

RECENT PUBLICATIONS

GREEN PAPER ON PARLIAMENTARY PRIVILEGE & SELECT COMMITTEES AND COERCIVE POWERS – CLARITY OR CONFUSION?

In accordance with past practice, I write to inform the committee about two recent publications that may be of interest to members.

Green Paper on Parliamentary Privilege

The first is a Green Paper on Parliamentary Privilege presented by the UK Government to the House of Commons and the House of Lords in April (and touted as the “first Government-led review of parliamentary privilege of which we are aware”). The Green Paper had several triggers:

- a perception that parliamentary privilege was little understood outside Westminster and had unfortunate connotations, reinforced by members’ attempts during the expenses scandal to invoke it as a shield against criminal prosecution (see *R v Chaytor and ors* [2010] EWCA Crim 1919, reported in Advice No. 45);
- recent experiences involving the breaking of court injunctions under parliamentary privilege (the *Trafigura* case and subsequent report by the [Committee on Super-Injunctions](#) chaired by the Master of the Rolls), the arrest of Damian Green MP and search of his office without warrant (see Advice No. 42) and the inquiry by the Culture, Media and Sport Select Committee into phone hacking by the press;
- recent unsuccessful attempts to modify the operation of Article 9 of the Bill of Rights 1689 (see Advice No. 43);
- the fact that the government of the day did not respond to the 1998-99 Joint Committee on Parliamentary Privilege.

The Green Paper is available at: www.official-documents.gov.uk/document/cm83/8318/8318.pdf

It poses a series of questions about possible reforms. The report is divided into three parts covering freedom of speech, the right of each House to regulate its own proceedings (known as exclusive cognisance) and other privileges.

Under the first part, the Green Paper considers the scope of freedom of speech and asks whether:

- “proceedings in Parliament” and “place outside of Parliament” should be defined in statute;

- privilege should extend to members' correspondence with ministers and constituents.

It also notes permitted uses of parliamentary proceedings in courts that do not involve any impeaching or questioning of those proceedings.

Although the 1998-99 Joint Committee recommended a statutory definition based on our 1987 Act, the UK Government considers that the status quo is satisfactory and has no plans to legislate on any elements of the Article 9 declaration.

With regard to correspondence with constituents or ministers, the Government also considers the status quo to be adequate in providing sufficient protection against defamation actions, through reliance on the defence of qualified privilege. This was the position taken by the 1998-99 Joint Committee and also reflects the situation in Australia.

In relation to the permitted use of parliamentary proceedings in courts, the Government rejects the need for statutory definition, relying on current case law to limit such use. Unlike in Australia, where judgments in the course of proceedings against Mr Justice Murphy in the New South Wales Supreme Court provided the catalyst for enactment of the *Parliamentary Privileges Act 1987*, none of the cases listed in the Green Paper involved any impeachment or questioning of parliamentary proceedings and therefore provide a clear guide to practice. Section 15AB of the Acts Interpretation Act is another example of Australia going down the path of statutory definition, in this case, of permitted uses of proceedings in Parliament for the purpose of statutory interpretation where there is ambiguity.

The most radical suggestion in the Green Paper is for parliamentary privilege to be “disapplied” to enable reliance on proceedings in Parliament for the prosecution of criminal offences, either selectively or generally. An exception is proposed for offences (labelled as “speech offences”) where potential use of proceedings in this way could have a chilling effect limiting freedom of speech in Parliament. The Green Paper includes a list of such offences, intended as a schedule to the proposed legislative amendment allowing reliance on proceedings in Parliament for the purpose of criminal prosecutions. This section of the Green Paper includes the most detailed analysis of any section in the report and is likely to incite most opposition as a fundamental attack on the principles of freedom of speech in Parliament.

