constitute a most serious inroad into freedom of speech.

They did not think that the present case fell into that extreme category so the stay should be rescinded.

It can be seen that the *Prebble* case touches on fundamental constitutional issues for the UK, including the privileges of Parliament; the relationship between Parliament and the courts, and the freedom of speech and of public democratic debate on political and governmental issues. Indeed, taken with the landmark case of *Pepper v Hart* [1993] 1 All ER 42 on the acceptability of resort to Hansard to assist in statutory interpretation in certain circumstances (in which Lord Browne-Wilkinson also gave the leading judgment), that is, the 'impeached or questioned' aspect of Article 9, it would appear that the question of Parliamentary privilege and the relationship between Parliament and the court is undergoing close judicial scrutiny. Madam Speaker made a statement on 21 July 1993 on a claim of privilege raised by Tony Benn in connection with Lord Rees-Mogg's legal challenge to the Maastricht, ratification process:[9]

Madam Speaker: The right hon. Member for Chesterfield (Mr. Benn) raised with me, as a possible breach of privilege, the willingness of a court on Tuesday of this week to hear an application based on allegation related to a Bill then before Parliament. The Bill was th European

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9 HC Deb vol 229 cc 353-4. See *R V Foreign Secretary ex p. Rees-Mogg* [1994] 1 All ER 457

Communities (Amendment) Bill, which is now an Act.

The right hon. Gentleman complained that proceedings in Parliament were, on that occasion, being questioned in a manner contrary to article 9 of the Bill of Rights. He asked me to give precedence to a motion tomorrow relating to the action of the court in agreeing to entertain Lord Rees-Mogg's application, and referring the matter to the Committee of Privileges.

I have decided that it would not be appropriate for me to grant precedence to a motion based on this complaint, not least because at the time to which the complaint relates the Bill had been passed by this House but was proceeding in another place. It would therefore primarily be a matter for that House to pursue.

I do, however, take with great seriousness any potential questioning of our proceedings in the courts, which is why I have chosen to deliver my decision on the complaint in this way, as the rules entitle me to do, rather than to write privately to the right hon. Member for Chesterfield, as would normally be the case.

The House will be aware that, following a recent decision by the House of Lords in the case of Pepper v. Hart, the courts now allow themselves to assess the significance of words spoken in this House during the passage of Bills in order to assist in the interpretation of statutes. That has exposed our proceedings to possible questioning in a way that was previously thought to be impossible.

There has of course been no amendment of the Bill of Rights, and that Act places a statutory prohibition on the questioning of our proceedings. Article 9 of the Act reads:

"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."

I am sure that the House is entitled to expect, when the case referred to by the right hon. Gentleman begins to be heard on Monday, that the Bill of Rights will be required to be fully respected by all those appearing before the court.

Geoffrey Marshall, a leading constitutional expert, was highly critical of the effect of *Prebble*, claiming it was a conflation of the "relatively clear protection principle" of Article 9 with "various wider claims, made by the Commons and conceded by the courts, as to the admissibility of evidence about proceedings in the House in actions of other kinds in which members or non-members may be involved."[10] Examples of this he cited were *Church of Scientology v Johnson-Smith* [1972] 1QB 522 and *R v Secretary of State for Trade ex p Anderson Strathclyde* [1983] 2 All ER 233 (Parliamentary proceedings could not be used to support a cause of action arising *outside* of Parliament) and *Rost v Edwards* [1990] 2 WLR 1280 (fact of decision of Committee of Selection could not be cited in a libel action by a Member).[11] Marshall concluded:[12]

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[10] "Impugning Parliamentary impunity", 1994 *Public Law*" 509-13 at 509

[11] On *Rost* see P Leopold "'Proceedings in Parliament': the grey area" 1990 *Public Law* 475-81

[12] pp 152-3. See also his *Times* letter on 28 July 1995 following the Hamilton case

> What today should we make of the sweeping provision in Article 9 of the Bill of Rights that the freedom of speech in Parliament should not be impeached or questioned in any court or place out of Parliament? Can it be, if not impeached, impugned, or challenged, or queried, or examined, or denounced, or criticised? If none of these things could be done in any place out of Parliament the rights of citizens to criticise the behaviour or proceedings of their representatives would be non-existent. But if there is no threat to the free-working of Parliament in vigorous challenge or criticism of Parliament's proceedings or activities in the press or on the hustings, why should Parliament be in danger if criticism of the remarks or behaviour of members or ministers is made in the course of legal proceedings? Since the decision in *Pepper v. Hart and R. v. Secretary of State for Foreign and Commonwealth Affairs ex p Rees-Mogg* it cannot be said that no examination of parliamentary proceedings can take place in a judicial forum. The freedom of debate is sufficiently protected if members enjoy absolute privilege from criminal and civil actions directed at what they say in the course of debate or proceedings in the House. There is no need to inflate claims of privileges beyond that. The common law in recent times has been discovering free speech as a value that is not only in play but may sometimes win. In the *Prebble* decision an opportunity has been lost to reinforce that understanding.

Patricia Leopold, a legal expert on Parliamentary privilege, has analysed *Prebble*.[13] She noted the clear link with *Pepper v Hart* (see above): "..it is quite clear that Lord Browne-Wilkinson intended to provide guidance on Parliamentary privilege in this country, and in particular to further comment on aspects of Parliamentary privilege considered by him in the House of Lords in *Pepper v Hart*" [p.204].

She examined the complex issue of waiver of privilege, noting that there was comparatively little authority on the point, but that, as the privilege of freedom of speech came from statute, ie article 9 of the Bill of Rights, it could not be waived by parliament or by a Member. She concluded that "it is clearly inappropriate for the courts to suggest to parliament that it should be willing to set aside the protection given to it by the Bill of Rights. Article 9 can be changed, but by legislation. It is possible for parliament to decide to exercise its discretion and not to enforce its penal jurisdiction in respect of every breach of privilege or contempt, but this does not amount to a waiver of privilege".[14]

Leopold then turned directly to the issue of Article 9, because *Prebble* was the first instance in England or New Zealand of an attempt to use Parliamentary material to establish the truth of the allegations which had given rise to the legal action.[15] She concluded, making the link

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[13] "Free speech in Parliament and the courts" (1995) 15 *Legal Studies* 204-218

[14] p.207, see also Lord Brougham in *Wellesly v Duke of Beaufort* (1831) 2 Russ & M 639 at 644-5: "... for a court knows nothing judicially of what takes place in Parliament until what is there done becomes an Act of Parliament." This is an example of the fundamental rule that the will of the Queen-in-Parliament expressed in statute is supreme, in constitutional law, over the will of either or both of its Houses, or its Members, expressed in resolution or any way other than statute.

[15] Cases such as *Church of Scientology v Johnson-Smith* [1972] 1 QB 522 concerned attempts to use Parliamentary material as evidence of malice regarding statements *outside* Parliament. In Lord Browne-Wilkinson's graphic terms (noted above) *Prebble* concerned use of Parliamentary material "not as a sword but as a shield".

with *Pepper v Hart* [p.209, footnotes omitted]:

> This aspect of the opinion of the Privy Council is an important reaffirmation of the respective roles of the courts and parliament. That there have been relatively few British cases ever to reach the Court of Appeal or the House of Lords connected with parliamentary privilege must be because both institutions recognise their constitutional roles, and potential collisions have been avoided by the exercise of discretion on both sides. Additionally the courts are well aware that, as happened in Australia, and in England after *Stockdale v Hansard,* in the end parliament can have the last word.
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> This part of the opinion of the Privy Council is particularly significant in the light of *Pepper v Hart*. In that case although the respective roles of parliament and the courts were emphasised by Lord Browne-Wilkinson. the decision that in certain circumstances a court could use *Hansard* as an aid to statutory interpretation had been opposed by the Attorney-General on behalf of parliament. There have been fears expressed in the House of Conunons, by amongst others the Speaker, that this case was evidence that after many years of the courts and parliament taking great pains not to tread on each other's jurisdiction, this was changing. Although the decision of the Privy Council in *Prebble* will be welcomed by parliament it is arguable that it goes too far in favour of freedom of speech in parliament at the expense of the proper administration of justice.

Prebble again threw up the precise meaning of Article 9, not just the term 'proceedings in Parliament [discussed in Section 5 below], but also the interpretation of 'impeached or questioned'. Leopold noted that, although *Prebble* did not deal with the matter directly, Lord Browne-Wilkinson did consider the Australian *Parliamentary Privilege Act 1987, s16(3)* of which excluded various forms of 'questioning' of Parliamentary proceedings:

> (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tended or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of-
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> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
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> (b) otherwise questioning' or establishing the credibility, motive, intention or good faith of any person; or
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> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

He declared that this provision "contains what, in the opinion of their Lordships, is the true principle to be applied." [1994] 3 All ER 407 at 414]. Thus, in Leopold's view, "there is now high, judicial authority for what cannot be done in court with respect to Parliamentary proceedings.... Lord Browne-Wilkinson's endorsement of s16(3) would appear to give much more general guidance on the meaning of 'impeached or questioned' in Article 9," [*op cit*, p.210] though it had to be read in context with *Pepper v Hart* and his later remarks that Parliamentary material could also be used simply to verify facts as a matter of history [reproduced above]. Leopold said that these remarks "are in accordance with the generally accepted view that the maintenance of the proper relationship between Parliament and the

courts is dependant on mutual respect. It is further reassurance to Parliament in the light of the decision in *Pepper v Hart.* Where judicial restraint breaks down... the consequence may be hostilities between two organs of the state..." [p.211].

