Parliamentary privilege: current issues

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There have been developments in parliamentary privilege since the last major review by the Joint Committee on Parliamentary Privilege report in 1999. There was renewed interest from the Government in legislation following suggestions that prosecuting former Members for alleged expenses abuse might involve issues of privilege. In the event, the *Chaytor* case found that parliamentary privilege was not engaged. More recently, the question of clarifying select committee powers has been raised, following the report from the Culture Media and Sport Committee on News International and Phone Hacking in May 2012.

The Government issued a green paper entitled Parliamentary Privilege on 26 April 2012, to begin a consultation on parliamentary privilege. The Paper included draft clauses on:

- removing the protection of Article 9 of the Bill of Rights 1689 from Members accused of various criminal offences;
- giving power to the House of Commons to allow lay members of House of Commons Standards Committee to vote in proceedings of the committee;
- amending the *Parliamentary Papers Act 1840* to rebalance the burden of proof in favour of reporters;
- amending the same Act to provide unambiguous protection for broadcasts of proceedings whose broadcasting has been authorised in by the House together with a qualified protection for broadcasts of parliamentary proceedings not authorised by the House.

The paper stated that it would be right for Parliament to have a proper opportunity to reflect through the vehicle of a Joint Committee.

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The Joint Committee was established on 9 January 2013 and its report was published on 3 July 2013. The report recommended against comprehensive codification of parliamentary privilege, but for clarification of the penal powers of both Houses and welcomed a change of heart by the Government on the recommendations to disapply privilege in respect of criminal prosecutions. The report also recommended reform of the *Parliamentary Papers Act 1840* and legislation to excuse Members of either House from jury service. It decided against legislation to confer rights on non-voting members of the Commons Standards Committee. Finally, it called for a restoration in the House of Commons of the sessional orders preventing the obstruction of Members in the streets leading to the House.

For authoritative procedural advice on parliamentary privilege, Members should contact the Clerk of the Journals.

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1 Background

Parliamentary privilege "consists of the rights and immunities which the two Houses of Parliament and their members and officers possess to enable them to carry out their parliamentary functions effectively. Without this protection Members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished."[1]

Parliamentary privilege has two main components:

- Freedom of speech, guaranteed by Article 9 of the Bill of Rights 1689;
- Exclusive cognisance, or sole control of all aspects of Parliament's affairs

Parliamentary privilege is not immutable, some privileges once asserted by Parliament have lapsed or been modified, some have been codified in statute law. The relationship between Parliament and the courts of law has also affected the development of parliamentary privilege. The principle of separation of powers has given rise to a question of boundaries. In the nineteenth century there were a series of disputes between the Commons and the courts.[2] These were resolved towards the end of the century. Stephen J in *Bradlaugh v Gossett* drew a distinction between rights to be exercised within the House itself such as sitting and voting "on which the House and the House only could interpret the statute" and "rights to be exercised out of and independently of the House on which the statute must be interpreted by the Court independently of the House."[3]

1.1 1999 Joint Committee on Parliamentary Privilege

Following concern about the parliamentary processes used to investigate the 'cash for questions' allegations in the mid 1990s, the incoming Labour Government promised a review of parliamentary privilege, as part of its parliamentary modernisation agenda. The Joint Committee was set up in July 1997 with broad terms of reference 'to review parliamentary privilege and make recommendations'. By the time the Joint Committee reported in early 1999, many of the immediate concerns had been dissipated. Nevertheless, the Joint Committee produced a thorough review, publishing a report and two volumes of evidence.[4]

It recommended legislation which would clarify a number of uncertain aspects. These were:

1. Article 9:

— `proceedings in Parliament' to be defined

— `place out of Parliament' to be defined

— the scope of the prohibition on `questioning' to be clarified

— section 13 of the Defamation Act 1996 to be replaced with a power for each House to waive article 9 for the purpose of court proceedings where the words spoken or the

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1 Joint Committee on Parliamentary Privilege HL Paper 43-I HC 214 1998-99 para 4

2 See the case of *The Sheriff of Middlesex,* (1840) II Ad & E 273. which found that the Commons could not imprison court officials seeking to enforce an order of the courts. This was a sequel to the case of *Stockdale v Hansard* (1839) in which the court held that the House of Commons by its own resolution could not authorise material to be published that at common law was defamatory.

3 Cited by Geoffrey Lock in his evidence to the Joint Committee on Parliamentary Privilege 1998-99

4 HL Paper 43-I,II<III HC 214 1998-99 http://www.publications.parliament.uk/pa/jt/jtpriv.htm

acts done in proceedings in Parliament would not expose the speaker of the words or the doer of the acts to any legal liability

— article 9 not to apply to court proceedings so far as they relate to interpretation of an Act of Parliament or subordinate legislation or judicial review of government decisions or the consequences of government decisions, or the non-critical use of statements where no legal liability is involved

— Parliament to have power to exclude from article 9 tribunals appointed under the Tribunals of Inquiry (Evidence) Act 1921 [now Tribunals Act 2005]

— application of article 9 to Scotland and Northern Ireland, and parliamentary privilege in general, to be clarified.

2. Control over parliamentary affairs:

— Parliament's sole control over its own internal affairs in the precincts to apply only to activities directly and closely related to proceedings in Parliament. As to other activities, statutes should be assumed to bind both Houses in the absence of contrary intention

— contempt of Parliament to be defined

— the powers of each House to fine to be stated and the power to imprison to be abolished, save for temporary detention of persons misconducting themselves within the precincts of Parliament

— the courts to be given a concurrent jurisdiction in respect of contempt of Parliament by non-members

— failure to attend proceedings or answer questions or produce documents to constitute criminal offences, punishable with a fine of unlimited amount or up to three months' imprisonment

— the Parliamentary Privilege Act 1770 to be amended to include court proceedings in respect of proceedings in Parliament

— freedom from arrest, immunity from subpoenas, and privilege of peerage to be abolished, and application of Mental Health Act 1983 to peers to be clarified.

3. Reporting of parliamentary proceedings:

— The Parliamentary Papers Act 1840 to be replaced by a modern statute.[5]

The Joint Committee envisaged a parliamentary privileges act, which would also clarify ancillary matters, with a precedent in the Australian Parliamentary Privileges Act 1987.

No legislation followed in subsequent sessions and there was no official Government response. The report was debated in the Commons on 27 October 1999 on a general motion to adjourn the House. The then Leader of the House, and Cabinet Minister, Margaret Beckett indicated that legislation was not a priority.[6]

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5 Ibid para 376

6 HC Deb 27 October 1999 c1020-1074

Annex 1 of the Joint Committee on Parliamentary Privilege 2013[7] refers to developments in privilege since 1999. The following sections of this Note also set out some significant developments since the last Joint Committee report.

1.2 The Courts and Parliament

The development of human rights law since the passage of the *Human Rights Act 1998* is of relevance to the development of parliamentary privilege. The UK Parliament is not a public body under the Act, but does come within the jurisdiction of the European Convention of Human Rights. The UK Parliament has already been a party to an important case in 2002 in Strasbourg where a constituent considered that she had been defamed by her MP, but the defamatory material formed part of parliamentary proceedings. On this occasion the European Court of Human Rights, by a majority decided that the importance of the principle of free speech should be upheld. (*A v UK.*[8]*)*

In *Konstas v Greece* (2011) the European Court of Human Rights (ECtHR) considered statements made in parliamentary debates in Greece by the Prime Minister, Deputy Minister of Finance and the Minister of Justice about ongoing criminal proceedings against the applicant for misappropriation of public funds. The court found that the presumption of innocence under Article 6 of the ECHR had been violated by the comments. However, it also found that general parliamentary debate-even on a specific matter- could not violate the ECHR. A commentator considered: "The interference with political expression is therefore narrowly tailored to upholding the separation of powers and through it the rule of law".[9]

The Speaker intervened in a High Court appeal on an Information Tribunal decision in 2008.[10] The Tribunal had considered whether Gateway reviews should be disclosable under Freedom of Information legislation and had quoted extensively from the Public Accounts Committee and reports from the Select Committee on Works and Pensions. The intervention was on the basis that the reliance by the Tribunal on the findings of the Select Committees to support its own ruling amounted to an infringement of Article 9. The Tribunal was relying on the truth of what was said in Parliament (and such reliance would invite an attack on the committee's conclusions or the process by which it reached them). In allowing the appeal, Lord Justice Stanley Burton considered that there was no reason why the courts should not receive evidence of the proceedings in Parliament "when they are simply relevant historical facts or events" as no "questioning" arose in such a case. On the other hand, he held that the Tribunal had erred in being influenced by the Parliamentary proceedings, The reliance of courts on select committee reports continues to be at issue.