Also included under consideration of issues relating to freedom of speech is the relationship between parliamentary privilege and the function of the courts in issuing injunctions and other non-disclosure orders. The paper concludes that no change to the law in this area is either desirable or necessary. A right of reply for aggrieved citizens is briefly considered, and the Senate's scheme noted, but the paper concludes that the concept of a right of reply “suffers from a lack of effectiveness for the defamed person” and is not supported. This conclusion is not based on any analysis of the numerous schemes that operate, particularly in Australasia, to the general satisfaction of the affected persons.

The final issue covered in Part One is the peculiar problem of section 13 of the UK Defamation Act 1996 (enacted in the wake of Neil Hamilton's failed attempt to sue the *Guardian* over the

cash for questions affair and involving a waiver of privilege) which is considered without any concluded view being offered.

Part Two, relating to exclusive cognisance, considers the application of the ordinary law within the parliamentary precincts, a concept which has suffered from much muddled thinking in the past, though it has been usefully clarified in the recent Chaytor judgment.

The regulation of the conduct of members of both Houses is then considered and recent developments in the wake of the expenses scandal noted. For the House of Commons, these included splitting the Standards and Privileges Committee into two committees to separate their functions and providing for the appointment of lay members to the Standards Committee. There is some question whether legislation is required to confer on the proceedings of the new mixed-member committee the status of proceedings in Parliament but, generally, the paper concludes that there is no need for legislation in this area, and that the regulation of members' conduct should be left to their Houses.

The most interesting section of the paper concerns the question of select committee powers, arising from some uncertainty about what the next steps might have been had the Murdochs not complied with summonses to attend hearings of the Culture, Media and Sport Select Committee in relation to its inquiry into phone hacking. The issue is not so much the powers of select committees, but the power of the Houses to punish for contempt. The House of Commons has not imposed a fine since 1666 and it is assumed by many that this power has thus lapsed. Nor has the House of Commons taken any action against a non-member since 1978 when it resolved to exercise its penal jurisdiction as sparingly as possible and only when satisfied that it was essential to do so in order to provide reasonable protection for the House, its members or its officers from improper obstruction or interference with the performance of their functions. The House of Lords has not punished a non-member since the 19th century. Two broad options to address the question of punitive powers of the Houses were put forward by the 1998–99 Joint Committee:

- statutory codification of the existing powers of the Houses, including conferring on the House of Commons a power to impose fines on non-members;
- creation of criminal offences for committing contempts, thus conferring Parliament's punitive jurisdiction on the courts.

The Green Paper examines both options, noting in passing the threshold test for contempt in section 4 of our *Parliamentary Privileges Act 1987*. One concern with the Houses exercising their own punitive jurisdiction is the perception that the procedures employed by the Houses do not sufficiently provide the kinds of safeguards associated with due process that a court provides. The Green Paper refers to the New Zealand Parliament's requirement for its committees to observe the principles of natural justice as a possible model, but it does not cite the more detailed protections required by Senate Privilege Resolutions 1 and 2 in respect of Senate committees generally and the Privileges Committee, in particular.

The choice between criminalising specific conduct or defining contempt by reference to general principles is also examined but, again, the practical solution provided by the Australian arrangements is overlooked. Under these arrangements, it is for the courts to determine whether a particular act meets the statutory test for contempt in the event that the extreme penalty of imprisonment is imposed but for the Houses to deal with all other matters concerning the application of the law.

Not surprising in a government-initiated paper is the suggestion that if specific contempts were criminalised civil servants should be exempt. There is also a consideration of what safeguards might be required for the initiation of prosecutions, including to ensure that the interests of the Houses are not overtaken by other interests.

Part Three of the paper examines a number of miscellaneous issues:

- the case for updating protections for the publication and broadcasting of parliamentary proceedings;
- the case for retaining members' freedom from arrest in civil matters and exemptions from attending court as a witness when Parliament is sitting;
- whether the service of documents within the Parliamentary precincts on sitting days should continue to be regarded as a contempt;
- whether the contempt of defamation of a House should be retained (a contempt abolished here by section 6 of the *Parliamentary Privileges Act 1987*);
- whether there is a continuing case for retaining privileges of the peerage.

Select Committees and Coercive Powers – Clarity or Confusion?