Leopold then turned to the question whether the exclusionary rules were different in the rare occasions where the plaintiff was a Member of Parliament. The Commons, through its 1967 Select Committee and elsewhere, had urged Members to seek redress through the courts rather than by a privilege claim where possible, and that the House should use its penal jurisdiction as sparingly as possible. The Privy Council decided that the fact that the plaintiff is a Member could not affect the application of article 9. Leopold commented [p.213]:

> The reason given for this was that the privilege protected by article 9 was the privilege of parliament. Parliament was sole judge of whether a member had misled the House or acted from improper motives, it was not something upon which the courts could adjudicate. In addition Lord Browne-Wikinson indicated that it was not possible for an individual member to override the collective privilege of the House to be sole judge of such matters, This is a strong endorsement of the proposition that an individual MP cannot waive parliamentary privilege, even if the privilege concerned is an individual rather than a collective privilege.

She examined the free speech issue which was addressed by the Board of the Privy Council [pp214-5]:

> In *Pepper v Hart,* the Attorney-General had submitted that for a court to investigate what a minister had meant by the words he bad used in discussing legislation would be to 'question' the freedom of speech or debate. With respect to this Lord Browne-Wilkinson suggested that if it was correct then:
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> '... any comment in the media or elsewhere on what is said in Parliament would constitute "questioning" since all Members of Parliament must speak and act taking into account what political commentators and others will say. Plainly article 9 can not have effect so as to stifle the freedom of all to comment on what is said in parliament, even though such comment may influence Members in what they say.
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> Lord Browne-Wilkinson in this observation recognised that democratic institutions such as parliament do not operate in a vacuum. This is something MPs have come to recognise, and it has become accepted that only in extreme cases will parliament act in respect of the media. However the effect of the decision in *Prebble v NZTV* is to restrict the freedom to comment on what MPs say to outside the courts. It may be asked whether it is logical to say that article 9 does not prohibit extensive comment and indeed criticism in the media in respect of what MPs have said in the course of proceedings in parliament, but it does prohibit similar comment or criticism in the course of court proceedings. Although the case law supports this conclusion it should not be forgotten that article 9 has its roots in a very different political situation. Consequently, as Geoffrey Lock remarks: "there can be a difficulty in the application to modern conditions of provisions enacted in very brief terms three centuries ago." .....
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> The attitude of the Privy Council to the wider free speech issue was undoubtedly based on the

need to preserve what is seen as the constitutional relationship between parliament and the courts. However, the final aspect of the decision on the stay of proceedings could be seen as an attempt by the Privy Council to give effect to the other public interests involved in the case without upsetting parliament.

She observed that "the Privy Council has stated the role of the courts in relation to parliament in a way that should be welcomed by parliament", but [p.216]:

The Privy Council held that the need for the legislature to exercise its powers freely on behalf of its electors prevailed in law over the need to protect freedom of speech generally, and over the interests of justice in ensuring that all relevant evidence is available in court. This does not mean that parliament should ignore the other two public interests identified by Lord Browne-Wilkinson. There is a need not just for judicial restraint, but also for both parliamentary restraint and parliamentary vigilance if the relationship between the courts and parliament is to be a satisfactory one.

She identified two practical aspects; the first being in relation to investigations by select committees, and examination of witnesses, especially non-Parliamentarians, by them [p.216]:

Witnesses are in a position to give evidence which may be self-incriminating which could put on record malicious allegations or even allegations of criminal offences against others. *Prebble* makes it clear that a witness to a select committee cannot be examined or cross-examined as to his evidence in subsequent court proceedings, nor can it he suggested to a court that a witness had lied to the committee. This would appear to allow a witness to a select committee to later be a witness in court and, without challenge, give evidence which is inconsistent with his earlier evidence to the select committee. Clearly this is not a desirable state of affairs, but as the Privy Council recognised, misleading the House is contempt of parliament, punishable by the House. This would appear to endorse the House exercising its penal jurisdiction in this type of circumstance, and taking action against the witness concerned.

Action by the House before what is now the Committee of Standards and Privileges has been criticised in the past for its procedures, which are said not to be fully conforming to natural justice or to the European Convention of Human Rights, and for its penal powers.

The second aspect arose if legal proceedings are stayed, preventing the testing of the truth of the allegations in court, but not in Parliament. She concluded by advising that "it would be better for Parliament to start seriously considering changes now before a crisis arises, rather than be faced with the situation that arose in Australia, when the changes to privilege were made in the context of constitutional controversy. However, this is a counsel of perfection. Parliament does not have a good track record of reforming its own law" [p.218].

III The *Hamilton* Case

Some commentators on *Prebble* remarked that the circumstances giving rise to a stay in proceedings would be rare[16] However, it arose very quickly in the UK.

Neil Hamilton MP, Ian Greer (a professional lobbyist) and Ian Greer Associates sued the *Guardian* and one of its journalists over an article alleging a 'cash for Questions' scandal, involving Mohammed Al-Fayed, the owner of Harrods. The plaintiffs pleaded that the article was defamatory by, in effect, alleging corruption by those offering and those accepting such payments; acceptance of such payments by a Member being potentially a serious breach of privilege. Mr Hamilton claimed that the allegations led to his resignation as a Minister, and Mr Greer and his company alleged loss of business. The newspaper and its journalist claimed that the article was true in substance and in fact.

The defendants claimed that the issues could not be inquired into without infringing parliamentary privilege and asked for the action to be stayed. The plaintiffs originally replied that, if this were so, they would petition parliament for leave to refer to parliamentary materials. But they later accepted that this would be ineffective in the face of the application and effect of Article 9 of the Bill of Rights. The judge, May J, said, "Parliament cannot except by subsequent legislation, grant leave to ignore the provisions and effect of a statute" [transcript p.8]. He resorted to *Prebble* as "the leading authority "on this issue, and quoted at length from Lord Browne-Wilkinson's judgment, and summarised its relevant propositions [pp 22-3]:

> (1) It is not permissible to bring into question anything said or done in Parliament by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives.
>
> (2) It is permissible to prove as a matter of history by reference to Hansard what happened in Parliament, but it is not permissible to do so by going beyond history so as to suggest impropriety.
>
> (3) Witnesses may not be cross-examined by reference to earlier evidence to a parliamentary Select Committee.
>
> (4) The court may be driven to stay proceedings altogether if the exclusion of material on the ground of parliamentary privilege makes it quite impossible fairly to determine the issues between the parties, but a stay will only be granted in the most extreme circumstances. Such circumstances may arise where so much of the evidence necessary to justify the libel has to be excluded that the defendants are unable to establish (if it be the case) the truth of their publication.

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[16] see, for example, *All ER Annual Review 1994*, p.492

(5) But since the effect of such a stay would be to deny justice to the plaintiffs by preventing them from establishing their good name in the courts, the action may in appropriate circumstances be allowed to proceed even though the defendant has to be prevented from relying on some material and is to that extent disadvantaged.

He referred to a very similar case just the previous week, *Allason v Haines*, concerning Rupert Allason MP's action against a journalist. In that case, Owen J applied *Prebble*, in that the defendants could not use Parliamentary material (in this case, Early Day Motions) in their defence, and said that "to enforce Parliamentary privilege in this case but to refuse a stay... would be unjust to the defendants..... As it seems to me, as a Member of Parliament, the plaintiff is able to enjoy the benefits of Parliamentary privilege; as the benefits of Parliamentary Privilege are there for him as well of course as for the whole of Parliament. However, as a Member he must take the ill consequences together with the good consequences."[17]

In the *Hamilton* case, the core of the defendants' argument was, according to May J, that, "taken as a whole, the article is, as its headline indicates, all about 'cash for questions', it alleges that two Members of Parliament were paid to ask Parliamentary questions... The whole subject matter necessarily calls in question the Members' conduct and motive in asking the questions and accordingly the whole subject matter is excluded by Article 9 of the Bill of Rights as it has developed" [transcript p.25].

The plaintiffs argued that, even if Parliamentary privilege required the deletion or alteration of some material, what remained would be sufficient for a fair trial as the issue was the corruption allegation, which was dependent on the question of fact whether the alleged payments were made. Corruption could be established without inquiring into Mr Hamilton's motives for asking questions, and the facts of the Questions and letters to Ministers could be established as historical events. Counsel for the Attorney-General as *amicus*, argued that the real issue of fact was whether the payments were made, and that if they were, they had to be corrupt. It would be possible therefore that the motive for the Questions might not need to be called into question. However, the allegation in the case was also that services for which the payments were made were in fact performed. Exclusion of the motive for those services could lead to legal difficulties because of the presumption that defamatory material was false unless proved to be true.

