Parliamentary Privilege

HM Government

Parliamentary Privilege

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Foreword

All strong democracies have at their core the recognition that parliamentarians must be free to speak their mind in debates – and MPs to represent their constituents' views - without fear or favour. This is at the heart of the privileges of Parliament which are an integral part of our constitutional arrangements. Indeed, the privileges of the Westminster Parliament are the model for the privileges of many legislatures around the world.

But parliamentary privilege is little understood outside of Westminster, and the connotation of the word "privilege" is unfortunate in its suggestion of special treatment for Members of Parliament. 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.

Nor was this the only recent occasion when public attention has been drawn to the application of parliamentary privilege in a modern context. Members of both Houses have relied on privilege to reveal information subject to court injunctions; there has been a renewed focus on the powers of select committees; and the arrest in 2008 of our colleague Damian Green MP raised questions about the relationship between parliamentary privilege and police investigations.

This is the first Government-led review of parliamentary privilege of which we are aware. Previous Governments have looked at various questions regarding the operation of privilege in isolation; we believe the time is now right to take a comprehensive look at its scope and operation, to ensure that parliamentary privilege continues to operate to protect the effective functioning of our democracy. In doing so, we are guided by many in Parliament who have considered these questions before – above all the 1998-99 Joint Committee on Parliamentary Privilege.

We raise the question of 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. 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 no wish to make any changes without thorough consultation. The intention of this paper is to facilitate a wide-ranging and open debate on parliamentary privilege. We hope as many people as possible will contribute their thoughts, either to us or directly to Parliament. Ultimately, though, these are Parliament's privileges, and it is right for Parliament to have a proper opportunity to reflect on their continuing purpose. That is why we believe it would be appropriate for Parliament to establish a Joint Committee to look at the issues raised in this paper.

We look forward to discussing the questions raised here with such a Joint Committee, and to an open and informed debate on this important, but little understood, part of our constitutional arrangements.

Sir George Young
Leader of the House of Commons
and Lord Privy Seal

David Heath
Deputy Leader of the
House of Commons

Executive summary

1. Parliamentary privilege is an essential part of our parliamentary democracy. It ensures that Members of Parliament are able to speak freely in debates, and protects Parliament's internal affairs from interference from the courts. Following the MPs' expenses scandal there were concerns that parliamentary privilege could be used by Members of Parliament to avoid prosecution for expenses fraud. While the courts concluded that a Member's expenses were not protected by privilege, the Government felt that, in light of the questions this case raised, the time was right for a comprehensive review of the privileges of Parliament.

2. This is a consultation paper which poses questions as to how each of the issues identified should be addressed. Responses are welcome from any interested party. Ultimately, though, these are Parliament's privileges, and it is for Parliament to decide on their future. The Government believes it would be appropriate for these issues to be scrutinised by a Joint Committee, and will be holding early discussions in both Houses about the establishment of, and timetable for, such a committee.

Part 1 – Freedom of speech

3. **Freedom of speech** is arguably the most important parliamentary privilege; for a democracy to function properly the people's elected representatives must be free to raise any matter. If a person speaking in Parliament believes a fact or opinion needs to be raised in a debate, that person should not be deterred from raising it by fear of a criminal or civil liability. This protection has long been claimed, and found concrete expression in Article IX of the Bill of Rights 1689 and in the Claim of Right Act 1689 in Scotland.

4. 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 a Member of Parliament or a witness to a select committee for defamation. The Government also considers that no legislative changes are appropriate in relation to injunctions and super-injunctions where, on occasion, parliamentary privilege has been used to circumvent the injunction.

5. However, 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. The paper also contains draft clauses which illustrate how this change could be implemented.

6. 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 speech offences. The draft clauses contain an illustrative list of offences for which the protection of privilege might continue to apply, and the Government seeks views both on the list and on the general approach.

Part 2 – Exclusive Cognisance

7. **Exclusive cognisance** is the right of each House of Parliament 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.

8. One current area of uncertainty caused by the doctrine of exclusive cognisance is 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; statute law does apply unless the law would interfere with Parliament's core functions. Therefore the Government does not believe that there is a case for legislation at this time.

9. 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 has recommended reforming this system by allowing lay members to serve on the Select Committee responsible for regulating Members of the House of Commons. The House of Commons recently voted to appoint lay members to this Committee, but without full voting rights. The Green Paper contains draft clauses which would clarify that, if voting rights were given to the lay members, the Committee's proceedings would still be protected by parliamentary privilege.