In the *Chaytor* judgement discussed below, the President of the Supreme Court, Lord Phillips, cited with approval the Joint Committee's exposition of the current application of exclusive cognisance. The European Court on Human Rights (ECtHR) has frequently considered both Parliamentary debate and the reports of the Joint Committee on Human

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[7] Joint Committee on Parliamentary Privilege report of 2013-14 HL paper 30/HC 100

[8] *A v United Kingdom 2002* (35373/97). See M R Jack "A v the UK in the European Court of Human Rights [2002] *The Table 73* (2003) pp31-36

[9] "Sir Thomas' blushes; protecting parliamentary immunity in modern parliamentary democracies" European Human Rights Law Review 2012 Ravi S Mehta

[10] *Office of Government Commerce v Information Commissioner* [2008] EWHC 774; see also *R(Wheeler) v Office of the Prime Minister and Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 1409

Rights when it reached its conclusions, according to Murray Hunt, legal adviser to the Joint Committee on Human Rights, writing in a personal capacity.[11]

1.3 Draft Corruption Bill 2002-03 and Bribery Act 2010

One concern of the Joint Committee on Parliamentary Privilege had been to resolve the question of possible use of parliamentary proceedings when Members were accused of bribery. In addition, there was uncertainty as to whether the common law offence of bribery of a person holding a public office applied to Members. A draft Corruption Bill introduced in 2002-03 was considered by a Joint Committee. This Committee considered in some depth the problems of reconciling the right of free speech for Members in Article 9 and the difficulties of prosecuting a Member for bribery. It was not supportive of the overall approach of the draft Corruption Bill which it was never formally introduced into Parliament.

Instead there were no legislative changes until the draft *Bribery Bill* was published in 2009. This time the Joint Committee on the draft bill was supportive of the overall approach and an amended version was introduced into the Lords in November 2009. Originally this draft bill included provisions on parliamentary privilege. The Explanatory Notes to Clause 15 of the draft Bribery Bill stated,

> **Clause 15** makes the word or conduct of an MP or peer admissible in proceedings for a bribery offence under the Bill where the MP or peer is a defendant or co-defendant notwithstanding any enactment or rule of law including Article 9 of the Bill of Rights 1689.

This clause therefore narrowed the approach followed by the draft Corruption Bill by confining the provision to the words or actions in Parliament of the Member concerned in the specific case. The Joint Committee on the draft *Bribery Bill* concluded that this complex matter should not be addressed "piecemeal" through different Bills, such as the Draft Bribery Bill and the Parliamentary Standards Bill (now the *Parliamentary Standards Act 2009*). The Committee recommended that clause 15 be deleted, considering that the issue should only be addressed as part of a comprehensive Bill specifically on Parliamentary Privilege.[12] For further information see Research Paper 10/19 *Bribery Bill [HL]*.

1.4 Parliamentary Standards Act 2009

Shortly before the draft Bribery Bill was being considered by the Joint Committee, the then Clerk of the House, Malcolm Jack gave evidence in favour of comprehensive legislation on parliamentary privilege. His oral evidence was given to the Justice Committee, together with the Clerk of the Journals, and Speaker's Counsel on 30 June 2009. This was in response to Clause 10 of the *Parliamentary Standards Bill* as introduced which made provision to waive privilege in relation to the work of a new Independent Parliamentary Standards Authority, the work of a Commissioner for Parliamentary Investigations or specific legal proceedings against any Member of the House of Commons.[13]

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[11] *Parliaments and Human Rights*:*Redressing the Democratic Deficit in Human Rights* Murray Hunt Hayley Hooper and Paul Yowell AHRC p51 April 2012

[12] Joint Committee on the draft Bribery Bill 2008-09, para 208 to 228 http://www.publications.parliament.uk/pa/jt/jtbribe.htm

[13] See Research Paper 09/61 *Parliamentary Standards Bill 2008-09*

In fact clause 10 was removed on 1 July 2009 on a vote by the Committee of the Whole House and the Government did not attempt to reinstate it in the subsequent passage of the legislation.[14]

The then Clerk of the House, Sir Malcolm Jack, was concerned in his evidence that the proposed waiver of privilege would not be practical, and created a risk of an overall 'chilling' effect:

> 19. However, even if the qualification were narrowed, the accused Member would be put in the position of having his words used against him, without being given the opportunity to adduce words spoken by other Members which might tend to exculpate him. This would create a very real risk of the trial being unfair and contrary to the requirements of Article 6 ECHR. This demonstrates the difficulty caused by admitting evidence of proceedings in Parliament: either the admission is on such a wide basis that it has a chilling effect on Parliamentary proceedings (by prejudicing or effectively removing the right of free speech), or it is on such a narrow basis that the fairness of trials is put at risk. [15]

The Clerk of the House was concerned that the issue of parliamentary privilege was being dealt with on a piecemeal basis, instead of undertaking the comprehensive legislation recommended by the Joint Committee in 1999:

> 20. I have argued in evidence to the current Joint Committee on the draft Bribery Bill that there is a case for not tinkering with parliamentary privilege on a piecemeal basis but implementing the recommendation of the Joint Committee on parliamentary privilege in 1999 that there should be a Parliamentary Privileges Act. Such an act would clarify the application of provisions of Article IX; define Parliament's control of its internal affairs and replace existing statute on the reporting of parliamentary proceedings. The experience of the Defamation Act of 1996, intended to address one perceived anomaly of parliamentary privilege, has led to others. The provision of section 13 of the Act was later held to undermine the collective right of the House to immunity in respect of proceedings by allowing an individual Member to waive privilege. Other difficulties of a practical nature where more than one Member was involved led the Joint Committee to recommend repeal of the section. Other encroachments on parliamentary privilege suggest that a piecemeal approach to defining and defending the Houses' legitimate right to function effectively is no longer sufficient. The Australian model for a Parliamentary Privileges Act is at hand for adaptation to British circumstances.[16]

The Justice Select Committee was supportive of this approach. There were also reports on the *Parliamentary Standards Bill* from the Lords Constitution Committee and the Joint Committee on Human Rights. The Lords Constitution Committee received evidence from the Clerk of the Parliaments about possible privilege implications,, but noted in its report that the deletion of Clause 10 had removed most of the more pressing privilege issues.[17] The Joint

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[14] HC Deb 1 July 2009 c362

[15] Justice Select Committee *Constitutional Reform and Renewal: Parliamentary Standards Bill* HC 791 2008-09 Written evidence from Dr Malcolm Jack 30 June 2009

[16] Ibid

[17] House of Lords Constitution Committee 18th report 2008-09 *Parliamentary Standards Bill: Implications for Parliament and the Courts* http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/134/13402.htm, para 14

Committee on Human Rights addressed the question of whether the proposed IPSA model of investigation would meet the requirements of procedural fairness[18]

1.5 Parliamentary expenses and *Chaytor*

The *Parliamentary Standards Act 2009* created a new offence of providing false or misleading information for allowances claims. The offence applies to Members of the Commons only. During the passage of the Bill there were concerns that the *Theft Acts* were already on the statute book. There have been no charges under the Act. However, one Members, three ex-Members and two peers were prosecuted under the *Theft Acts* as a result of the parliamentary expenses scandal.[19] Three were former Members and they appealed against their prosecution on the grounds that elements of the expenses scheme were covered by parliamentary privilege and therefore could not be examined by the courts. This *Chaytor* case was appealed to the UK Supreme Court in 2010 which found that the Members' expenses scheme was not a parliamentary proceeding; therefore the principle of exclusive cognisance did not apply. The President of the Supreme Court, Lord Phillips examined precedents in the area of Article 9 and commented

> 61There are good reasons of policy for giving Article 9 a narrow ambit that restricts it to the important purpose for which it was enacted - freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown's judges.[20]

Lord Phillips' judgement also considered the issue of the application of legislation to Parliament. The Green Paper of April 2010 noted that his analysis supported the view that it was necessary to consider whether a statute was concerned with the internal affairs of either House to determine its application to Parliament.[21] Lord Phillips stated:

> 89. Parliament by legislation and by administrative changes has to a large extent relinquished any claim to have exclusive cognisance of the administrative business of the two Houses. Decisions in relation to matters of administration are taken by parliamentary committees and it has been common ground before the Court that these decisions are protected by privilege from attack in the courts. The 1999 Report distinguishes, however, between such decisions and their implementation, expressing the view that the latter is not subject to privilege. I consider that view to be correct.[22]

1.6 Damian Green affair

The offices of the Conservative frontbencher, Damian Green, were searched on Thursday 27 November 2008, while the House was prorogued. The Speaker noted in his statement of 3 December 2008 that the search had taken place without a warrant. He announced a new protocol which would require a warrant for any future searches or accesses to papers. Following a debate in the House on 8 December 2008 a motion was passed to establish a committee whose membership would be selected by the Speaker to investigate police searches on the parliamentary estate. However, no committee was established or nominations made, partly due to ongoing police inquiries, until 13 July 2009 when the House

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[18] Human Rights Committee 19th report *Legislative Scrutiny*: *Parliamentary Standards Bill* *http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/124/12404.htm#a3*

[19] Elliott Morley, Jim Devine, David Chaytor, Eric Illsley Lord Hanningfield Lord Taylor of Warwick. The prosecution against Margaret Moran was stopped on health grounds

[20] *R v Chaytor and others*, Supreme Court judgment UKSC 52, paragraph 61

[21] Parliamentary Privilege Cm 8318

[22] *R v Chaytor and others*, Supreme Court judgment UKSC 52, paragraph 89

resolved to establish a Privilege (Police Searches on the Parliamentary Estate) Committee. Further information is available in Standard Note 4905 *Parliamentary Privilege and Qualified Privilege.*

The Attorney General submitted a memorandum to the Leader of the House, Harriet Harman, on 3 April 2009 which sought to clarify some of the issues involved, in the Attorney General's role as legal adviser to Parliament.[23] The memorandum was deposited in the Commons Library.[24] The memorandum concluded that it was the role of the courts to determine any questions of law relating to parliamentary privilege, especially in relation to Article 9. Not all Members accepted this conclusion. Bill Cash, for example, protested that Parliament should be the arbiter of these issues. [25]

On 16 April 2009, the Director of Public Prosecutions, Keir Starmer, announced that he had decided not to proceed with prosecutions against a civil servant, Mr Galley, and Mr Green. His reasons were set out in full, but related to the insufficient evidence of harm to the public interest of the alleged leaks under the offence of misuse of public office. Therefore, without a court case, there appeared no opportunity for a decision on whether material taken from Mr Green's office was protected by parliamentary privilege. The Clerk of the House warned the police soon after Damian Green's arrest that the material seized as a result of their search of his office in Parliament might include material subject to parliamentary privilege.[26] The Attorney General's memorandum argued that it would not be the responsibility of the Standards and Privileges Committee or the House to determine whether such material was considered parliamentary proceedings. This opinion was not fully accepted. Bill Cash argued in a letter to the *Times* that Baroness Scotland had paid insufficient attention to the Duncan Sandys precedent in 1939 that disclosure by Members in the course of debate or proceedings in Parliament could not be made the subject of proceedings under the *Official Secrets Acts*.[27] Professor Anthony Bradley also argued in evidence to the Committee on the Issue of Privilege that the Attorney General's interpretation raised important questions.[28]

In 1939 Mr Sandys was threatened with prosecution under the *Official Secrets Act*s by the Attorney General and having raised this as a point of order, the matter was referred to a special select committee. The Select Committee on the Official Secrets Acts released two reports, concluding that the soliciting or receipt of information was not a proceeding in Parliament. When the report was debated the House agreed with the Committee that the definition of 'proceedings' should be extended to communications between one Member and another or a Member or minister so closely related to a matter pending or expected to be brought before the House that they formed part of the business of the House.[29]

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[23] For background, see "Leak files may be used in court" 7 April 2009 *BBC News*

[24] DEP 2009/1081 Also printed as Appendix IV to the Select Committee on the issue of Privilege (Police searches on the Parliamentary Estate) HC 62 2009-10

[25] HC Deb 20 April 2009 c36See letter from Bill Cash MP to *Times* 18 April 2009

[26] Committee on issue of privilege (Police searches on the parliamentary estate) 2009-10 HC 62, para 129

[27] "MPs and secrets: letters to the editor" 18 April 2009 *Times.*

[28] Email from Professor A W Bradley to Clerk of Committee Committee on issue of privilege (Police searches on the parliamentary estate) 2009-10 HC 62. See also *Public Law* July 2012 "The Damien Green affair – all's well that ends well?"

[29] See HC 101 1938-39. The Duncan Sandys report was debated and approved by the House on 21 November 1939 HC Deb c1071-84. The reports are summarised in the Committee on issue of privilege (Police searches on the parliamentary estate) 2009-10 HC 62, paras 33-36

The Committee on the Issue of Privilege (Police Searches on the Parliamentary Estate) published its report on 22 March 2010.[30] It noted that in relation to privilege, there was no settled law and that the Joint Committee had not commented on the issue in its 1999 report:

> 141. Sir William McKay's Memorandum of 28 July 2000 stated that "we have no real precedent for how such a request should be met". In the memorandum which "tries to suggest what the reaction might be, resting on first principles and on Canadian practice", Sir William McKay set out what he described as some "unresolved imperatives"—
>
> Control of the premises is vested in the Speaker
>
> The Speaker is guardian of the House's privileges (subject to the House itself)
>
> The House's privileges must not be infringed
>
> Proceedings and Members taking part in them, must not be impeded
>
> Privilege does not afford protection from a proper search
>
> The Palace of Westminster is not a sanctuary.
>
> 142. These imperatives remain and we endorse them as central to any discussion of the issues thrown up by this case. It is fruitless to attempt to cover every possible set of circumstances that might conceivably arise in the future from the interaction of the House, its Members and the criminal law, but those imperatives provide a firm starting point.[31]

The Police Searches Committee considered that the distinction between protected and unprotected material was critical to any new arrangements for conducting searches of Members' offices. It did not express definite support for new legislation on privilege, but considered that a comprehensive review would be necessary:

> 169. As we have indicated, there are a number of issues connected with parliamentary privilege which deserve careful consideration. **It would in our view be a mistake for Parliament to legislate in haste or to address only one aspect of the multi-faceted relationship between liberty, Parliament and the law. While we have no unanimous conclusion on the wisdom or necessity of legislating on parliamentary privilege, we agree in recommending that before any Government Bill on the subject was introduced it would be highly desirable for the whole question to be addressed in the round by a special joint committee drawn from both Houses. Before setting out to define and limit parliamentary privilege in statute, there needs to be a comprehensive review of how that privilege affects the work and responsibilities of an MP in the twenty-first century.**[32]

1.7 Super injunctions

Super-injunctions began to attract concern in the Commons from 2009. A super- injunction is a court order which requires that, when an injunction is in place, its very existence may not be disclosed or published. On 12 October 2009, Paul Farrelly tabled a number of Parliamentary questions, one of which concerned an injunction obtained by Trafigura, a company trading in oil, base metals and other items, preventing the publication of a report on the alleged dumping of toxic waste in the Ivory Coast. Trafigura's solicitors, Carter-Ruck, on

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[30] Committee on issue of privilege (Police searches on the parliamentary estate) 2009-10 HC 62

[31] Ibid

[32] Ibid

learning of Mr Farrelly's question, informed the *Guardian* that it would be a breach of the injunction if the newspaper reported the question, but agreed to seek instructions from Trafigura on a variation of the order. The *Guardian* promptly published, initially online and then on the front page of its 13 October 2009 issue, that it was unable to report a tabled Parliamentary question. In a letter to the Speaker on 14 October 2009, Carter-Ruck stated that there had never been any question of Trafigura applying for an injunction that had as its purpose the prevention of publication of any matter arising in Parliament. The letter went on:

> Nevertheless, as formulated (and as The Guardian apparently accepts) the Order would indeed have prevented The Guardian from reporting on the Parliamentary Question which had been tabled for later this week. Following correspondence yesterday, we made clear to The Guardian that we would take further instructions on their request to vary the Order and respond to them as soon as possible today, but despite (or because) of that they chose to publish their article last night and this morning regardless.
>
> There is no question of Trafigura seeking to "gag" the media from reporting Parliamentary proceedings, and the parties have now agreed to an amendment to the existing Order so as to reflect that.[33]

The Master of the Rolls (Lord Neuberger) set up a committee which reported on 20 May 2011. Lord Neuberger upheld the constitutional importance of Article 9: "No super-injunction, or any other court order, could conceivably restrict or prohibit Parliamentary debate or proceedings." He found no evidence that any order had purported to oust parliamentary privilege, or that any injunction had been granted or sought with the intention of preventing press reporting of parliamentary proceedings. However, the report acknowledged that court orders could be used against MPs undertaking a constituency role outside of formal parliamentary proceedings. There was a role for injunctions preventing reporting of family court decisions, for example. Library Standard Note 5978 *Privacy* sets out more detail on the background to the Neuberger report.