May J rejected the plaintiffs' "ingenious" arguments, because it would require the defendants to prove justification without resort to "the alleged link between the alleged payments and the admitted asking of the questions. The sting of the libel is that link, a link which may not be

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[17] *Allason* transcript p.10, quoted at *Hamilton* transcript pp 24-5. *Allason* is reported in the *New Law Journal*, 27.10.95, pp1576-7

called in question in court 'whether by direct evidence, cross-examination, inference of submission'. The heart of the allegation is, in the words of *Erskine May* pleaded by the plaintiffs themselves, 'Corruption in the execution of a Member's duty'. It is not confined to more limited corruption outside Parliament such as might be sufficient to found a criminal indictment" [transcript, pp32-3]. He concluded:[18]

> For these reasons, I am constrained by authority to stay the proceedings. The *Prebble* case is so closely in point that I see no scope for bold innovation by a judge at first instance, even though I am acutely conscious that staying the actions may be perceived as a profound denial of justice to the plaintiffs, as a denial of a forum to the defendants to justify their publication and even as a licence to publish material about parliamentary proceedings which, if it is untrue, may go unremedied.
>
> The law undoubtedly being that it is for Parliament alone to regulate its proceedings without questioning from the courts, it is no part of the courts function to call in question the adequacy of parliamentary procedures to achieve such regulation. As Lord-Browne Wilkinson in substance said, to prevent a defendant newspaper from relying, in defence of libel proceedings which nevertheless continue, on matters which could, if they were permitted to rely on them, establish that the publication was true could produce chilling results. Equally, however, to deny plaintiffs a forum for establishing, if it be so, that a publication which has damaged them severely is untrue is to deny the opportunity of remedy which is afforded to every other person and which ought to be afforded without exception. I guess that the public perception would be that such remedies as might be available within parliament for Mr Hamilton and Greer Associates, if the publication is untrue, would be an inadequate substitute for those available to their fellow citizens in court. It was accepted at the Bar that , whatever procedures might be available and whatever their effect, they would not include the power to compensate the plaintiffs, if that were appropriate, in damages. Reputations might be salvaged, but money losses would remain without compensation. I guess that the public perception would also be that these actions ought to be capable of being tried in court, that the plaintiffs ought to be enabled to make their full cases and that the defendants ought to be enabled to make their full defences, so that the truth may be established in an unimpeded trial by judge and jury,
>
> Every Judge is acutely aware that the ability of all persons to come to the courts to have their disputes tried and determined fairly, openly and according to law is a cardinal right upon which freedom under the constitution depends. The courts exist to try cases, not to decline to do so. In this instance, statute and authority require the court to do just that.

IV The Lords Debate

What is now clause 14 of the present bill did not appear in the *Defamation Bill* as originally introduced. There were unsuccessful attempts to introduce the new clause in the Lords at committee and report stage;[19] but it was at third reading that it received its most detailed consideration.[20]

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[18] transcript pp 33-5

[19] HL Deb vol 571, cc 250-8 2 April 1996 and cc 647-54 16 April 1996. As the new clause was technically negatived on report, the House had expressly agreed to consider it again on third reading: cc 1404-6, 29.4.96

[20] HL Deb vol 572, cc 24-54 7 May 1996

The proposal was moved by Lord Hoffman, a Law Lord, who reviewed the nature of the Article 9 privilege and *Prebble* and their effect on the *Hamilton* case, and explained the intention of his amendment [c 26]:

> But I am sure your Lordships will agree that it is unjust that he should not be able to put the matter before a judge and jury, like any other citizen who considers that his integrity has been publicly defamed. It is therefore to redress this injustice to Mr. Hamilton and anyone else who may in future find himself in the same position that I put forward this amendment. Its effect-if I may summarise-is to allow a Member of either House in defamation proceedings to lift a corner of the curtain which the Bill of Rights draws over parliamentary proceedings and to allow the judicial gaze to fall upon his conduct alone. In no other way does it touch upon Article 9 or the privileges of Parliament.

He recognised that "while access to justice is a matter of high constitutional importance.... it cannot always take paramount place. There are other aspects of the public interest to which it must sometimes defer; and one of these is the proper functioning of a democratic Parliament, which in our ancient constitution is still underpinned by the Bill of Rights," [c.26], and continued:

> So it is argued by some that the present case is only the other side of the coin. If honourable Members can say what they like about other people without being sued, why should they be able to sue for what other people say about them?
>
> I think that this symmetry is deceptive. The public interest in freedom of speech in Parliament is ancient, plain and obvious. Not only is it greatly prized; it is also jealously guarded against misuse. Both Houses have their own disciplinary procedures against Members who abuse the privilege to defame outsiders. But what is the public interest in allowing anyone free licence to make defamatory statements about what honourable Members or noble Lords do in the course of their parliamentary duties? It may be said that they are public figures and that therefore in the interests of general discussion of public affairs they should have to submit to what may be said about them. The United States comes close to having such a rule. It allows public figures to sue for defamation only if they can prove that the statement was made with malice or reckless disregard of the truth. It is not enough for them to be able to show or even to require the other side to show that it was wrong.
>
> But there is little support for such a rule in this country. And to maintain the rule with which we are concerned today would be a very eccentric way of giving effect to a policy of free discussion of public figures. First, it would apply only to what they did in the course of their parliamentary duties. If Mr. Hamilton had been alleged to be corrupt in the performance of his duties at the Department of Trade, there is no doubt that he could have sued for libel like anyone else. There is simply no logic in a distinction between what he does in that capacity as a public figure and what he does as a Member of another place.

He concluded that "the argument that honourable Members or noble Lords must take the

rough of the Bill of Rights with the smooth does not stand up to critical examination" [c.27]. He also accepted that it could be argued against his proposal that it had not been sufficiently considered, given the three centuries during which Article 9 had remained unaltered, and noted that Lord Simon of Glaisdale had proposed that the matter be referred to a Joint Committee of both Houses. However, he believed such a course would deny Mr Hamilton access to justice.

Lord Hoffman also noted objections to the fact that his proposal would allow a person to waive the protection of privilege" so far as [it] concerns him" [c.28]:

> The objection in principle is this: that the privilege of Parliament is the privilege of each House as a whole and not that of any individual Member. It should therefore only be capable of being waived, if at all, by a resolution of the House. But I do not think that that would be a practical solution. There is no precedent for the House being able to waive the privilege so far as it protects the free speech of an individual Member and for my part I think that that would be a dangerous doctrine. It would enable a majority to deprive an unpopular member of a minority group of his essential constitutional right to freedom of speech. Equally, in a case like this, the right of a Member to sue for libel would be dependent on a resolution which may be influenced by factional interests. So there should be no general principle of waiver by resolution of the House. The remedy offered by the amendment is essentially a private matter for the Member who has been defamed, and that is how I think it should be.

He acknowledged a potential practical problem where there were two or more Members involved in a matter but not all wish to sue, and admitted that there was "no easy answer to this question". He would rely on the judges to protect the interests of such third parties.

Lord Simon of Glaisdale said that "there can be no question but that the amendment raises matters of the highest constitutional importance ... the Bill of Rights is at the very heart of our constitution" [c30]. He rejected the notion that the current situation allowed free licence to anyone to defame Parliamentarians: "Parliament itself has its own machinery for ensuring that that kind of injustice is not perpetrated" [c30]. He believed that the proposed amendment required "much more consideration and consultation" and that it was "highly" unsatisfactory that such a constitutional point should be implemented as a by-blow in a defamation Bill". He was concerned about the assumption that there is a privilege belonging to individual Parliamentarians, as well as to either or both Houses. Even where a Member invoked the waiver Parliament could take up that matter as a question of its privilege, leading to the "quite intolerable" situation of overlapping inquires in the courts and Parliament, especially over the definition of 'proceedings in Parliament'. He also raised the point of waiver where more than one Parliamentarian was involved:[c32]

> One waives privilege and sues; the other stands on his rights. What is to be done? My noble and learned friend mentioned that but did not offer any solution. I can see no solution that would be consonant with justice. In fact, the sensible thing now would be for the House to conduct its own inquiry, taking no notice of any pretended waiver by one Member; but he would have a statutory right by implication to have that waiver.

Lord Simon was worried about the effect of the amendment on public opinion: "What would they say if this House were to approve a measure that allowed a Member to pick and choose: to stand on his privilege when it suits him but to waive it when it suits him" [c33]. He also queried the application of the amendment (and of the pre-union Bill of Rights itself) to Scotland.[21] Lord Richard, Leader of the Opposition, said that it was clear that the amendment affected the issue of the privilege of parliament as a whole, not of any individual Member, and that it altered the privileges as expressed in the Bill of Rights. Therefore "an amendment tacked on to the Third Reading in your Lordships' House of a Bill on defamation is, frankly, not the way in which a constitutional issue of such importance should be considered" because "it goes to the root of the constitutional relationship between Parliament and the British public" [c34]. He supported the idea of an investigation by a Joint Committee of both Houses. Lord Renton also opposed the amendment, making the point that the proposed power of waiver would place members under a "moral obligation" to do so: "If that became the usual practise, then *de facto*, though not directly by law, we would do away with the privilege conferred by the Bill of Rights. So we must be very careful before we give a discretionary power on the part of the individual which could become by moral obligation a pressure and in the way indirectly alter a constitutional principle." [c35][22] Lord Ewing of Kirkford thought that Lord Simon of Glaisdale's proposed Joint Committee should also include "some constitutional experts who serve in neither House of Parliament in order to bring outside opinion and influence to bear on the proceedings of that investigation" [c36] but Lord Aldington thought that for so long as the legal action is stayed "Mr Neil Hamilton's character is stained."