10. **Select committees** have come to play an increasingly 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 Green Paper consults on the desirability of a number of possible reforms, such as legislating to give the two 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

11. The final section of the Green Paper discusses those privileges that do not fall under the two main headings of freedom of speech and exclusive cognisance.

12. 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 of Parliament has ordered to be printed are protected from legal action arising from publishing these documents, as is anyone producing copies, extracts or abstracts of these documents. The Green Paper contains draft clauses that would clarify that broadly analogous protection applies to those who broadcast parliamentary proceedings.

13. Also, documents ordered to be produced by Parliament currently receive an absolute protection, while there is a qualified protection for publishing extracts and abstracts. This means 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 is different from the normal burden of proof in defamation cases where qualified privilege is asserted, where it is the person who alleges that the report is defamatory that must prove that they have been maliciously misrepresented, rather than the publisher who must prove that the treatment is properly motivated. The Green Paper contains draft clauses that would bring the burden of proof in line with that in other defamation proceedings.

14. **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.

Chapter 1 – Overview and general approach

What is parliamentary privilege?

15. Parliamentary privilege is a protection for the proceedings of Parliament – debates, committee hearings, votes and so forth – and only indirectly for the individuals who participate in them. It is a safeguard to ensure that parliamentarians, including the public's elected representatives, are able to carry out their duties to the best of their ability, and that all of Parliament's vital constitutional functions can be carried out to the highest possible standards. It is in short a necessity, just as legal professional privilege (confidentiality of discussions with clients) is a necessity, if people are to feel able to speak honestly with their lawyers.

16. Parliamentary privilege is an often misunderstood concept. It is not helped by its name; the connotations of the word "privilege" are unfortunate, as it is associated with special treatment for individuals. The term "parliamentary privilege" might superficially imply, to those not familiar with it, that there are special rights or protections for parliamentarians, perhaps even to the extent that MPs and peers are "above the law". Now more than ever, the idea of parliamentarians being somehow above the law chimes very badly with the public perception of how things ought to be.

17. The necessity of parliamentary privilege is best illustrated by a brief explanation of what parliamentary privilege is. There are two main aspects to parliamentary privilege:

- **Freedom of speech** is for all those who participate in parliamentary proceedings, whether MPs, peers or non-members. This freedom of speech exists only in parliamentary proceedings, which includes (among other things) debates, committee hearings and published reports, but does not apply to anything said by an MP or a peer outside parliamentary proceedings.

- The **exclusive cognisance** of each House of Parliament (sometimes referred to as "exclusive jurisdiction") – which broadly translates as the right of each House to regulate its own proceedings without interference from the courts. This includes the conduct of its Members and of other participants such as witnesses before select committees. If the Houses did not have such rights, any person might be able (to take one example) to question in the courts the decision-making processes behind the passage of legislation. This would undermine the independence of a sovereign Parliament, and in particular of the democratically elected House of Commons.

18. Parliamentary privilege is part of the law, rather than something that puts MPs or peers above the law. The origins of the privileges of Parliament are various, but it is clear that the main privileges of the Houses have been accepted by governments and by the courts for many centuries. The 1998-99 Joint Committee on Parliamentary Privilege recorded that "what the House of Commons originally claimed as customary rights, in the course of repeated efforts to assert them, hardened into legally recognised privileges".[1] This is contrasted with the House of Lords, which has "ever enjoyed" its privileges.[2] In practice this recognition by the courts has long meant that many of Parliament's privileges are part of the common law.

19. Since 1689, the most important aspect of privilege – freedom of speech – has also been enshrined in statute law, by the Bill of Rights in England and Wales and by the Claim of Right Act in Scotland.

20. Although it is not tecŸically a privilege of Parliament, this paper also looks at the protection granted in law to those who publish or broadcast proceedings in Parliament. Again, this privilege exists to ensure there can be a complete and accurate record of Parliament's proceedings, available to any citizen. This is an important complement to the freedom of speech in parliamentary proceedings.

Why is privilege still necessary?

Free speech

21. "Freedom of speech in debate" has been asserted by the Speaker of the House of Commons at the commencement of every parliamentary session since the late sixteenth century. Nowadays that assertion is a formality, but originally it was hugely contentious, most obviously when it was disregarded by Charles I in the arrest of Sir JoŸ Eliot and two other Members in 1629 for seditious words spoken in debate and for violence against the Speaker.[3] The perceived significance of this privilege was reflected in its being the only one of Parliament's privileges to be enshrined in the Bill of Rights 1689, in which Parliament definitively established the principle of a constitutional monarchy following the Glorious Revolution which deposed King James II.