Three days later, the Attorney General, Dominic Grieve, announced that a joint committee on privacy and injunctions would be established. The committee reported in March 2012. [34] It noted how John Hemming had revealed information about the footballer Ryan Giggs protected by anonymised injunctions during parliamentary proceedings. Currently it is a matter for each parliamentarian to decide, if they come across information that is subject to an injunction, whether to reveal that information in parliamentary proceedings. But the Joint Committee was worried about the impact on Parliament and the principle of comity with the courts, should this privilege be abused. It concluded that instances of irresponsible use were rare and that no special procedures were yet necessary. The Joint Committee did not agree with the advice of the former Clerk of the House, Sir William McKay, that a new resolution should be adopted to give the Speaker power to impose suspension on a Member who was considered to have acted irresponsibly.

The Culture, Media and Sport (CMS) Committee's report *Press Standards, Privacy and Libel* published in February 2010[35] commented on the *Trafigura* case, recommending urgent changes in the *Parliamentary Papers Act 1840:*

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[33] Letter from Carter-Ruck to the Speaker Dep 14 October 2009 2009/2523

[34] Joint Committee on Privacy and Injunctions First Report March 2012 http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf

[35] Second Report Culture Media and Sport Committee HC 362 2009-10

> 101. The free and fair reporting of proceedings in Parliament is a cornerstone of a democracy. In the UK, publication of fair extracts of reports of proceedings in Parliament made without malice are protected by the Parliamentary Papers Act 1840.
>
> They cannot be fettered by a court order. However, the confusion over this issue has caused us the very gravest concern that this freedom is being undermined. We therefore repeat previous recommendations from the Joint Committee on Parliamentary Privilege that the Ministry of Justice replace the Parliamentary Papers Act 1840 with a clear and comprehensible modern statute.

This area of law has been reviewed by the barrister Philip Johnson in *Public Law* July 2012.[36]

1.8 Select committee powers

The power of select committees to send for persons, papers and records came under scrutiny during the investigation of the phone hacking affair by the Select Committee on Culture, Media and Sport. Select committees generally gain access to information largely using informal routes, with the threat of sanctions as a last resort. There have been occasional difficulties with the summoning of ministers and civil servants, but the CMS Committee's use of a formal warrant to summon Rupert and James Murdoch in July 2011 was unusual, and provoked much comment as to the ability of select committees to impose sanctions on witnesses who refuse to attend. Standard Note 6208 *Select Committees: evidence and witnesses* gives more detail.

Witnesses before Committees enjoy parliamentary privilege, and it is a contempt of Parliament for others to penalise a witness for the evidence they give. In the most recent case, a member of the CAFCASS board, Judy Weleminsky, had criticised the organisation in evidence to the Constitutional Affairs Committee. She was reprimanded by the Lord Chancellor for failure to behave in a corporate manner. The Standards and Privileges Committee found that the officials who had investigated Ms Weleminsky's conduct had committed a contempt of Parliament, as well as the Lord Chancellor, who apologised to Parliament.[37]

Providing false evidence to a Committee, whether or not an oath had been administered, would be a contempt of the House. The *Perjury Act 1911* provides for lawfully sworn witnesses, who make false statements to be tried in the courts. Doubts have been expressed by commentators as to whether this Act actually enables prosecutions to be undertaken.[38] If proceedings for perjury before a Committee were brought, it would be for the courts to deal with the relationship between Article 9 of the Bill of Rights and the *Perjury Act* 1911. The Joint Committee on Parliamentary Privilege favoured clarification, noting also the existence of the *Witnesses (Public Inquiries) Protection Act 1892* which includes penalties for those who are proved, before the courts, to have threatened or punished any person on account of evidence given by that person before a committee of either House, unless that evidence was given in bad faith.

> 318. These are two instances where parliamentary privilege was not intended to stand in the way of evidence relating to proceedings being given in court. In the light of the

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36 "What can the press really say? Contempt of court and the reporting of Parliamentary Proceedings" *Public Law*

37 Standards and Privileges Select Committee Fifth Report http://www.publications.parliament.uk/pa/cm200304/cmselect/cmstnprv/447/44703.htm

38 Constitution Society *Select Committees and Coercive Powers- Clarity or Confusion? June* 2012p58*http://www.consoc.org.uk/wp-content/uploads/2012/06/Select-Committees-and-Coercive-Powers-Clarity-or-Confusion.pdf*

> prominence given in this century to article 9, it would be advisable to reaffirm these two statutory exceptions to that article in any future statute on privilege. We are not aware of any prosecutions under either statute. Presumably, these statutes would be considered only when a grave offence was specifically drawn to the attention of the House and the prosecuting authorities by the appropriate committee.[39]

On 9 December 2011, the Liaison Committee announced that it would undertake an inquiry into select committee powers and effectiveness.[40] The Speaker has also called for reform. In a speech marking the anniversary of the 1911 Parliament Act, he suggested that:

> There are three areas which seem to me at least to merit some quite extensive exploration.
>
> The first is the ability of select committees to compel the attendance of witnesses whom they regard as essential to their inquiries. Reluctant attendance of a witness is perhaps not unusual. Outright refusal is rarer, but of course it is precisely in these cases that the interests of Parliament and the public must be served.
>
> We have some venerable and indeed picturesque procedures for securing the attendance of witnesses, but I think the time has come to consider whether we need something more in accord with modern constitutional and legislative circumstances.
>
> The same goes for the ability to call witnesses to account should they give false evidence, or otherwise mislead a select committee.[41]

The Constitution Society report on the coercive powers of select committees was published in June 2012.[42] This found that:

> In the context of select committees, whose powers and practices may be subject to change, there is a strong case for ensuring clarity and certainty by more specific rules rather than through reliance on informal and often uncertain past practice or development of any system of constitutional conventions (which currently do not exist) in relation to select committees.

The Clerk of the House, Robert Rogers, submitted written evidence to the Liaison Committee on 16 July 2012. His evidence reviewed the options for clarifying and strengthening the powers of select committees. He concluded:

> 82. If no action is taken, and the Committee on Standards and Privileges finds that the witnesses named by the Culture, Media and Sport Committee are guilty of contempt – or if in due course a similar finding is made in respect of other witnesses before another committee, it is possible that the House and the wider public will be frustrated at the House's lack of capacity to impose a proportionate penalty.
>
> 83. But it is also important to bear in mind that, if the House is to be given penal powers by legislation, it will not be enough to have high standards of fairness at what one might see as the appeal stage; in other words, when the matter is referred to the Committee of Privileges (although fairness at that stage might reduce the likelihood of an ECHR challenge). The standards of fairness – possibly even including adversarial process – would need to be there from the start, if a prosecution were to be successful.