Lord Lester of Herne Hill was convinced "that the amendment is flawed and would infringe fundamental principles of the constitution," for a number of reasons: [c38]

> First, contrary to the view of some of your Lordships, I believe that Mr. Neil Hamilton, whom the amendment was devised to assist and who has not pursued an appeal to the higher courts, would have reasonable prospects of success, as I shall explain. Secondly, the amendment is, as your Lordships have indicated, at odds with the protection given to parliamentary privilege by Article 9 of the Bill of Rights. Thirdly, it would operate arbitrarily. Fourthly, I believe that it would extend parliamentary privilege in a manner that would unnecessarily interfere with free speech. Fifthly, it would create new conflicts between Parliament and the courts of the kind we thought dead and buried a century ago. Lastly, it would authorise conduct that would infringe the European Convention on Human Rights.

He noted that "nowhere in the Commonwealth has any other legislature or any member of any other legislature, so far as I am aware, sought to tamper with Article 9 in the wake of the *Prebble* case in the manner contemplated by this amendment." He believed that Mr Hamilton

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[21] J D B Mitchell's *Constitutional Law* (1968), a leading Scottish authority, concluded that, although Parliamentary privilege was different in origin and development in Scotland and England, "as a general rule the law must be taken as uniform, though in particular cases where procedure rules of general law are important there may still be differences. There is, however, little modern authority in Scotland, and the weight of English authority as forming a pattern of thought must be regarded as substantial" (p.125).

[22] It is not clear whether the *Witnesses (Public Inquiries) Protection Act 1892* ("An act for the better protection of witnesses giving evidence before.... any Committee of either House of Parliament...") would apply such cases affecting waiver by select committee witnesses

would have been able to pursue his action notwithstanding Article 9 and that his case "can readily be distinguished from the *Prebble* decision"[c39] He then analysed Lord Hoffman's amendment in the context of Article 9: [cc39-40]

> In addressing the merits of the case, I believe that the amendment of the noble and learned Lord, Lord Hoffmann, goes much wider than the particular circumstances of Mr. Hamilton's case. In my opinion the amendment is plainly inconsistent with Article 9. It seeks-the noble Lord, Lord Renton, made the point-legislative authority for Parliament to surrender its vital collective privilege to any individual Member or anyone else who is a witness in defamation proceedings and whose conduct is in issue in those proceedings. It leaves entirely to the discretion of that Member or witness, or other individual, to decide whether to waive the protection given to Parliament by Article 9. I venture to doubt whether such a course can constitutionally be taken in accordance with Article 9 and in accordance with the law and custom of our constitution as observed over the past three centuries without the House itself deciding in each particular case whether or not to waive the collective privilege. However, that is what the amendment seeks to do by means of what is really a parliamentary equivalent of a sweepingly broad Henry VIII clause ourselves acting in this sense as Henry VIII.
>
> I believe that the amendment is also inconsistent with the central purpose of Article 9 in another important way. Its very existence would mean, if it were enacted, that a Member who has been defamed will be under pressure to waive the collective privilege to vindicate his reputation. Furthermore, although the amendment purports to leave it to the discretion of the individual without affecting the operation of parliamentary privilege in relation to another person who has not waived it, that is not how it will work in practice, as several noble Lords have said.

He referred to the difficulties already mentioned by other Peers where more than one Parliamentarian is involved in a potential privilege action or even where a Member was a defendant, as in a *Church of Scientology v Johnson-Smith* situation: [cc40-1]

> Secondly, it could be waived entirely to further his own particular interest as a party to litigation. I take as an example the case of the *Church of Scientology v. Geoffrey Johnson-Smith,* as he then was. The plaintiff in that case sued Geoffrey Johnson-Smith for defamatory remarks made during a television interview outside Parliament. Geoffrey Johnson-Smith pleaded fair comment and privilege. To defeat that plea, the Church of Scientology pleaded that the MP had acted with malice, and it sought to adduce evidence, including extracts from *Hansard,* of what the MP had done and said in Parliament. The court refused to permit that because it would breach parliamentary privilege.
>
> However, if the amendment were passed, a defendant would retain the option to use parliamentary privilege to shield himself in libel proceedings not only in respect of what he had said or done in Parliament, but also, as in the Johnson-Smith case, of what he had said or done outside Parliament. On the other hand, he would be given the new right, an entirely novel right, at his sole discretion, to waive privilege whenever it suited him, whether as plaintiff or defendant, in defamation proceedings. That would surely strike the other party to the libel proceeding, and the public at large, as an unfair extension of parliamentary privilege, inconsistent with its origins

and primary purpose and arbitrary in its operation.

The amendment would also "unjustifiably interfere with free speech" because the media when criticising a Parliamentarian, would "have no way of knowing whether, or upon what basis, parliamentary privilege might be waived so as to permit the newspaper to establish the truth of fair criticisms of the conduct of elected Members in the performance of their legislative duties" [c41]. He also criticised the amendment for applying only to defamation cases, and not to, say a criminal trial for conspiracy, bribery or corruption. He concluded: [c42]

> The immunities written into Article 9 were not included simply for the personal or private benefit of Members of either House but to protect the integrity of the legislative process by ensuring the independence of individual legislators. It was the culmination of a long struggle for parliamentary supremacy. I submit that it is as important as ever in protecting the independence and integrity of Parliament and should not be permitted to be undermined to meet the personal and private needs of particular individuals, however much we may or may not sympathise with the case.

Lord Blaker supported the amendment, recalling a similar position to Neil Hamilton he was in in 1990:[c44]

> I had no means of clearing my name. This seemed to me to be wholly unjust. I could not understand how the rule of privilege, which had been originally intended to protect freedom of debate in Parliament, could prevent a Member of either House of Parliament defending himself against a libel.

Lord Peyton of Yeovil made a similar point: [c47]

> What seems to me to be odd, unpalatable, and very hard to accept, is that a privilege which was designed for the protection of Parliament and its Members should now have the wholly unintended effect of barring the access of one Member to the courts, that Member believing himself to have been seriously libelled. I need not go into that more than to say that he was obliged, as a result of the publication of that accusation, to resign as a Minister of the Crown. I know that sympathy for Mr. Hamilton has been expressed even by those who oppose the amendment, but I feel, nevertheless, that perhaps rather too much has been made of a minor change to a law which has stood for over 300 years. It does not seem too much to suggest, in the interest of justice to an individual, this modest change, which does not give him anything save that which is the right of every citizen of this country who feels he has been wronged.

The Lord Chancellor, Lord Mackay of Clashfern, emphasised that the Government was neutral on the amendment, and "there is no intention whatever on the part of the Government that there should be anything other than a free vote on the matter in the House of Commons" [c49]. He summarised the issue, following the *Hamilton* and *Allason* cases, as follows: [cc49-50]

> If those judgments are correct, the Act relating to England and Wales which created the obstacle to doing justice was created to protect the parliamentary process and that has turned out to be an obstacle to a Member of Parliament obtaining access to justice. That may be inevitable and certainly under the present law it appears to be inevitable. The question is whether Parliament

should intervene to change it. All noble Lords have agreed that if the law has that effect the only way it can be changed is by the intervention of Parliament.

I accept immediately that the privilege created by the Bill of Rights as regards this aspect is a privilege of Parliament. It is not a privilege of individual Members of Parliament; it is a privilege of Parliament. However, the consequence of the existence of that privilege is the interposition of an obstacle to protecting themselves in the face of individual Members of Parliament. That may be a consequence of the privilege of Parliament, but it is an obstacle that the individual faces in seeking access to the courts in order to clear his name from what he believes to be a defamation.

One option would be to refer the matter to a Joint Committee, but he believed that it would be more appropriate for each House to decide the matter independently through the proposed amendment. He then set out his own view on waiver: [cc50-51]

And then it seems to me that it is right that the in whose path this obstacle to justice is consequence of this particular immunity or should have the right to say that he does that obstacle to remain in his path, if that is his wish.

Various points have been made in relation to this; for example, that pressure could be put on one Member to waive his privilege. At present there is the familiar invitation to a Member who makes a statement that he should come outside and make it again. That is a matter for the Member's discretion.

Lord Harris of Greenwich: It is not taken up very often.

The Lord Chancellor: My Lords, the noble says that that invitation is not taken up very often. The matter of waiver would be a matter for the individual Member of Parliament, and in relation to this amendment it leaves it open to the individual Member whether or not to exercise that waiver.

Assuming that the law laid down by Mr. Justice May and Mr. Justice Owen is correct, following *Prebble,* as they thought they were, anyone can defame a Member of Parliament in respect of that Member's participation in the proceedings of Parliament without that Member of Parliament having any possibility of obtaining redress in the civil courts for that defamation.

The noble Lord, Lord Lester of Heme Hill, who at an early stage was sympathetic to the amendment, has indicated some reasons against it: that it may prevent free speech and so on. The alternative is to leave unresolved the problem that a Member of Parliament can be defamed in respect of his central activities as he participates in the proceedings of Parliament without remedy in defamation which would be open to any ordinary citizen.

He concluded by believing that "a sufficient case has been made for this amendment for your Lordships to consider carefully whether or not is should be part of the Bill when it goes to the House of Commons on the distinct understanding that this matter will have to be debated and considered very carefully in the House of Commons before this remedy if afforded" His personal view was that "it is right for your Lordships to give the House of Commons an opportunity to consider it" [c51], ie based on an amendment moved from the Lords' Cross-Benches. He also thought that as it was an amendment to a bill on defamation, "it is proper

to deal with this only, if at all, in the context of defamation. This Bill does not allow us to deal with a whole range of proceedings. But your Lordships may well feel that in relation to an important matter of this kind, it may well be right to proceed in stages" [c52]

On a division, the amendment was agreed 157-57.