The second publication is a recent report published by the Constitution Society (UK) and reported in the press as casting doubt on the powers of select committees, and on the protection by parliamentary privilege of witnesses before those committees. Unfortunately, the greatest source of confusion appears to be the failure of the authors to grasp simple concepts of parliamentary procedure. Much is made of the claim that select committees do not appear to have coercive powers and that their powers to call for persons, papers and records are illusory. Erskine May is accused of being seriously misleading in claiming that witnesses before select committees enjoy the protection of parliamentary privilege. The authors appear not to appreciate that committees are subordinate bodies, created by their Houses for particular purposes and given particular powers to perform particular functions. As subordinate bodies, they do not have unlimited powers but remain subject to the will of the House that established them. Nor is it appreciated that members of a House are subject only to a direction of that House unless otherwise provided, or that it is the House that exercises coercive or punitive powers, not committees. The status and function of standing orders also appears to be a mystery.

The case for claiming that committees do not have the powers we thought they had is based on the following reasoning:

First, there is a threshold difficulty over the proper interpretation of the phrase “send for persons” etc in the Standing Orders. The Standing Orders of the House of Commons use this phrase in most of the select committee provisions. However, the Standards and Privileges Committee is invested not only with his power (Standing Order 149(5)) but also with what appears to be the additional power to “order the attendance of any Member”. Unless this is simply loose drafting and confers no additional power on the Standards and Privileges Committee, it would appear that the phrase “send for persons” could not extend to ordering such persons to attend. If that is right, it follows that the special report process [ie, to the House] would not be capable of being implemented since the “sending for” could only ever be an invitation. (pp. 34-5)

The report is riddled with such flawed reasoning. In this example there is a failure to understand that, in the parliamentary context, members of the plenary are not subject to orders of a subordinate body. This is the position reflected in Senate standing order 177 (for example) which provides that if a committee requires the attendance of a senator as a witness, the chairman shall invite the senator to attend (in writing) and, if the senator declines to attend or to give evidence, the committee shall report the matter to the Senate. The Senate may order a senator to attend a Senate committee or to give evidence to the committee. These rules reflect universal practice.

In the case of a committee such as the House of Commons Standards and Privileges Committee, which has a particular role in relation to the conduct of members, it is not surprising that the House has delegated to that committee the power to order a member to attend. However, it is ridiculous to argue that the power to order a member’s attendance means that the general power to send for persons etc is diminished and unenforceable. There is no relationship between the two, other than to reinforce the principle that a member is not generally subject to direction by a subordinate body, and a special delegation of power is required for this purpose.

The authors subscribe to the school of thought that elevates any right under the law above the basic law of parliamentary privilege as expressed in Article 9 of the Bill of Rights. Thus, the protection of witnesses under parliamentary privilege must always be subordinate to any other right that the courts may determine to be superior (in spite of such a determination being contrary to the settled law):

The most obvious example is that of a criminal trial. The effect of excluding statements made before a select committee that might be needed to advance a particular defence (as for example seeking to challenge the statement of a witness in a trial who had also given evidence to different effect before a select committee), on the basis that such statements were automatically protected by parliamentary privilege under article 9 of the Bill of Rights, would be to contravene elementary ideas of what is necessary for a fair trial.

Similarly statements made before a select committee might well be needed by a claimant in civil proceedings to advance a common law or statutory right. (pp. 59-60)

There is no doubt that the European Convention on Human Rights and the jurisdiction of the European Court of Human Rights presents particular challenges to the law of parliamentary privilege in the United Kingdom but an analysis of these challenges is not illuminated by the analysis in this report which is deeply flawed. Unfortunately, the report is likely to attract significant publicity because of its apparently reputable source and given the level of interest in the activities of the UK Culture, Media and Sport Select Committee's inquiry into phone hacking. The report is accessible by clicking on the link at the following url:
www.consoc.org.uk/2012/06/the-constitution-society-launches-new-report-select-committees-and-coercive-powers-clarity-or-confusion/