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GOVERNMENT PAPER LAUNCHES REVIEW OF PARLIAMENTARY PRIVILEGE

The Government today called for public views on the constitutional privileges of Parliament to ensure that they continue to provide effective protection in a modern context.

Leader of the Commons Rt Hon Sir George Young MP and deputy Leader David Heath MP announced publication of a consultation document to launch a debate on whether changes in the law are needed. Ultimately, it would be for Parliament itself to determine the outcome.

“All strong democracies have at their core the recognition that parliamentarians must be free to speak their mind in debates – and for MPs to represent their constituents – without fear or favour,” they say. “This is at the heart of the privileges of Parliament which are an integral part of our constitutional arrangements.”

The Government proposes that a Joint Committee of both Houses should be established to examine the issues in today’s Green Paper - and also to have regard to relevant reports of select committees.

Noting that the term “parliamentary privilege” is little understood outside of Westminster, the paper says that any suggestion of special treatment for MPs and peers is “unfortunate”.

“That connotation was reinforced in 2010 when some MPs and peers attempted to invoke parliamentary privilege to prevent criminal prosecutions for offences relating to their parliamentary expenses. Of course, this attempt ultimately failed; it was reassuring that it did so, because it showed that privilege is only intended to provide protection in relation to the core functions of Parliament. Nonetheless, it served as a reminder that even the most durable of constitutional tenets should periodically be reviewed,” the paper states.

The Government also notes that, recently, MPs and peers have relied on privilege to reveal information subject to court injunctions. Ministers question whether changes are needed to ensure that privilege does not provide an inappropriate immunity for parliamentarians from criminal prosecution, to reinforce the principle of fair and equal treatment in law.

They say: “At the same time, we consider whether changes are needed to strengthen the appropriate protections for free expression in proceedings and in the reporting of those proceedings in the media.” The Government has concluded that a comprehensive review of parliamentary privilege is timely. However, it makes clear it has no wish to make any changes without thorough consultation.

Notes:

The paper poses questions to address each of the issues identified in it:

Part 1 – Freedom of speech

Freedom of speech is arguably the most important Parliamentary privilege and extends back to Article IX of the Bill of Rights 1689 and in the Claim of Right (1689) in Scotland. **The Government does not consider that it is necessary to make any changes to the protection of privilege in civil cases.** To ensure freedom of speech in Parliament, it is right that parliamentary proceedings cannot be relied upon to sue an MP or a witness to a select committee for defamation. The Government also considers that no change in the law is appropriate in relation to injunctions and super-injunctions where, on occasion, parliamentary privilege has been used to circumvent the injunction. **However, it suggests that it is open to question whether it should be possible for parliamentary privilege ever to prevent Members being successfully prosecuted for criminal offences.** 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. **Draft clauses illustrate how this change could be implemented.**

If privilege were partially disapplied, it would be important to minimise any “chilling effect” on free speech in Parliament. Participants in proceedings should not be deterred from expressing their genuinely held opinions or sharing information with the House by having to consider whether they may be acting in breach of laws which limit free speech outside of proceedings. **For this reason the protection of privilege would need to continue to apply to certain offences including those most closely related to freedom of speech. Draft clauses contain an illustrative list of offences for which the protection of privilege might continue to apply.**

Part 2 – Exclusive Cognisance

Exclusive cognisance is the right of each House to regulate its own proceedings and internal affairs without interference from any outside body. This includes the conduct of its Members, and of other participants such as witnesses before select committees. **The paper questions whether the doctrine of exclusive cognisance causes any uncertainty about the extent to which statute law applies to Parliament.** The purpose of exclusive cognisance is to protect Parliament in its role as a legislative and deliberative assembly. However it is sometimes argued that this privilege confers a much wider protection - exempting Parliament from having to comply with legislation governing day-to-day activities such as employment and health and safety. The most recent court judgment in this area suggests that the line likely to be taken by the courts in future is “reasonably clear” - that statute law does apply unless it would interfere with Parliament’s core functions. **Therefore, the Government does not believe there is currently a case for legislation.**

Both Houses of Parliament are ultimately responsible for the regulation of their Members, including disciplining their Members for breaches of the Houses’ rules about Members’ conduct. The Committee on Standards in Public Life recommended reform of the system, by allowing lay members to serve on the Select Committee responsible for regulating Members of the House of Commons. In March this year, MPs voted to appoint lay members to this committee, but without full voting rights. **The document contains draft clauses which would clarify that, if voting right were given to the lay members, the Committee’s proceedings would still be protected by parliamentary privilege.**

Select Committees nowadays play an important role in national political life, providing an official forum in which Members of either House undertake detailed scrutiny of Government policy and hold the Government to account for its decisions. Recent events have raised questions about whether these committees have the powers they need to perform these important functions. **The paper consults on the desirability of a number of possible reforms, such as legislating to give both Houses enforceable powers by codifying their existing powers, or creating criminal offences for committing contempts of Parliament, to allow Parliament’s powers to be enforced through the courts.**

Part 3 – Other privileges

The final section discusses privileges that do not fall under the two main headings of freedom of speech and exclusive cognisance. **The paper consults on the desirability of changes to the law on reporting of parliamentary proceedings.** In particular, individuals who publish documents which either House has ordered to be printed are protected from legal action arising from publishing these documents or for producing copies, extracts or abstracts of these documents. **The paper contains draft clauses that would clarify that broadly analogous protection applies to those who broadcast Parliamentary proceedings.**

Also, documents ordered to be produced by Parliament currently receive an absolute protection, while there is a qualified protection for publishing extracts and abstracts. The publisher or broadcaster of an extract or abstract will only be protected if they can show that the publication was fair, accurate and without malice. This differs from the normal burden of proof in defamation cases where qualified privilege is asserted. In that case, it falls to the person who alleges that a report is defamatory to prove that they have been maliciously misrepresented, rather than the publisher who must prove that the treatment was properly motivated. **Draft clauses contained in the paper would bring the burden of proof in line with that in other defamation proceedings.**

Miscellaneous issues. The final section of the Green Paper consults on the future of a number of other privileges including Members’ freedom from arrest in civil matters, Members’ freedom from being compelled to appear in court as witnesses, and a number of privileges that are expressed in the Standing Orders of the House of Lords.

Editors:

1. **The Programme for Government states:** “We will prevent the possible misuse of Parliamentary privilege by MPs accused of serious wrongdoing.”
2. **The Queen’s Speech (2010) stated:** “A draft Bill will be published on reforming parliamentary privilege.”

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