V 'Proceedings in Parliament'

Clause 14 (5) is of interest in that it appears to be an attempt at a definition of 'proceedings in Parliament'. *Article 9 of the Bill of Rights* is as follows:

> "That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament".[23]

Clause 14 (4) retains all existing privileges relating to "legal liability for words spoken or for things done in the course of, or for all purposes of or incidental, to any proceedings in Parliament," and *subsection 5* to seeks apply this to a number of specific cases:

> (5) Without prejudice to the generality of subsection (4), that subsection applies to-
>
> (a) the giving of evidence before either House or a committee;
>
> (b) the presentation or submission of a document to either House or a committee;
>
> (c) the preparation of a document for the purposes of or incidental to the transacting of any such business;
>
> (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of either House or a committee; and
>
> (c) any communication with the Parliamentary Commissioner for Standards or any person having functions in connection with the registration of members' interests.
>
> In this subsection "a committee" means a committee of either House or a joint committee of both Houses of Parliament.

This wording appears to be based on section 16 of the (Australian) *Parliamentary Privileges Act 1987:*

> **Parliamentary privilege in court proceedings**
>
> **16.(1)** For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.
>
> **(2)** For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, "proceedings in Parliament" means all words spoken and acts done in the course of, or for purposes of or incidental to, the

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[23] see generally, G. Lock, "The 1689 Bill of Rights" (1989) XXXVII Political Studies 540-61

transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes-

(a) the giving of evidence before a House or a committee, and evidence so given;
(b) the presentation or submission of a document to a House or a committee;
(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and document to formulated, made or published.

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of -

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

(4) A court or tribunal shall not-

(a) require to be produced or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or

(b) admit evidence concerning any oral evidence taken by a House or a committee in or require to be produced or admit into evidence a document recording or any such oral evidence unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

(5) In relation to proceedings in a court or tribunal so far as they relate to-

(a) a question arising under section 57 of the Constitution; or
(b) the interpretation of an Act,

neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

(6) In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.

(7) Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act.

The definition of 'proceedings in Parliament' under Article 9 (and the *Parliamentary Papers Act 1840*) has long been a contentious matter in the law of Parliamentary privilege. In modern times, for example, the development of the range of work of Parliament and its

Members, beyond the obvious activity in the Chambers and in committees, has tested the limits of the phrase. The classic modern example is the *George Strauss* case in 1957-8:[24]

> G R Strauss MP had written to the minister responsible in the Commons for the electricity industry (the Paymaster-General) complaining of the methods of disposal of scrap cable followed by the board, a regional unit of the Central Electricity Board. The minister referred the letter to the board, who protested to Mr Strauss about its contents. Finally the solicitors to the board informed the member that they had instructions to sue him for libel unless he withdrew and apologised. Mr Strauss drew the attention of the House to this threat, and the matter was referred to the Committee of Privileges. The most important question was whether the original letter from the member to the Paymaster-General was a 'proceeding in Parliament' within the meaning of the Bill of Rights. The committee concluded that Mr Strauss was engaged in a proceeding in Parliament; accordingly the threat by the board to sue for libel was in respect of statements made by the member in Parliament and therefore threatened to impeach or question his freedom in a court or place outside Parliament. Thus the board and their solicitors had acted in breach of privilege. However, the committee recommended the House to take no further action in the matter. On 8 July 1958, the House decided on a free vote (218 to 213) to disagree with the committee, and thereupon resolved that the original letter was not a proceeding in Parliament and that nothing in the subsequent correspondence constituted a breach of privilege. The threat to sue for libel was then withdrawn.
>
> In support of the majority view, it was argued that members should not seek to widen the scope of absolute parliamentary privilege and should be content to rely on the defence of qualified privilege in the law of defamation. There is no doubt that a complaint addressed by a member of Parliament to a minister on an issue of public concern in which the minister has an interest has the protection of qualified privileges But qualified privilege may be rebutted by proof of express malice and it might possibly be held to constitute malice in this sense if a member passed on to a minister without any inquiry a letter from a constituent containing defamatory allegations.
>
> In support of the view that a member's letter to a minister should be regarded as a proceeding in Parliament, it is certain that if a member tabled a parliamentary question instead of writing to the minister, he would be absolutely protected. Today it seems inevitable that many matters should be raised in correspondence with ministers and not immediately become the subject of questions. A complicating factor in the London Electricity Board case was that Mr Strauss's complaint might have been regarded as raising a matter of day-to- day administration for which the minister was not responsible to Parliament, which case a parliamentary question might not have been accepted.

The Privileges Committee adopted the analysis of the Committee on the case in 1939 on the applicability of the Official Secrets Acts to Members.[25] The 1939 Committee had stated:

> 3. The article in the Bill of Rights is not necessarily an exhaustive definition of the cognate privileges. But even assuming that it is, the privilege is not confined to words spoken in debate or to spoken words, but extends to all proceedings in parliament. While the term

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[24] Wade and Bradley, *Constitutional and Administrative Law*, 11th ed, 1993, pp 227-8. See also 5th report of Privileges Committee, HC 305, 1956-57; Report of Privileges Committee, HC 227, 1957-58; HC Deb vol 591 8 July 1958 cc 208-346

[25] Select Committee on the Official Secrets Acts, HC101, 1938-39

'proceedings in parliament' has never been construed by the courts, it covers asking of a question and the giving written notice of' such question, and includes everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business.

4. The privilege of freedom of speech being confined to words spoken or things done in the course of parliamentary proceedings, words spoken or things done by a member beyond the walls of parliament will generally not be protected. Cases may, however, easily be imagined of communications between one member and another, or between a member and a minister, so closely related to some matter pending in, or expected to be brought before, the House, that though they do not take place in the chamber or a committee room they form part of the business of the House, as, for example, where a member sends to a minister the draft of a question he is thinking of putting down or shows it to another member with a view to obtaining advice as to the propriety of putting it down or as to the manner in which it should be framed. The Attorney General said that, should such a case come before the courts, he could not but think that they would give a broad construction to the term 'proceedings in parliament' having regard to the great fundamental purpose which the privilege of freedom of speech served, and that he could 'see a possible construction of "proceedings" which would extend to matters outside the precincts if they were related to what is to happen in the House'.

5. There is authority for saying that an act not done in the immediate presence of the House may yet be held to be done constructively in parliament and therefore protected. Sir Robert Atkyns, sometime Lord Chief Baron of the Exchequer, in his Argument upon the case of Sir William Williams, says that the Commons' 'right and privilege so far extends, that not only what is done in the very House sitting the parliament, but whatever is done relating to them . . . during the parliament and sitting the parliament, is nowhere else to be punished but by themselves or a succeeding parliament, although done out of the House . . . In a just sense, any offence committed by a member relating to the parliament, though done out of the House, is termed an offence in parliament.

6. Sir Gilbert Campion expressed the opinion that 'the immunity of members from the criminal law in respect of acts done by them in the exercise of the functions of their office ' could ' not be confined to acts done within the four walls of the House'. This conclusion was, he considered, involved in Mr. Justice O'Connor's dictum in *R. v. Bunting* that a member of parliament 'is privileged and protected by *lex et consuetudo parliamenti* in respect of anything he may say or do within the scope of his duties in the course of parliamentary business '. He drew your Committee's attention to two American decisions, *Coffin v. Coffin and Kilbourn v. Thompson* decided by the Supreme Court of Massachusetts and the Supreme Court of the United States respectively, regarding the extent of the protection afforded to members of legislative bodies by constitutional provisions relating to freedom of debate in those bodies. These decisions, he considered, went a long way towards establishing the proposition that privilege extended to every act resulting from the nature of the office of a member and done in the execution of that office, whether done in the House or out of it ; and although they were not binding on the courts here, he was of opinion that considerable weight must be attached to them because the terms of the constitutional provisions in question were similar to, though not so wide as, those of the article in the Bill of Rights. In view of the broad construction given by the American courts to provisions confined in terms to speeches and debates he thought it reasonable to suppose that, if the courts in this country were called upon to construe the wider words in the Bill of Rights, they would go at least as far.

7. Whatever may be said with regard to acts resulting from the nature of the office of a member and done in the executdon of that office generally, Mr. Justice O'Connor's dictum

must, Your Committee think, command general assent ; and it would, in their view, be unreasonable to conclude that no act is within the scope of a member's duties in the course of parliamentary business unless it is done in the House or a committee thereof and while the House or committee is sitting.

That report had been agreed to by the House on 21 November 1939.[26] However the House in 1958 rejected the Privileges Committee's Strauss report when it was debated, thereby deciding, in effect that a letter from a Member in such a situation is not a 'proceeding in Parliament'.[27] Herbert Morrison, who moved the successful amendment, declared that "I think that this House is in danger ... of elevating the rights of its own members, in communications going outside the House, markedly above the rights of the citizens outside, and that we are in danger of a tendency that could be injurious to the liberty and equality of the British people" [c 227].

In a comprehensive review of the matter, the 1967 report of the Select Committee on Parliamentary Privilege examined the definition, within the context of the privilege of the freedom of speech:[28]

73. This freedom is defined in Article 9 of the Bill of Rights, 1688 (1 Will and Mary, Session 2, c. 2) which declares "That the freedom and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament ".