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39 Joint Committee on Parliamentary Privilege, *Report*, 9 April 1999, HC 214-I 1998-99, para 318

40 Liaison Committee inquires into select committee powers and effectiveness Press Notice 9 December 2011

41 Speaker Bercow, *Parliamentary Reform Today – Lessons from 1911*, Speech at the Livery Hall, Guildhall, London, 3 November 2011

42 Select Committees and Coercive Powers: Clarity and Confusion Richard Gordon QC and Amy Street Constitution Society June 2012

> 84. It might be possible to designate certain inquiries as "high-risk" and conduct them in a different way; but the implications of having "first-class" and "second-class inquiries" might not be attractive.
>
> 85. It might be, of course, that simply to have those powers in statute might mean that they would be unlikely ever to be needed, and that their mere existence would be sufficiently salutary. The Liaison Committee will not need me to tell them that this would not be an easy judgement to make. [43]

Robert Rogers also noted that although the courts were bound by the statute law of Article 9, the *Perjury Act 1911* and the *Witnesses (Public Inquiries) Protection Act 1892* were implied amendments of that Article. There were a number of practical difficulties in bringing prosecutions, which might explain why the provisions appeared to be untested. These issues have been brought into focus by the the Culture, Media and Sport Committee inquiry into phone hacking allegations..[44]

Following the report of the committee the matter was debated in the House on 22 May 2012 and referred to the Standards and Privileges Committee, which investigates claims of breach of privilege and alleged contempts. The formal minutes from the Standards and Privileges Committee noted on 3 July that it would not exercise any power of committal in respect of the allegations made against witnesses by the Culture, Media and Sport Committee and that the maximum punishment it would recommend to the House would be admonishment. The minutes also noted that the Committee would suspend its inquiry if requested to do so by the Director of Public Prosecutions on the grounds that to continue might prejudice any pending legal proceedings or criminal investigations. The formal procedures to be followed in the investigation were also set out in the minutes.[45]

1.9 Members in their constituency role

As the work of Members in relation to dealing with individual constituency cases has developed in the last few decades, the question of protection for correspondence between MP and constituent has become more prominent. The Privileges Committee's finding in the Strauss case in 1958 that a communication between a Member and a minister was a proceeding in Parliament was not supported by the whole House in 1958.[46]

Standard Note 2024 *Parliamentary privilege and qualified privilege* notes that since the *Freeson* case, Members have effectively had protection for their constituency correspondence, always provided the channel of communication was a proper one for the transmission of a complaint or other defamatory comment, to a responsible authority, and that no malice was involved. In 1969, Reg Freeson MP communicated certain complaints about a firm of solicitors, which he knew were defamatory, to the Law Society and to the Lord Chancellor. It was held by the Court that an MP had "both an interest and a duty to communicate to the appropriate body at the request of a constituent any substantial complaint from the constituent concerning a professional man in practice at the service of the public".... It thus ruled that Mr Freeson's letter was subject to qualified privilege. [47]

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[43] Liaison Committee *Powers of select committees* Paper by the Clerk of the House 16 July 2012

[44] Culture, Media & Sport Committee's 11th Report of Session 2010–12, *News International and Phone-hacking*, HC 903-

[45] Minutes of the Standards and Privileges Committee 3 July 2012 Matter referred to the Committee on 22 May 2012

[46] HC 227 1957-58. The report was debated at HC Deb 8 July 1958. See *Parliament: Functions, Practice and Procedures* Robert Blackburn and Andrew Kennon 2003 para 3-11

[47] *Beach and anor. v Freeson*, 1QB [1972] p

Jack Straw was sued for comments made to a newspaper about an issue in his constituency. Although the courts dismissed the action, he incurred costs in defending the action. The Commons passed a motion on 23 May 2000 to provide for his expenses to be reimbursed. The House also agreed to establish an insurance scheme for Members covering their role as employers and 'the cost of defending a civil claim for defamation and of payment in respect of any award made by a court in such a claim, where the act complained of was not covered by parliamentary privilege, but arose from the Member's duty as a Member.'[48] A further specific resolution was agreed to provide the Member, Jack Straw, with compensation for legal costs in an action for negligence brought against him:[49]

Bearing in mind the impact of the *Data Protection Act 1998,* a statutory instrument was passed to enable the Member (or someone acting with their authority) to process sensitive personal information about the constituent in the course of the Member's "functions as a representative" (e.g. constituency casework) without having to establish "explicit consent". The order also gives others (e.g. agencies or organisations) who are contacted by Members authority to disclose sensitive personal information to them where this is necessary to help with their functions, without having to obtain the explicit consent of the individual concerned.[50]

Members are often involved in very sensitive work, and may receive information via a whistleblower or similar. The Duncan Sandys case in 1939 is often cited in this respect, where the select committee concluded that communications between one Member and another or between a Member and a Minister were so closely related to some matter pending in, or expected to be brought before the House, that they form part of the business of the House and therefore attract parliamentary privilege. In Mr Sandy's case, the issue was an alleged breach of the *Official Secrets Act.*[51] The Commons concurred with the conclusions of the select committee.

In most of these cases a Member is dealing with a constituent and, only qualified privilege will apply, as the material being dealt with will not be a proceeding in Parliament. Commentators have made comparisons with the position under the German constitution; Article 47 of the German Basic Law makes clear the authority of the President of the Bundestag and allows Members to refuse to give evidence concerning persons who have confided information to them in their capacity as members of the Bundestag.[52]

What is the position when constituents wish to discuss court proceedings with their MP but this has been restricted by a court order? At present this would appear to be protected by parliamentary privilege only when directly related to a proceeding in Parliament. Constituents are not likely to be aware of the difference between qualified privilege and legal professional privilege which protects solicitors and barristers from disclosing information. The former MP David Howarth noted this point in his oral evidence to the Joint Committee on Privacy and Injunctions:

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[48] HC Deb 23 May 2000 c938. Details of the scheme are available on the intranet at http://intranet.parliament.uk/finances/insurance/mps-insurance

[49] HC Deb 5 July 2001 Vol 371 c 477. The issue is discussed in Library Standard Note SN/PC 1010 *Members' Constituency Role: Parliamentary Privilege and Insurance*

[50] *Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002* [SI 2002/2905] This is discussed in Library Standard Note SN/HA 1936 *Data Protection: Constituency Casework*

[51] Report of the House of Commons Select Committee on the Official Secrets Act (1939): paragraph 4 HC 101 1938-39

[52] See evidence from Professor Anthony Bradley to the Joint Committee on Privacy and Injunctions 2010-11 Oral and Written Evidence Q 1140

> ***David Howarth***: I think the key to this is the legitimate expectation of the constituent rather than of the Member of Parliament. Constituents come to Members of Parliament with a great range of extremely sensitive material—medical records, records about children, accusations about criminal offences—that they, I think, expect to be kept confidential. The fact that it is not clear, because of these decisions of the House and because of a rather confusing judgment by the Court of Appeal in the 1950s, exactly how that privilege works, I think Parliament owes it to constituents to clarify the matter as much as it can. It seems to me, having done the job for a bit, that it is very similar to the situation between a lawyer and a client when the client is asking for advice. It requires that sort of privilege because otherwise information relevant to the case is not going to be given to the Member of Parliament if people realise that information could get out.[53]

The Family Procedure Rules now make provision explicitly entitling a party to proceedings to communicate information to an elected representative or peer without the permission of the court where this is for the purpose of enabling the elected representatives to give advice, to investigate or to raise a question of policy or procedure.[54] The 2011 Joint Committee on the Draft Defamation Bill recommended that the right to qualified privilege for Members and their staff be set out in statute, so that uncertainty about individual actions would be ended.[55]

2 The Green Paper April 2012

2.1 Background

Initially a draft parliamentary privilege bill was expected, rather than a consultative paper. The Programme for Government agreement of May 2010 stated: "We will prevent the possible misuse of parliamentary privilege by MPs accused of serious wrongdoing." The Queen's Speech for 2010 promised a draft bill on parliamentary privilege.[56] David Heath, Deputy Leader of the House, told the House on 19 December 2011 that the Government intended to publish a Green Paper before the end of the session, to consult on the desirability of certain changes that could be made to the operation of parliamentary privilege, and seek views on whether legislation was appropriate in this area.

In the event, the Government announced only a few draft clauses, rather than a draft bill, on 26 April 2012 in a written ministerial statement.[57] This focused on a particular series of issues:

> In line with the commitment in the coalition agreement, the Government has considered whether there are potential obstacles that ought to be removed to the prosecution of Members of either House for ordinary criminal acts. This is notwithstanding the Supreme Court ruling in R v Chaytor and others, which established that parliamentary privilege could not form part of a defence in cases relating to claims for allowances, as these were not proceedings in Parliament under article 9 of the Bill of Rights 1689, and did not fall within the exclusive jurisdiction of the two Houses. The paper consults on whether the protection of privilege should be disapplied in cases of alleged criminality, to enable the use of proceedings in Parliament as evidence in

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53 Oral Evidence to Joint Committee on Privacy and Injunctions http://www.parliament.uk/documents/joint-committees/Privacy_and_Injunctions/JCPIWrittenEvWeb.pdf Q1140

54 Practice Direction 14E Communication of information relating to proceedings HM Courts and Tribunals Service

55 Joint Committee on Draft Defamation Bill HL 203 HC 930

56 Queen's Speech 2010 No 10 Downing St website.

57 http://www.cabinetoffice.gov.uk/sites/default/files/resources/Written%20Ministerial%20Statement%20-%2026%20April%202012%20-%20Parliamentary%20Privilege.pdf

criminal proceedings. The paper also contains draft clauses which illustrate how this change could be implemented.