22. In the modern era, any challenge to the freedom of speech in parliamentary proceedings would be unlikely to come from the Crown or indeed from Government, which has long since ceded functional independence to the principal agencies of the State concerned with upholding the law – the police, prosecutors and courts. It is no longer possible for the monarch or for a minister of the Crown to mandate the arrest or charge of any individual.

23. The continued importance of freedom of speech is therefore now a reflection of parliamentary sovereignty. As the paramount forum of the land, Parliament must be free to go about its business without fear or favour, and individuals must be able to contribute to the best of their abilities to Parliament carrying out its functions. If a person speaking in Parliament believes a fact is pertinent to the matter under discussion, they should not be deterred from raising it by any prospect of criminal or civil penalty for revealing that fact. Nor should such a threat prevent the *honest* expression of opinion, whether that is in a debate or in a report by or submission to a committee.

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1 Joint Committee on Parliamentary Privilege, First Report of Session 1998-99, *Parliamentary Privilege,* HL 43-I / HC 214-I, para 5

2 As above, para 6

3 *Erskine May*, 24th edition (London, 2011), p208

24. Most democratic states have enacted some similar protection for free speech in legislatures, even where their legislatures are not sovereign – such as the Speech and Debate clause of the US constitution.[4] This is usually to be found within their codified constitutions, and often the model for that protection is Article IX of the Bill of Rights 1689. There is also protection for free speech in the proceedings of the Scottish Parliament, National Assembly for Wales, and Northern Ireland Assembly.[5]

25. The Government does not believe that Parliament could function effectively without the privilege of free speech. While we propose some modifications to its operation, we entirely accept and endorse the continuing appropriateness of the principle enshrined in Article IX of the Bill of Rights.

Exclusive cognisance

26. Like freedom of speech, the right of each House to regulate its own internal affairs was initially asserted as a protection against an overly mighty executive, but has developed over time into a reflection of parliamentary sovereignty. Originally its primary constituent aspect was the freedom from arrest, reflecting the paramount importance of avoiding parliamentarians being prevented from attending Parliament's proceedings, which was apparently recognised as early as 1340.[6] It is worth noting though that this freedom from arrest only ever extended to civil matters and not to criminality by Members, and so its importance diminished with the gradual abolition of imprisonment for debt.

27. In the present day, exclusive cognisance manifests itself most importantly in the recognition that conduct and procedure in parliamentary proceedings is for the relevant House to regulate (or deviate from). This means that the courts cannot strike down Parliament's decisions by challenging the procedures used to reach the decisions, nor may they suspend someone as a member of either House. The Houses can limit their own exclusive cognisance by statute, as for example they have done in providing that Members of the House of Commons are automatically disqualified if they receive a custodial sentence of over twelve months.

28. Exclusive cognisance does not mean that MPs and peers are exempt from ordinary law, nor that the Houses of Parliament are a haven from the law. Where the conduct of an MP or a peer does not relate to proceedings in Parliament, even if it takes place within Parliament's physical premises, it is within the jurisdiction of the courts and therefore the law will apply to them as to anyone else. Members of both Houses have been arrested, charged and on occasion imprisoned. Equally, though, where privilege does operate to exclude ordinary courts, Members are still subject to discipline by Parliament.

29. The position in other countries varies, but it is common for legislatures to be empowered to determine their own procedures, including in countries with codified constitutions.[7] It is also common for legislatures to have powers to regulate the conduct of their members – indeed, some

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4 United States Constitution, Article I, Section 6, Clause 1

5 Scotland Act 1998, sections 41-2; Government of Wales Act 2006, sections 42-3; Northern Ireland Act 1998, section 50

6 *Erskine May*, p210

7 For example Article 40 of the German Basic Law is that "the Bundestag adopts its own rules of procedure", while Article 1 of the United States Constitution contains provision that "each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member" (section 5).

countries provide a wide freedom from arrest for legislators, and so are reliant on the relevant legislature to ensure that any misconduct is punished.[8]

30. As with freedom of speech, the Government believes that it continues to be an important manifestation of parliamentary sovereignty that the two Houses are free to determine and enforce their own procedures without reference to the courts; and that this necessarily includes the regulation of conduct in those proceedings. It follows that we continue to recognise the importance of the Houses' right to control their own internal affairs.