74. The correlative immunity to this freedom or right, and the effective method by which it is safeguarded without recourse to the penal jurisdiction of the House, is the ability of a Member to claim absolute privilege if sued in the courts for a defamatory, or other wrongful statement made during a debate or "proceeding in Parliament." If such an action were brought, the writ would be summarily struck out if it were apparent from it that the occasion was a proceeding in Parliament. If the writ itself did not make this apparent, the action would be dismissed as soon as the fact became apparent. In such an action it would be the function of the courts to construe the expression "proceeding in Parliament" and to detemine whether the occasion was or was not comprehended by that term. It cannot in the view of Your Committee be doubted that the modern limits and application of this expression, which may well have been clear enough to the legislature in the 17th century, are no longer free from uncertainty.

It examined the Strauss case, and was clearly unhappy that the Privileges Committee and the House had focused so narrowly on the definitional point rather that the broader issues of the House's penal powers to enforce its privileges and its relationship with the courts in their interpretation, and made a number of proposals:

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[26] HC Deb vol 353 cc 1071-84
[27] HC Deb vol 591, cc 208-346 8 July 1958
[28] HC 34, 1957-69, December 1967

83. The decision of the House in the London Electricity Board case is, like that made in every other case in which the penal jurisdiction of the House is invoked, not binding even upon the House, although without doubt Mr. Speaker would have regard to it under what is normal procedure today, if he were called upon to decide in some analogous case whether a *"prima facie* case of breach of privilege " had been made out. Still less, however, will it influence a decision of the courts. If in similar circumstances hereafter a writ were issued against a Member and the Member applied to the court to strike out the writ upon the ground that the occasion was a "proceeding in Parliament", and accordingly that the letter enjoyed absolute privilege, it would be for the courts to interpret and apply that term. The courts, as the law stands to-day, would not when interpreting the Bill of Rights be bound by the resolution of the House of Commons in the London Electricity Board case. Thus in theory it could happen that a statutory absolute privilege disclaimed by the House could be upheld by the courts-a striking example of the confusion which can arise by reason of the present practice of the House in failing clearly to distinguish between its power to punish contempt and the consequences of a so-called " breach of privilege ".

SCOPE OF " PROCEEDINGS IN PARLIAMENT "

84. In making the comment set out in paragraph 83, Your Committee are not of course prejudging what the courts' view would be about the meaning and extent of a "proceeding in Parliament". The practical effect of this decision of the courts would be to determine whether a letter such as that written by Mr. Strauss to the Minister would enjoy absolute privilege or only the qualified privilege which attaches to communications of this character published without malice. Your Committee believe that their opinion of the extent and meaning of Article 9 of the Bill of Rights is relevant to their terms of reference only to the extent that if they think that the protection afforded by that Article is inadequate and uncertain, in the light of the modern functions of a Member, they can properly record the fact and advise that legislation be promoted to improve the protection so that it may comply with modern requirements. If in so doing they are held to be overstepping their terms of reference, they consider themselves to be justified by the consideration that the clearer and the more adequate is the protection afforded by the courts the less need or temptation will there be to invoke the penal jurisdiction of the House in order to provide protection in doubtful or marginal cases.

85. The opinion of Your Committee is that in all probability a Parliamentary Question and a Notice of Motion become a " proceeding in Parliament" at any rate when published in the Order Paper. Upon the question whether such documents are " proceedings in Parliament" at an earlier stage, e.g. on being handed into the Table Office, or still earlier when being circulated within the precincts for the purposes of consultation or the securing of signatures, there has never been an authoritative expression of opinion. The same is true of discussions within the ambit of their terms of reference of bodies appointed under Parliamentary authority, e.g. Sub-Committees of a Select Committee, whilst travelling away from the precincts for the purpose of obtaining information to enable them to perform the function allotted to them by the House. Your Committee respectfully accept, though not without some hesitation, the probable correctness in law of the view expressed by the House by a narrow majority in the London Electricity Board case that a letter written by a Member to a Minister concerning a matter which is within the scope of the Member's Parliamentary duty and which is also within the scope of the Minister's ministerial duty is none the less not a " proceeding in Parliament

THE NEED FOR REFORM OF STATUTE LAW

86. In the view of Your Committee, the questions which they have canvassed in paragraph 85 and their inability to give definite answers to them are strong evidence that the

law needs to be reformed to bring it into a proper relationship with modern requirements. Your Committee point out that the Parliamentary Question developed as a time-saving device to avoid the necessity for a debate unless the answer to the question was considered to be unsatisfactory; to-day the Parliamentary Question is, they believe, in all probability a "proceeding in Parliament ", and thus accorded the protection of absolute privilege. This was the view of the Committee on The Official Secrets Acts. That Committee in their Report (H.C. 101 (1938-39)) said: "The term 'proceedings in Parliament' covers both the asking of a Question and the giving of such Question;" and their conclusions were accepted by the House. The congestion of Question hour has similarly led to the time-saving practice of writing letters to Ministers, seeking their intervention upon matters within their departmental responsibility. Many Members now use the Parliamentary Question as a weapon of penultimate resort to give publicity to its subject-matter when, and only when. they cannot obtain satisfaction by correspondence; yet the House has taken the view that such correspondence does not fall within the ambit of " proceedings in Parliament " and so regards it as not protected by absolute privilege. The practical effect of this distinction seems to Your Committee to be indefensible.

87. Your Committee accordingly recommend that legislation be promoted to extend and clarify the scope both of absolute and of qualified privilege. They do not conceive it to be their function to make the precise recomrnendations appropriate to the function of a drafting committee and accordingly their proposals, as set out hereafter, are intended to indicate for the benefit of the draftsman no more than the broad lines along which they think that the boundaries of absolute and qualified privilege should in future lie.

(a) Absolute Privilege

88. Your Committee have no doubt that absolute privilege should be enjoyed in respect of everything said or done in the Chamber or during the proceedings within the precincts of the House of any Select Committee, sub-Committee or other body or group of Members appointed by or with the authority of the House (e.g. a Speaker's Conference). They think that it should be open to the House and to any such Committee, etc., to resolve that absolute privilege should extend to its meetings outside the precincts of the House whether at home or abroad, and whether such meetings take the form of formal meetings or of informal discussions of the business of such Committee, etc. The privilege should be enjoyed by Members, Officers and persons requiring or invited to appear before the House, Committee, etc., whilst so appearing.

89. Your Committee further consider that any documents prepared, published or printed under the authority of an order of the House or of a Committee, etc., or by way of official record of the proceedings of the House or of a Committee, etc., or such as are necessary for the due performance of the business of the House or of a Committee, etc., should enjoy absolute privilege, save and except that if at any time they are published without the authority of the House etc. (e.g. Memoranda first submitted to a Select Committee and subsequently published by the author or a third party upon his own initiative) such publications should not enjoy absolute privilege.

90. Questions and Notices of Motion appearing on the Order Paper and at any time prior thereto, and drafts of Questions and Notices of Motion which are intended to lead to the placing of a Question or Notice of Motion on the Order Paper, provided that they are published no more widely than is reasonably necessary for the purpose, should enjoy absolute privilege.

91. Your Committee are strongly of the opinion that the decision of the House in the London Electricity Board case should be reversed by legislation. For the reasons which they have given earlier, and moreover since some of their proposals are likely in practice to remove from the scope of the penal jurisdiction of-the House many possible sources of complaint relating to defamatory statements, they are satisfied that absolute privilege should extend to communications, written or oral, between Members and Ministers, Mr Speaker, the Chairman of Ways and Means and Chairmen of Committees, which relate or are reasonably believed by the Member concerned to relate to the functions of those Ministers, etc., concerned ; and also to similar communications between Members and all Officers of the House, persons employed to assist the House in its Parliamentary functions and the Comptroller and Auditor General, provided that such communications relate to, or are reasonably believed by the Member concerned to relate to, the official duties of such Officer, etc. The breadth of scope of the absolute privilege proposed in this paragraph is justified by the fact that such communications are today part of the ordinary way in which Members perform their Parliamentary functions or are inextricably mixed up with them. The practice of communicating with Ministers, Mr. Speaker etc. is an indispensable adjunct or alternative to the formal procedure of the House and so saves its time. If precedent is needed for the extension of absolute privilege to such communications, Your Committee would find it in S. 10*(5)* of the Parliamentary Commissioner Act 1967, which they would regard as anomalous if effect were not to be given to their proposals.

92. When referring to communications "between" Members and the persons referred to, Your Committee include replies written by or on behalf of such persons to Members.

(b) Qualified Privilege

93. In the view of Your Committee a wide field of communications connected with a Member's Parliamentary functions, including letters written by electors to Members or Ministers upon matters falling within the Parliamentary functions of a Member or the Ministerial functions of the Minister, already enjoy qualified privilege. If legislation such as they have proposed is promoted, they think that it might be desirable to codify and to clarify the scope of such privilege and to make it clear (in view of the complexity of modern powers and functions) that a reasonable belief that the communication falls within the scope of the Member's or Minister's functions should similarly establish the right to qualified privilege.