The Green Paper also discusses, among other questions:

whether a legislative definition of proceedings in Parliament is needed;

whether legislation is desirable to establish that the principle of exclusive cognisance applies only to activities directly and closely related to proceedings in Parliament;

whether legislation is necessary or desirable to ensure that the powers of Select Committees can be satisfactorily enforced; and

whether there should be changes to the law on reporting of parliamentary proceedings in the media.

The Green Paper included draft clauses on:

- removing the protection of Article 9 from Members accused of various criminal offences;
- giving power to the House of Commons to allow lay members of House of Commons Standards Committee to vote in proceedings of the committee;
- amending the *Parliamentary Papers Act 1840* to rebalance the burden of proof in favour of reporters;
- amending the same Act to provide unambiguous protection for broadcasts of proceedings whose broadcasting has been authorised in by the House together with a qualified protection for broadcasts of parliamentary proceedings not authorised by the House.

The Green Paper noted that this appeared to be the first Government-led review of parliamentary privilege and that it would be right for Parliament to have a proper opportunity to reflect through the vehicle of a Joint Committee. The consultation ends on 30 September 2012. The Green Paper's provisional conclusion was that "the Government does not believe the case has yet been made out for a comprehensive codification of privilege in a Parliamentary Privilege Act as was done in Australia in 1987"(para 37).

2.2 Article 9 and criminal offences

The Green Paper noted how the initial impetus for reform from Government was the defence submitted in what became the *Chaytor* case that criminal proceedings could not be brought against Members and former Members because of the operation of parliamentary privilege. In the event, the Supreme Court held that parliamentary privilege did not apply. Nevertheless, the Paper considered that a Government-led review of parliamentary privilege was 'long over-due' especially as there was no formal response to the Joint Committee report in 1999 (paras. 3.2-3.3)

Chapter 3 of the Paper suggested that "it is wrong in principle to deny the courts access to any relevant evidence when the alleged act is serious enough to have been recognised as a criminal offence" (para 95). It set out three draft clauses which would have the effect of disapplying the protection of privilege in all criminal cases, except where specified offences were being prosecuted.

The exceptions would be only where the alleged criminal offence "related closely to the principal reason for the protection of privilege i.e. the protection of freedom of speech and debate in parliament" (para 98). These were set out in an accompanying Schedule and include the common law offence of misconduct in public office, most of the Official Secrets Act, selected offences under the Terrorism Act 2000, and the Public Order Act 1986. These would be relevant where an MP wanted to refer to material which might be in breach of the law. Others are included to protect the person passing the information to Members. These include data protection legislation, and the wrongful disclosure of material subject to taxpayer confidentiality. The Schedule would be amendable by an SI subject to the affirmative resolution procedure.

The Paper acknowledged the potential 'chilling' effect of the proposed change, citing the former Clerk of the House:

> 100. If the approach of disapplying the protection of privilege were to be followed, the principal consequence of this proposal that would need to be mitigated is the creation of a "chilling effect" to free speech by the possibility of criminal liability from that speech. A "chilling effect" would take place if any participant in proceedings were prevented from making whatever contribution to proceedings the participant felt was appropriate, by a concern that their words would end up being examined in court. In the view of Sir William McKay, a former Clerk of the House of Commons, when talking about the possible disapplication of the protection of privilege when there were allegations of bribery, any chilling effect would be "too high a price to pay for the remedying of a very, very serious but very rare mischief".

The solution was proposed in para 101:

> 101. The draft clauses are therefore one way in which it might be possible to balance two competing requirements – ensuring that parliamentary privilege cannot be used to evade the reach of the courts where criminality is suspected, while protecting the right of free speech and debate in Parliament by minimising any chilling effect to free speech in parliamentary proceedings.

There would be an additional safeguard whereby the consent of the relevant prosecuting authority (DPP etc) would be necessary before parliamentary proceedings could be used in a criminal prosecution. (paras 138-143). The authority would have to consider the public interest in such a use. No consent would be required where the defence choose to introduce proceedings in Parliament as evidence (para 149).

The Green Paper considered that parliamentary proceedings would only rarely be relevant for criminal proceedings. The one major exception was prosecutions for corruption or bribery.

One of the major concerns about the proposal to take parliamentary proceedings into account in court proceedings is the potential impact on other participants in those proceedings. They might be subject to questioning by counsel, in an attempt to undermine the prosecution case. The Green Paper acknowledges this danger, but considers that the chilling effect would be less than in the case of a defendant (paras 149-150). It suggested that where the defence chose to introduce parliamentary proceedings as evidence, the prosecution would be able to use them without recourse to the relevant prosecuting authority. The Green Paper considered that there were dangers in disapplying parliamentary privilege for non-Members, such as witnesses to select committees, where a chilling effect might be felt. An alternative would be to disapply only to as to capture a non-Member being prosecuted on the same facts as an MP or peer (paras 154-162).

Chapter 3 asked for responses on whether parliamentary privilege should be disapplied in the case of incitement to violence or terrorism and whether the offence of misconduct in public life should be on the list of exceptions, bearing in mind the proposed review of the Law Commission into misconduct in public life.[58]

2.3 *Parliamentary Papers Act* 1840

The only other area where legislation was proposed was to clarify the *Parliamentary Papers Act 1840.* Chapter 8 rehearsed the history of the 1840 Act and the demands to improve its clarity. There have been inconsistencies in the treatment of print and broadcast media.

The Green Paper set out the current applicability of the 1840 Act:

> 295 The effect of sections 1 and 2 of the Parliamentary Papers Act 1840 is that court proceedings, whether criminal or civil, against persons for the publication of papers by Order of either House of Parliament, will be immediately stayed on the production of a certificate from the Speaker or Clerk of either House, verified by affidavit, that such publication is by order or under the authority of either House of Parliament
>
> section 3 provides a qualified privilege for individuals who "print an extract from or abstract of" a "report, paper, votes or proceedings" where it is published in good faith and without malice (the latter point being decided by a jury).
>
> Section 3 has been extended by s9 of the Defamation Act 1952 to sound broadcasts and by Schedule 20 of the Broadcasting Act 1990 to television or internet broadcasts (broadcasts contained in a "programme service".)
>
> There is also protection under the common law for fair and accurate reports of a debate in either House by the same principle that protects fair reports of proceedings in a court of law. The Defamation Act 1996 extends qualified privilege in a similar way to reports from overseas legislatures.[59]

The Green Paper examined the current problems and proposed solutions from the standpoint of the 1999 Joint Committee report:

> 305. The Joint Committee did not, however, call for substantial revision of the way in which publications are currently protected, considering that "the protection given to the media by the 1840 Act and the common law itself should be retained."[137] It did, though, point to some inconsistencies between the treatment of print and broadcast media, as well as questioning the burden of proof in cases under section 3 of the 1840 Act:
>
> *At common law the burden of proving malice lies upon the person who alleges it; namely the plaintiff in the defamation proceedings. Under section 3, the printer (or, now, the broadcaster) must prove a negative: that he was not actuated by improper motive.*
>
> *The reason why section 3 was framed in this way is not clear. The 1970 joint committee preferred the common law approach. We agree. Proof of malice is an essential ingredient in the plaintiff's ability to recover damages. The point is not of major importance, and in practice there seems to have been no difficulty, but if there is to be legislation it would be useful to clarify this area of the law.*[138]

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[58] Law Commission *Misconduct in Public Life* http://lawcommission.justice.gov.uk/areas/misconduct.htm The project will begin early in 2014.