Why review parliamentary privilege now?

31. The genesis of the Government's commitment to review the operation of parliamentary privilege lay in the announcement in February 2010 by lawyers representing three MPs and one peer that they would be making the case that criminal proceedings could not be brought against them because the court proceedings would infringe parliamentary privilege. The court proceedings in question were to consider charges of false accounting relating to parliamentary expenses claims made by the four defendants. The Programme for Government subsequently stated that "we will prevent the possible misuse of parliamentary privilege by MPs accused of serious wrongdoing".[9]

32. Although ultimately the Supreme Court held that parliamentary privilege did not prevent the bringing of criminal proceedings in these cases, the cases raised significant public concern. The Prime Minister identified the key outstanding question as "whether the balance is right in all cases between the necessary protection afforded by privilege, and the important principle that MPs and peers should be subject wherever possible to ordinary criminal and civil laws".[10] In particular, more than one Joint Committee of both Houses have questioned whether there are circumstances in which parliamentary privilege could act to prevent successful and merited prosecutions for bribery.[11]

33. A Government-led review of parliamentary privilege is, in any event, long overdue. While it is right that the appropriate extent and operation of parliamentary privilege is ultimately determined by Parliament, there is a place for Government in the debate on the various public interests involved. The then Government never responded to the report of the 1998-99 Joint Committee on Parliamentary Privilege, but that Committee produced a comprehensive consideration of issues arising from privilege, which deserves a considered response.[12]

34. There have also been a number of other occasions since the Joint Committee on Parliamentary Privilege reported on which the extent or the operation of parliamentary privilege has come under discussion, all of which ought to be considered in the light of a general review. These include:

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[8] The French, German and Danish Constitutions all contain variants of an article that "Members may not be charged or imprisoned without the consent of Parliament, except if he/she is caught flagrante delicto" – see article 26 of the French Constitution, article 46 of the German Basic Law, section 57 of the Danish Constitutional Act.

[9] *The Coalition: Our Programme for Government*, May 2010, p27

[10] Letter from the Prime Minister to the Rt Hon Kevin Barron MP, 14 September 2011 – published at http://www.publications.parliament.uk/pa/cm201012/cmselect/cmliaisn/608/11090605.htm

[11] Joint Committee on Parliamentary Privilege, para 167; Joint Committee on the Draft Corruption Bill, report of session 2002-03, HL157 / HC705, paras 134-135

[12] Joint Committee on Parliamentary Privilege

- the arrest in 2009 of Damian Green MP on charges relating to misconduct in public office, including the searching of his parliamentary offices by the Metropolitan Police and the report of the Select Committee which followed this;[13]

- attempts by the previous Government to make limited exemptions to Article IX in the draft Corruption and Bribery Bills, and in the Bill which became the Parliamentary Standards Act 2009 (none of which exemptions ultimately became law);[14]

- a number of occasions on which Members of either House have used parliamentary privilege apparently to circumvent injunctions made by order of a court, which has led to reports from the Culture, Media and Sport Select Committee, by a special Committee on Super-Injunctions established under the chairmanship of the Master of the Rolls, and most recently by a Joint Committee on Privacy and Injunctions;[15] and

- the inquiry by the Culture, Media and Sport Select Committee into phone hacking by the press, which has raised questions over the powers of select committees in the House of Commons.[16]

Our overall approach

35. As this is the first Government-led review of parliamentary privilege of which we are aware, we have attempted in this paper to produce a comprehensive review of the major issues relating to the operation of parliamentary privilege today, using as our starting point the review undertaken by the 1998-99 Joint Committee. The paper considers each of the chief areas considered by the Joint Committee, and attempts a consideration of each of its main recommendations and those of subsequent relevant committees. As it is a consultation paper, it also poses questions as to how each of these issues should be addressed. Responses are welcome from any interested party.

36. A partial exception to this is where committees go into matters of internal procedures which are properly for the consideration of the two Houses. We do not attempt to design internal procedural mechanisms for either House, although it is legitimate for the Government to express opinions, and we do so on occasion.