94. Your Committee think it desirable to emphasize that they do not propose that a Member's communication to a citizen repeating or summarizing the reply of a Minister, etc. should enjoy absolute privilege, even though the communications between Member and Minister which preceded the communication to the citizen are themselves afforded absolute privilege. Such a communication should enjoy qualified privilege only. The Member should not be relieved from the obligation of avoiding malice in making such a communication if such a communication is made maliciously, to the detriment of a defamed third party, Your Committee think that the third party should continue, as now, to be entitled in such case to recover damages for defamation. Members ought, in the view of Your Committee, to exercise special care in reporting to private citizens the contents of absolutely privileged documents addressed to themselves.

The report was debated by the House on 4 July 1969 on a take note motion,[29] which,

[29] HC Deb vol cc 825-913

however, did not focus especially on the definition issue as that was, at the time, under examination by the Joint Committee on the Publication of Proceedings in Parliament. That committee reported in May 1970 and considered the definition in detail.[30] The Committee believed that "the test which should determine whether particular proceedings are proceedings in Parliament should be functional and not geographical. In other words the question to be asked should be 'Are the proceedings the transactions of Parliamentary business?'; not 'Were the proceedings held inside the Houses of Parliament?' Parliament has had to sit at times elsewhere; and Committees still do" [para 19]. They continued, considering the Strauss' situation:

> As regards the showing of drafts of intended questions or notices of Member to another or by a Member to a Minister or by a Member to strangers the Committee think that some limitation upon the extent of such "publication" is proper if absolute privilege is to be retained. The one they suggest is that the publication should be no wider than is reasonably necessary for the discharge of a Member's functions as such.
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> 20. There remains the problem of letters written to Ministers by Members. These may sometimes contain matter defamatory of a third person but may nevertheless relate to some matter which the Member may, as part of his parliamentary duty, justifiably consider requires investigation or ventilation. Should such a letter be the subject of absolute privilege or not? .....
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> 22. The present Committee need not rehearse the rival arguments. For they must come to a conclusion whether such a letter *ought* to be treated as a proceeding in Parliament for the purpose of attracting absolute privilege.
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> 23. In favour of an affirmative answer is the fact that a letter to a Minister is very often an alternative to the putting down of a Question on the Order Paper. Such a Question would clearly be a proceeding in Parliament and would therefore attract absolute privilege. It could well be that such a Question would not contain any defamatory matter, but that a supplementary Question would. This likewise would be a proceeding in Parliament and protected by absolute privilege. If this be so, it is anomalous that a letter from a Member to a Minister, written in discharge of his Parliamentary duty by the Member, should not be similarly protected.
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> 24. On the other hand it has to be borne in mind that the letter forwarded to the Minister may contain defamatory material emanating from a constituent which on investigation could turn out to be both untrue and malicious.
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> 25. The Select Committee on Parliamentary Privilege was strongly of the opinion that absolute privilege should attach to letters such as those now being considered.....
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> 26. After full consideration, the present Committee take the same view as the Select Committee on Parliamentary Privilege.

They recommended:

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[30] HC 261, HL 109, 1969-70, paras 12-34

27. The Committee agree that proceedings in Parliament should continue to be protected by absolute privilege. They consider however that the time has come when "proceedings in Parliament" for this purpose should be defined by Statute. They suggest the following definition:-

(1) For the purpose of the defence of absolute privilege in an action or prosecution for defamation the expression " proceedings in Parliarnent " shall without prejudice to the generality thereof include

(a) all things said done or written by a Member or by any officer of either House of Parliament or by any person ordered or authorised to attend before such House, in or in the presence of such House and in the course of a sitting of such House, and for the purpose of the business being or about to be transacted, wherever such sitting may be held and whether or not it be held in the presence of strangers to such House: provided that for the purpose aforesaid the expression "House" shall be deemed to include any Committee sub-Committee or other group or body of members or members and officers of either House of Parliament appointed by or with the authority of such House for the purpose of carrying out any of the functions of or of representing such House; and

(b) all things said done or written between Members or between Members and officers of either House of Parliament or between Members and Ministers of the Crown for the purpose of enabling any Member or any such officer to carry out his functions as such provided that publication thereof be no wider than is reasonably necessary for that purpose.

(2) In this section "Member" means a Member of either House of Parliament ; and " officer of either House of Parliament " means any person not being a Member whose duties require him from time to time to participate in proceedings in Parliament as herein defined.

The House again debated the 1967-68 Select Committee's report on 16 July 1971. The Leader of the House, William Whitelaw, insisted (even when reminded of the work of the Joint Committee) that the question of 'proceedings in Parliament', which involved "complex legal issues" on the defence of legal privilege "must, I think, await the report of the present Phillimore Committee on the Law of Defamation".[31]

The 1975 report of the Faulks Committee on Defamation supported the need for a statutory definition of 'Proceedings in Parliament':[32]

Definition by Statute

203. In paragraphs 26 and 27 of the *Second Report of the Joint Committee on the Publication of proceedings in Parliament (supra)* the Committee recommended that "proceedings in Parliament" (a phrase which appears in Article 9 of the Bill of Rights 1688) should continue to be protected by absolute privilege, but should be defined by statute in the

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[31] HC Deb vol 821 cc 922-995 at 933. See also his further comment at c.990 and the speeches of Sam Silkin at c.954, and George Strauss at cc 975-8

[32] Cmnd 5909, March 1975

terms and for the reasons given in paragraphs 20-30 of the Report. The definition covers, *inter alia,* all things said, done or written between Members of Parliament or between Members and Officers of either House of Parliament or between Members and Ministers of the Crown for the purpose of enabling any Member or any such officer to carry out his functions as such, provided that publication be no wider than is reasonably necessary for that purpose. We agree that the term "proceedings in Parliament" should be defined by statute and we agree with the definition proposed by the *Second Report of the Joint Committee.* We have also considered the alternative definitions of "Officer of either House of Parliament" discussed in paragraphs 28 to 30 of the report. We favour the first alternative which places on the court the responsibility for deciding whether an Officer should be entitled, in the public interest, to the same absolute privilege in an action or prosecution for defamation as a Member of either House of Parliament.

In the 1976-77 session the Privileges Committee reviewed the recommendations of the 1967 select committee report which had not yet been adopted. Its consideration of the 'proceedings in Parliament' question was as follows: [33]

7. In considering the desirability of a greater degree of certainty over the scope of privilege, the 1967 Report gave close attention to the need to attempt a definition of "proceedings in Parliament" following the decision of the House in the "Strauss" case. In that case it was decided by a narrow majority (and against the advice of the Committee of Privileges) that the sending of a particular letter by the Rt hon Member for Vauxhall to the Minister of Supply was not a `proceeding' that should enjoy the absolute privilege from question in the courts confirmed in the Bill of Rights. The 1967 Report recommended that there should be legislation to define the scope of proceedings in Parliament, which would make clear (among other things) that it included all things done or written between Members and Ministers of the Crown for the purpose of enabling a Member to carry out his functions. This recommendation has subsequently been endorsed by the Joint Committee on the Publication of Proceedings in Parliament and by the Faulks Committee on Defamation and a draft Clause of a Bill has been proposed. Your Committee consider that such a definition is necessary in order to reflect the way that Parliament actually works. Its adoption might in fact lead to a reduction in the amount of potentially defamatory matter given wide circulation, since if a letter enjoyed absolute privilege, a Member making a preliminary enquiry would not need to raise the matter in the House or on the Order Paper in order to be assured of protection. It is anomalous that a Member's communications with the Parliamentary Commissioner for Administration enjoy absolute privilege under the Parliamentary Commissioner Act 1967, while his communications with a Minister do not. Your Committee recommend, therefore, the enactment of the following definition of "proceedings in Parliament" proposed by the Joint Committee [reproduced above] .....

8. The Joint Committee and the Committee on Defamation referred to above were content to leave to the courts the decision as to whether a person was acting as an officer of the House for the purposes of the Act. Your Committee, however, do not consider that such a question should pass out of the control of the House, since only the House should decide what it requires to be done as part of its proceedings. A certificate from Mr Speaker would be an appropriate means of determining such a matter, in respect of officers of the Conunons. Furthermore, it would not be consistent with the House's privilege of exclusive control over its own proceedings for the courts to decide disputed questions relating to whether the actions

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[33] 3rd report of 1976-77, HC 417 - footnotes omitted

of Members or Officers were authorised by Parliament, or whether their actions were for the purpose of carrying out its functions. A certificate from Mr Speaker would again be the appropriate means of determining such questions as they affect the Commons. In cases that were not straightforward Mr Speaker's certificate could be issued following a formal decision of the House.

Perhaps the most recent detailed Parliamentary consideration of the issue was in the Privileges Committee's 1985 'Zircon film' report.[34]

60. At several points in its enquiry, Your Committee has been reminded of the difficulty in interpreting the phrase "proceedings in Parliament" which is used in Article 9 of the Bill of Rights, and which is fundamental to all complaints of breach of privilege or contempt (see Evidence, pp 4-5, paras 21-26). A number of committees in the past have had problems regarding the definition of this crucial concept, particularly the Committee on the Official Secrets Acts of 1938-39 when considering the *Sandys* case and Your Comittee's predecessor of 1957-58 in relation to the *Strauss* case; in the latter case the House disagreed with the Committee's interpretation (Evidence, p 5, paras 23-24).

61. Various committees have suggested new definitions of the term, some going further than others, and have recommended that this be done by legislation (Evidence, p 5, para 25). The Joint Committee on the Publication of Proceedings in Parliament, of 1969-70, recommended the text of such a statutory definition for the purpose of the defence of absolute privilege in actions for defamation (HC 261 (1969-70) paras 25-28). This recommendation was endorsed by Your Committee's predecessors of 1976-77 (HC 417 (1976-77) para 7) (Evidence, p 5, para 25 and p 8, Annex C). No such legislation has been passed.