[59] *Parliamentary Privilege* Cm 8318

> 306. The draft clauses at the end of this chapter reflect this analysis. Clause 1 would, if enacted, provide that the burden of proving malice under the Parliamentary Papers Act 1840 would lie with the claimant, bringing it into line with the common law. Clause 2 would provide broadly analogous protection for broadcasts as for printed publications. In particular, subsections (2) and (3) of clause 2 would provide protection for all broadcasts of proceedings in Parliament made by or under the authority of either House similar to the absolute privilege given to written publications by sections 1 and 2 of the 1840 Act. This would protect the broadcasts made on Parliament's website (whether they are sound-only or including video), which of course were not a concern when the Joint Committee reported. Subsection (4) would then provide a qualified privilege for any other broadcast of proceedings in Parliament which is not made by or under the authority of either House; the broadcast would be privileged unless the claimant could prove that it was made with malice.
>
> 307. Subsection (5) attempts to capture all of the various media by which parliamentary proceedings or publications could be broadcast (other than printing, which is already covered by the Parliamentary Papers Act), and ensure they would be protected equally; however, the Government would welcome views as to whether the definition here is sufficiently exhaustive.[60]

The Green Paper went on to consider the suggestion from the Joint Committee on the Draft Defamation Bill that the press should have a clear and unfettered right to report on what is said in Parliament, with the protection of absolute privilege for any report which is fair and accurate.[61] This differed from the conclusions of the Joint Committee on Privacy and Injunctions that there was a danger that the media could pass private information covered by an injunction to a Member to encourage their use in parliamentary proceedings. This would then be reported in the knowledge that no legal consequences could follow.[62] This Joint Committee therefore recommended that qualified privilege should apply to media reports of parliamentary proceedings in the same way as to abstracts and extracts from Hansard.[63]

The initial conclusion in the Green Paper was to reject the use of absolute privilege for reporting parliamentary proceedings. It stated that:"The Government believes that the core purpose of protecting freedom of speech in proceedings is to inform those proceedings and not to draw matters to the attention of audiences outside Parliament" (para 310). It believed that the protection of good faith and without malice remained crucial, citing the possibility of misuse by media sources raised by the Joint Committee on Privacy and Injunctions. The Green Paper's approach was to favour rebalancing the 1840 Act:

> 311. An absolute privilege for "fair and accurate reporting" would remove the existing conditions in common and statute law that reports of parliamentary proceedings are in good faith and without malice. The Government believes these protections remain crucial. For example, in considering these issues in its recent report, the Joint Committee on Privacy and Injunctions raised the possibility of the media passing private information covered by a court injunction to Members, encouraging them to use the information in parliamentary proceedings, and then reporting on those proceedings in the knowledge that no legal consequences can follow.142 The Government believes that in such circumstances it is right that the person who took out that injunction should

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[60] Ibid

[61] Joint Committee on the Draft Defamation Bill 2010-2012 HL 203/HC 930-I para 51

[62] Joint Committee on Privacy and Injunctions First Report HC 273 March 2012 para 237

[63] Ibid para 241

have the right at least to ask the courts to consider whether the newspaper had acted in bad faith and so was in contempt of court.

312. The Joint Committee on Privacy and Injunctions instead recommended that qualified privilege should apply to media reports of parliamentary proceedings in the same way as to abstracts and extracts from Hansard.143 However, the Joint Committee's recommendation would appear not to recreate the further conditions which would currently seem to apply to fair and accurate media reports not covered by the 1840 Act under the common law – namely that privilege does not extend to the publication of material which is not of public concern, or the publication of which is not for the public benefit. In the context of statements made in Parliament which reveal information subject to an injunction, it is clear that there is a public interest in knowing what is said and done in Parliament, but this needs to be balanced in the circumstances of each individual media report against the other public interest that reasoned court decisions are respected; it is after all open to parties to an injunction to apply for variation of its terms.

313. The Government is not aware of circumstances in which any media organisation has been prevented from publishing reports of parliamentary proceedings by doubts over the extent of the current protection in law; but we would welcome evidence that sheds light on the possible extent of any problem, and on whether there is reason to believe that the courts cannot currently weigh the appropriate factors in coming to decisions within the current law. The draft clauses in this paper are restricted to the rebalancing of the burden of proof in favour of reporters, and a further unambiguous protection for broadcasts of proceedings whose broadcasting has been authorised by the House together with a qualified protection for broadcasts of parliamentary proceedings not authorised by the House; but in the light of the recommendations of the two recent Joint Committees, we would welcome views as to whether there are other changes which could be made to the law that would clarify the extent of protection for publishers, while still protecting individuals' rights.[64]

2.4 Lay Members on Standards Committee

The final area where the Green Paper set out draft clauses was to regularise the position in relation to lay members of the Select Committee on Standards. The Committee on Standards in Public Life recommended that there should be at least two lay members with full voting rights who had never been parliamentarians on the select committee, in its report following the Members expenses scandal.[65] The House agreed in principle to this recommendation by passing a resolution on December 2010, inviting the Procedure Committee to consider how to implement the matter.[66] The Procedure Committee report of November 2011 was concerned about the addition of lay membership. It considered that if implemented, the existing Committee of Standards and Privileges be reconstituted as two committees, so that lay members were not involved in privilege matters and recommended legislation to put beyond any reasonable doubt "any question of whether parliamentary privilege applies to the Committee on Standards where it has a lay element".[67]

The Government response to the Procedure Committee report of 29 February 2012 accepted that it would be sensible to proceed first with the addition of lay members without voting rights. A new standing order would require that any written opinion of a lay member would be

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64 *Parliamentary Privilege* Cm 8318 April 2012

65 Committee on Standards in Public Life 12th report *MPs' expenses and allowances*, November 2009 recommendation 51

66 HC Deb 2 December 2011 c1017

67 Procedure Committee 6th report 2010-12 HC 1606

published as part of any report from the Standards Committee. Further detail is given in Library Standard Note 5127 *The Code of Conduct for Members- Recent Changes*

The Government accepted the need to consider the case for legislation. The Green Paper noted the views of Professor Bradley and Lord Nicholls that lay members could be appointed with full voting rights, but accepted the need for certainty, setting out a draft clause that would do this. It was not proposed that the new clause would extend to any other committee of either House.

2.5 The scope of the Green Paper

The Green Paper therefore set out only 6 draft clauses, mainly designed to provide clarity in the existing position. More radical was the proposal to remove the protection of Article 9 for Members and others accused of criminal offences.

The rest of the Green Paper examined a range of other issues. These included:

- Whether proceedings in Parliament should be defined in statute (paras 50 to 62);
- Whether constituents should be protected when passing sensitive information to Members (paras 63 to 76);
- Whether a "place out of Parliament" or "impeaching or questioning" in Article 9 should be defined in statute (paras 77 to 82);
- Whether legislation was necessary to restrict freedom of speech in Parliament in respect of court injunctions (paras 164 to 175);
- Whether a right of reply scheme should be introduced if a member of the public considered that their reputation had been affected by statements in Parliament (paras 176 to 182);
- Whether section 13 of the *Defamation Act 1996* (allowing MPs and others to waive parliamentary privilege where conduct is at issue in a defamation case) should be repealed (paras 183-192);
- The current application of exclusive cognisance, following the *Chaytor* judgment (paras 202 to 217);
- The regulation of Members in both Houses (chapter 6);
- Whether the powers of select committees needed legislative clarification (chapter 7).

The Green Paper was not in favour of innovation in these areas. It noted that making statutory provision for the definition of proceedings would mean that the courts would examine whether any particular material was subject to privilege, thus eroding parliamentary privilege itself. It cited William Blackstone's argument in favour of flexibility and evolution. It did not consider the argument of the then Clerk, Sir Malcolm Jack, in his 2009 evidence, that encroachments on parliamentary privilege suggested that a piecemeal approach to defining and defending its scope was no longer sufficient,[68]

[68] Justice Select Committee *Constitutional Reform and Renewal: Parliamentary Standards Bill* HC 791 2008-09 Written evidence from Dr Malcolm Jack 30 June 2009

The Green Paper also did not support any extension of privilege to constituents, which might encourage correspondence intended to circumvent court orders and damage the reputation of third parties. Constituents could already use the qualified privilege used under defamation legislation for correspondence given in good faith and without malice.

There were no proposals to implement the recommendation of the Joint Committee in 1999 that recommended a formal waiver by Parliament to allow use of proceedings by specific named inquiries taking evidence on oath (para 197).[69] The Green Paper was concerned about a chilling effect if Members thought that their words might be subject to later judicial review. However the current position has some uncertainties. The Scott Inquiry into arms for Iraq in the 1990s examined proceedings extensively but this was not challenged by Parliament, presumably because it was non-statutory in form.[70] Sir Richard severely criticised various aspects of parliamentary proceedings, including the veracity of answers to parliamentary questions, evidence to a select committee by a minister and a civil servant.[71]

The Green Paper was unenthusiastic about any legislation affecting Members and injunctions, suggesting that the way forward was respect for the principle of comity between the courts and Parliament. Nor did it consider a right of reply the appropriate subject of legislation, given that such a scheme could be enforced by standing orders in each House (para 182). It considered that there was a lack of demand for the repeal of section 13 of the *Defamation Act 1996* (para 191).[72] There would be difficulties with legislating to define the extent of exclusive cognisance, since this would require a prior definition of what is meant by proceedings in Parliament. Overall, the Paper considered that the *Chaytor* judgement provided a useful precedent for courts in the future, especially as it was similar to the approach of the 1999 Joint Committee (para 217).

Chapter 6 on the regulation of Members did not consider the potential impact of the European Convention on Human Rights (ECHR) on the procedures used to investigate and discipline Members. The jurisdiction of the European Court of Human Rights (ECtHR) was recognised by the Joint Committee in 1999. The question of whether parliamentary procedures for investigation and punishment are compatible with Article 6 (right to a fair trial) has been raised in Parliament on a number of occasions, most recently in the debates on the *Parliamentary Standards Bill 2008-9.* Most recently, the written evidence from the Clerk of the House to the Liaison Committee on 16 July 2012 noted the “prospect of breaching the requirements of Articles 5 and 6 of the European Convention on Human Rights, and the high probability of the United Kingdom being taken to the Court of Human Rights was a substantial reputational risk, most of all for a Parliamentary institution all of whose Members would support the fair and equal treatment of citizens as a fundamental requirement of modern society.”[73]

In the case of *Demicoli v Malta* in 1991, the ECtHR reversed the judgment of the Constitutional Court of Malta to the effect of not challenging the proceedings of the House of Representatives, and upheld that the editor of a political satirical magazine had the right to a

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[69] Joint Committee on Parliamentary Privilege HL Paper 43/HC 214 1998-99 para 96

[70] *Report into the Inquiry into the export of Defence Equipment and Dual-use Goods to Iraq and related Prosecutions* HC 115 1995-96. See *The Constitution after Scott* Adam Tomkins 1998. See Joint Committee on Parliamentary Privilege HL 43/HC 214 1998-99, para 93

[71] See *Public Law* Autumn 1996 *The Scott Report*

[72] See Library Research Paper 12/30 *Defamation Bill 2012-13* section 1.4 for background to s13

[73] Liaison Committee *Select Committees Powers and Effectiveness* Paper by the Clerk of the House, para 25 16 July 2012

fair hearing by an independent and impartial tribunal.[74] The court concluded that this right was violated by the participation of two members of the Maltese House of Representatives, who had been criticised by the editor, throughout the investigatory proceedings.

The Green Paper did not consider that any other change to the regulation of Members was required, beyond the draft clause to ensure that the Standards Committee augmented by lay members would attract parliamentary privilege. It noted the *Recall of MPs draft bill* and proposals in the *House of Lords Reform draft bill* to allow peers to resign and for the Lords to expel Members.[75]

The Government was also against change on select committee powers, arguing that it was not aware of a case where an individual had failed to respond to a formal summons from a committee. It was unenthusiastic about addressing the powers of the Commons to punish a non Member for committing a contempt, arguing that changes would be needed to the House's procedures to ensure an individual's right to a fair hearing (para 261). The Green Paper did not favour criminalising contempts either, since this would necessitate a much more significant transfer of Parliaments' authority to the courts (para 265). The creation of a statutory definition of contempt, as in Australia, would also be problematic:

> 272. However, any attempt to create a statutory definition of contempt would result in courts having an element of discretion in determining what constitutes contempt of Parliament. This would not be compatible with the current position which is that it is for each House alone to decide what constitutes a contempt. A threshold legislative definition of contempt would also leave the scope of any criminal offence of contempt uncertain, which might lead to the unsatisfactory position where an individual would not be able to know for certain whether or not their behaviour was criminal. For this reason the Government is not currently minded to devise a statutory definition of contempt, or to create a generic offence of contempt of Parliament.

The Joint Committee had favoured making a failure to attend when summoned or to answer questions or produce documents or suppress or destroy a document a criminal offence. The Green Paper argued that a general defence would be needed that the accused person had a reasonable excuse for non-compliance. This would enable the court to question the reasonableness of the order with presumably undesirable consequences (para 279). The Green Paper thought that such an offence would be difficult to apply to Members and to civil servants, as well as for members of the judiciary and certain prosecutors.

Finally, the Paper considered whether there was a continuing case for Members' freedom from arrest in civil matters, or exemption from attending court as a witness. It also raised the issue of the serving of court orders within the precincts of the Palace on a sitting day and the question of abusive contempts, as well as certain Lords privileges contained in standing orders.

3 Joint Committee on Parliamentary Privilege

On 28 May 2012 the Lords agreed without debate to establish a joint committee with the following terms of reference: "to consider and report on the Green Paper on Parliamentary Privilege presented to both Houses on 26 April (Cm 8318) and that the committee should report by 31 January 2013." However, the Commons did not immediately agree an equivalent resolution until 3 December when the Commons members were appointed by the

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[74] *Demicoli v Malta* (App no. 13057/87) (1991) 14 EHRR 47
[75] See Library Standard Note 5089 Recall Elections

House and the Lords members subsequently on 9 January 2013. The Chairman was Lord Brabazon of Tara. The full membership was as follows:

Member	Party
Sir Menzies Campbell MP	Liberal Democrat
Mr William Cash MP	Conservative
Thomas Docherty MP	Labour
Tristram Hunt MP	Labour
Mr Bernard Jenkin MP	Conservative
Mrs Eleanor Laing MP	Conservative
Lord Bew	Crossbench
Lord Brabazon of Tara (Chair)	Conservative
Baroness Stedman-Scott	Conservative
Lord Davies of Stamford	Labour
Baroness Healy of Primrose Hill	Labour
Lord Shutt of Greetland	Liberal Democrat

The Joint Committee held five oral evidence sessions, with evidence via video link from the United States, South Africa and New Zealand. There were 15 pieces of written evidence. Both oral and written evidence are available online only.

3.1 Report of Joint Committee July 2013

The report was published on 3 July 2013. Almost all of the text was agreed unanimously, apart from paragraphs on the use of select committee proceedings by the courts.[76] The report had 38 recommendations in total.

The main features of the recommendations were:

- no need for comprehensive codification of parliamentary privilege at this point;
- clarification of the continued ability of both Houses to use penal powers, but not involving legislation. Instead the report contained draft House of Commons resolutions and standing orders;
- welcoming a change of heart by the Government not to implement the Green Paper proposals to disapply privilege in respect of criminal prosecutions;.
- legislative reform of the *Parliamentary Papers Act 1840;* on balance the Committee did not support extending absolute privilege to all reports of

[76] *Minutes of Evidence* 18 June 2013

proceedings, but recommended that qualified privilege should apply to fair and accurate reports including all disseminations of images texts or sounds

- legislation to excuse Members of either House from jury service;.
- no requirement for legislation to confer rights on non-voting members of the Commons Standards Committee;
- a restoration in the House of Commons of the sessional orders preventing the obstruction of Members in the streets leading to the House.[77]

The Committee also commented on a number of current issues, including a New Zealand legal decision on the status of briefings by officials for parliamentary proceedings,[78] the application of legislation to Parliament, the effect of repetition of statements made in Parliament outside Parliament, the repeal of section 13 of the *Defamation Act 1996* (allowing MPs to waive privilege in defamation actions), the judicial questioning of proceedings in Parliament. [79] Full details are in the report.

[77] Background on the removal of sessional orders in the Commons from 2005 in is given in Standard Note 5593 *Sessional Orders*

[78] *Attorney General and Gow v Leigh* [2011] NZSC 106

[79] *Jennings v Buchanon* [2004] UKPC 36