62. Your Committee has not found it necessary, in this inquiry, to examine in depth the question of how the term "proceedings in Parliament" should be defined. It was sufficient that it was satisfied that the concept did not apply to a particular showing of a film, under arrangements made privately by a Member, in a room within the precincts of the House (para 16 above). Nor, Your Committee believes, would the recommended definition referred to above have extended to that event. However Your Committee asked the Clerk of the House to provide a memorandum on the wider question of the best and most up to date definition. This he has done (Appendix 12). Your Committee believes that this memorandum will be helpful in any future consideration of the scope of the term "proceedings in Parliament" and accordingly ommends it to the attention of the House.

Erskine May considers the matter as part of its comprehensive description of Parliamentary privilege:[35]

Meaning and scope of 'proceedings in Parliament'

The Bill of Rights 1689 and the Parliamentary Papers Act 1840 both use the word `proceedings' without further definition, in a context where such likely to be important. The primary meaning, as a technical parliamentary term, of 'proceedings' (which it had at least as early as the seventeenth century) is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it

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[34] 1st report of 1986-87, HC 365, May 1987. See the Clerk's memoranda at pp 4-5 and appendix 12

[35] 21st ed, 1989, pp 92-4

reaches a decision.

An individual Member takes part in a proceeding usually by speech, but also by various recognized kinds of formal action, such as voting, giving notice of a motion, etc, or presenting a petition or a report from a committee, most of such actions being time-saving substitutes for speaking. The Select Committee on the Official Secrets Act in 1938-39 argued that 'proceedings' covered both the asking of a question and the giving of written notice of such question, and includes everything said or done by a Member in the exercise of his functions as a Member in a committee of either House, as well as everything said or done in either House in the transaction of Parliamentary business.' Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers also can take part in the proceedings of a House, eg by giving evidence before it or before one of its committees, or by securing the presentation of their petitions.

While taking part in the proceedings of a House, Members, officers and strangers are protected by the same sanction as that by which freedom of speech is protected, namely, that they cannot be called to account for their actions by any authority other than the House itself (see chapter 9).

A large description of what is comprehended by the phrase 'proceedings in Parliament' is thus not difficult to arrive at, and of course the application of any definition to a particular case will normally be a matter for the House concerned. Nevertheless, for some time there has been discussion of the advisability of attempting a closer definition, in order both to provide a more secure framework for decisions in individual cases and to help in judgments about how close to a doubted proceeding an act done outside Parliament needs to be before it can properly benefit from the immunity conferred by privilege and declared by the Bill of Rights. The Select Committee on the Official Secrets Act gave thought to the latter problem and concluded that `cases may easily be imagined of communications between one Member and another or between a Member and a Minister, so closely related to some matter pending in, or expected to be brought before the House, that, although they do not take place in the Chamber or a committee room, they form part of the business of the House, as, for example, where a Member sends to a Minister the draft of a question he is thinking of putting down, or shows it to another Member with a view to obtaining advice as to the propriety of putting it down or as to the manner in which it should be framed'. The Committee's conclusions were agreed to by the House.

On the other hand, in 1958 the House rejected the opinion of the Committee of Privileges that a particular letter written by a Member to a Minister relating to a nationalised industry was a proceeding in Parliament. It had accepted however the conclusion of the Committee in 1947 that 'attendance of Members at a private party meeting held in the precincts ... during the parliamentary session to discuss parliamentary matters ... is attendance in their capacity of Members of Parliament', so that financial arrangements to induce a Member to disclose information from such a meeting were a breach of privilege.

The Select Committee on Parliamentary Privilege in 1967 reviewed these issues once more and recommended legislation to extend and clarify the scope of both absolute and qualified privilege,'and the Joint Committee on the Publication of Proceedings in Parliament in its second report in 1970, in agreeing with the 1967 committee, put forward a draft definition of 'proceedings in Parliament' on essentially functional lines.' The Faulks Committee on the Law of Defamation reported to the same effect in 1975,' and two years later the Committee of Privileges repeated the recommendation for legislation 'in order to reflect the way that Parliament actually works'.' On the other side of the argument is the contention that a precise statutory definition of 'proceedings' would deprive the Houses of freedom of interpretation and might lead to disputes with the courts. The most recent review of the matter by a select

committee simply commended the evidence received to the attention of the Commons as likely to be helpful in any future consideration of the scope of the term 'proceedings in Parliament'. To date, no legislation intended to define 'proceedings' has been laid before Parliament.

Proceedings, precincts and criminal acts

Even after any future definition of 'proceedings', it would no doubt remain the case, as it is now, that (for example) not everything said or done within the precincts forms part of proceedings in Parliament. The most striking example of this is the conclusion of the Privileges Committee in 1815 that the arrest of Lord Cochrane (a Member of the Commons) in the Chamber (the House not sitting) was not a breach of privilege (p 95). Particular words or acts may be entirely unrelated to any business being transacted or ordered to come before the House in due course. In the view of the Select Committee on the Official Secrets Acts 'a casual conversation in the House cannot be said to be a proceeding in Parliament, and a Member who discloses information in the course of such a conversation would not ... be protected by privilege, though it might he a question whether the evidence necessary to secure his conviction could be given without the permission of the House'. The Privileges Committee concluded in 1987 that there was no precedent for the House's affording Members any privilege on the *sole* ground that their activities were within the precincts of the Palace and there were no grounds for believing that the showing of a film to Members or others under arrangements made privately by a Member, 'could of itself, be held to be a proceeding in Parliament'.

Moreover, though the Bill of Rights will adequately protect a Member as regards criminal law in respect of anything said as part of proceedings in Parliament, there is more doubt whether criminal acts committed in Parliament remain within the exclusive cognizance of the House in which they are committed. In the judgment of the House of Lords in Eliot's case (see pp 73 and 84*n*), it was deliberately left an open question whether the assault on the Speaker might have been properly heard and determined in the King's Bench. The possibility that it might legally have been so determined was admitted by one of the managers for the Commons in the conference with the Lords which preceded the writ of error. In *Bradlaugh v Gosset*, Mr Justice Stephen said that he knew of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice'. Since he went on immediately to refer to *Eliot's case* and accepted the proposition 'that nothing said in Parliament by a Member, as such, can be treated as an offence by the ordinary courts', it must be supposed that what the learned judge had in mind was a criminal act as distinguished from criminal speech.'

In such cases, it will be essential to determine where the alleged criminal act stands in relation to the proceedings of the House. An officer carrying out an order of the House is in the same position as the Members who voted the order. In *Bradlaugh v Erskine,* the Deputy Serjeant at Arms was held to be justified in committing the assault with which he was charged, since it was committed in Parliament, in pursuance of the order of the House, to exclude Bradlaugh from the House. As Lord Coleridge observed, 'The Houses cannot act by themselves as a body; they must act by officers'. It would be hard to show how a criminal act committed by a Member, however, could form part of the proceedings of the House.'Apart from *Eliot's case* 350 years ago, no charge againat a Member in respect of an allegedly criminal act in Parliament has been brought before the courts. Were such a situation to arise, it is possible that the House in which the act was committed might claim the right to decide whether to exercise its own jurisdiction. In taking this decision, it would no doubt be guided by the nature of the offence, and the adequacy or inadequacy of the penalties, somewhat lacking in flexibility, which it could inflict.

In conclusion, it can be noted that, although clause 14 of the present bill does not refer expressly to *Article 9 of the Bill of Rights*, part of the wording of subsection (1) is taken directly from it, and the definition in subsection (5), if enacted being the only *de facto* modern statutory definition, in effect, of 'proceedings in Parliament' may well be resorted to, to some degree, by the courts in any case concerning Article 9. It will be through such legal actions that the effectiveness of the proposed definition will be tested, and demonstrate to what extent the doubts over many years about the practicality of formulating an adequate statutory definition (and which have contributed to the failure by Parliament to legislate on this matter thus far) were justified.[36]

APPENDIX

CLAUSE 14 OF THE BILL

Evidence concerning proceedings in Parliament

14.-(1) Where the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, he may waive for the purposes of those proceedings, so far as concerns him, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament.

(2) Where a person waives that protection-

(a) any such enactment or rule of law shall not apply to prevent evidence being given, questions being asked or statements, submissions, comments or findings being made about his conduct, and

(b) none of those things shall be regarded as infringing the privilege of either House of Parliament.

(3) The waiver by one person of that protection does not affect its operation in relation to another person who has not waived it.

(4) Nothing in this section affects any enactment or rule of law so far as it protects a person (including a person who has waived the protection referred to above) from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament.

(5) Without prejudice to the generality of subsection (4), that subsection applies to

(a) the giving of evidence before either House or a committee;

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[36] See generally P Leopold, "'Proceedings in Parliament': the grey area", 1990 *Public Law* 475-81

(b) the presentation or submission of a document to either House or a committee;

(c) the preparation of a document for the purposes of or incidental to the transacting of any such business;

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of either House or a committee; and

(e) any communication with the Parliamentary Commissioner for Standards or any person having functions in connection with the registration of members' interests.

In this subsection "a committee" means a committee of either House or a joint committee of both Houses of Parliament.

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