37. While the Green Paper attempts to be a comprehensive review, the Government does not believe the case has yet been made for a comprehensive codification of privilege in a Parliamentary Privilege Act as was done in Australia in 1987. The 1999 Joint Committee, having made a series of recommendations for legislation in particular areas, considered that "overall statement as a code is the natural next step in a modern presentation of parliamentary privilege", and that "a code would assist non-members as well as members, because it would enable the ordinary citizen to have access to the privileges of his member of Parliament".[17]

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[13] Committee on Issue of Privilege, First Report of session 2009-10, *Police Searches on the Parliamentary Estate*, HC 62, 15 March 2010

[14] Draft Corruption Bill 2003, clause 12; draft Bribery Bill 2009, clause 15; Parliamentary Standards Bill 2009 (as introduced), clause 10

[15] Culture, Media and Sport Select Committee, Second Report of Session 2009-10, *Press standards, privacy and libel*, HC 362-I, 24 February 2010; Report of the Committee on Super-Injunctions, *Super-Injunctions, Anonymised Injunctions and Open Justice*, 20 May 2011; Joint Committee on Privacy and Injunctions, Report of Session 2010-12, *Privacy and Injunctions*, HL 273 / HC 1443, 27 March 2012

[16] To be published as HC 903-vi

[17] Joint Committee on Parliamentary Privilege, para 385

38. While we go through our reasoning in individual chapters and agree with a great many of the 1999 Committee's individual recommendations, in general the Government does not see enough evidence of problems in practice to justify such a significant exercise, which would inevitably have other consequences that may not be currently foreseen. This contrasts with the position in Australia in 1987, where there was a clear view that privilege was being applied by the courts in a way contrary to the view of Parliament as to how it ought to operate.

39. In the UK, since 1689 the boundaries of parliamentary privilege have in practice largely been determined by the courts, within the framework set by the Bill of Rights, the Claim of Right Act and pre-existing common law. The Government believes that, notwithstanding the discrete areas discussed in this paper where there may be a case for legislative change, the boundaries of parliamentary privilege have for the most part been very clear, and its operation has not been sufficiently problematic to justify such a radical departure from the UK's basic constitutional underpinning.

Q1: Do you agree that the case has not been made for a comprehensive codification of parliamentary privilege?

Part One: Freedom of speech

Chapter 2 – Freedom of speech: general issues

Introduction

40. The protection of freedom of speech in Parliament by the exclusion of any role for the courts in questioning proceedings in Parliament is set out in Article IX of the Bill of Rights 1689. The twenty-fourth edition of Erskine May, the acknowledged authoritative work on parliamentary procedure, describes it as follows:

> *In 1689, by the Bill of Rights, statute law brought into sharper focus an important part (but only a part) of what the English Parliament had long claimed. The statute did not supersede the privilege of freedom of speech but it put the claim on a more defined basis. The continued exclusion of interference in or by the courts in the proceedings of either House was succinctly and robustly asserted.*[18]

41. Article IX of the Bill of Rights 1689 states that:

> *the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.*

42. The Bill of Rights was passed by the English Parliament. In Scotland, a separate but similar Act, the Claim of Right Act 1689, was passed by the Scottish Convention. It states in this regard:

> *That for redress of all grievances, and for the amending, strengthening, and preserving of the laws, Parliament ought to be frequently called and allowed to sit, and the freedom of speech and debate secured to the members.*

43. Although the Bill of Rights was passed by the English Parliament, the 1999 Joint Committee on Parliamentary Privilege took evidence from the then Lord President of the Court of Session, Lord Rodger of Earlsferry, and the then Lord Chief Justice of Northern Ireland, Sir Robert, now Lord, Carswell, who "were convinced that the law would be interpreted in Scotland and Northern Ireland so as to reflect closely the interpretations placed upon parliamentary privilege by the English courts, even though the interpretation in every case might not be precisely the same".

[18] *Erskine May*, 24th edition (London, 2011), p 227

44. Freedom of speech is guaranteed in Parliament by preventing the courts from questioning what was said in Parliament; this means that Members cannot be sued, or charged with a criminal offence as a result of anything they say during proceedings. As the 1999 Joint Committee put it, this ensures Members of each House have the right to "say what they will", and to "discuss what they will".[19]

45. Freedom of speech in Parliament is of fundamental importance. Parliament should be a forum for free and frank debate, and Members of both Houses should be able to raise issues without having to agonise over the exact form of words used to guard against legal action. As the 1939 House of Commons Select Committee on the Official Secrets Act noted, this privilege also exists to ensure that MPs are able to freely represent the views of their constituents:

> *The privilege of freedom of speech enjoyed by Members of Parliament is in truth the privilege of their constituents. It is secured to members not for their personal benefit, but to enable them to discharge the functions of their office without fear of prosecutions civil or criminal.*[20]

46. The constitutional right of freedom of speech carries with it a responsibility to exercise that right responsibly. This was, for example, acknowledged in the House of Commons by the Speaker of the House when he addressed the House at the beginning of this Parliament:

> *On receiving royal approbation for my re-election as Speaker, I made the traditional claim to Her Majesty for all the House's ancient and undoubted rights and privileges, particularly to freedom of speech in debate. That is at the very heart of what we do here for our constituents, and it allows us to conduct our debates without fear of outside interference, but it is a freedom that we need to exercise responsibly in the public interest, and taking into account the interests of others outside this House. I would encourage any Member to research carefully and to take advice before exercising this freedom in sensitive or individual cases.*[21]

47. It is not just Members that enjoy protection; non-members who participate in proceedings are also protected from legal action being taken on the basis of what they say. This is particularly important for witnesses to select committees as it enables them to freely express their opinions, and ensures that the committee is able to hear evidence from people who might otherwise be unwilling to speak out in public.

48. Recent developments have seen proceedings in Parliament used in court more regularly than in the past without encroaching upon the protections provided by parliamentary privilege. Proceedings in Parliament can be cited as a matter of fact or of history to show what was said and when; in doing so they are not being questioned or impeached. The courts can now make use of proceedings in Parliament as an aid to help interpret Acts of Parliament, following the decision in *Pepper v. Hart*;[22] they can be used where there is a judicial review of ministerial decisions; and they can also be used in other court cases where a ministerial decision is being questioned.

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[19] Joint Committee on Parliamentary Privilege, First report of Session 1998–99, *Parliamentary Privilege,* HL 43-I / HC 214-I, para 36

[20] Committee on the Official Secrets Act, First report of session 1938–39, *Report,* HC- 101, para 23

[21] HC Deb, 27 May 2010, col 301

[22] *Pepper v. Hart* [1993] 1 AC 593

Issues

49. The 1999 Joint Committee on Parliamentary Privilege stated that there was a lack of certainty regarding key terms that are used in Article IX: what is meant by "proceedings in Parliament", the meaning of "impeached or questioned" and the meaning of "in any ... place out of Parliament." The following issues are considered here:

    - whether the **term "proceedings in Parliament"** should be defined in statute;
    - whether and to what extent Members' **correspondence with Ministers or constituents** should be protected by privilege;
    - whether there should be any clarification of the **definition of "place out of Parliament"**, in particular coverage of tribunals of inquiry; and
    - **the use of parliamentary proceedings in the courts** in certain circumstances, notwithstanding Article IX, when it is not considered to be "impeaching or questioning".

Defining proceedings in Parliament

50. The question of how and whether to define what constitutes a "proceeding" has long been raised by those advocating reform of parliamentary privilege for two main reasons: firstly, to provide clarity; and secondly, to amend the scope of privilege.

51. The argument made is that it is unsatisfactory that anyone should not know, in any given circumstance, whether the actions they are undertaking are covered by absolute privilege. This applies primarily to Members, but also to officials of both Houses, to witnesses before select committees and other participants in proceedings. The Joint Committee on Parliamentary Privilege recommended a statutory definition of proceedings in Parliament, based on the definition used in the Parliamentary Privileges Act 1987 (Australia).

52. Erskine May states that the primary meaning of proceedings is "some formal action, usually a decision, taken by the House in its collective capacity. While business which involves actions and decisions of the House are clearly proceedings, debate is an intrinsic part of that process which is recognised by its inclusion in the formulation of Article IX."[23] In most instances it is very clear whether an action is a "proceeding" and therefore covered by the protection in Article IX. A speech in the chamber, a written or oral parliamentary question, a motion or a committee report will be a proceeding. A speech at a private event, a request to either House under the Freedom of Information Act 2000, or a TV interview will not be.

53. The Government has considered whether there are sufficient areas of ambiguity to justify attempting to produce a statutory definition of proceedings in Parliament. Over the years there have been a number of court cases in which the boundaries of the definition of proceedings have been tested.

54. In *Rost v Edwards* in 1990 Popplewell J considered that the Register of Members' Interests (and by extension the other registers kept by the two Houses) was not a proceeding in Parliament.[24] The Joint Committee on Parliamentary Privilege stated that, assuming the decision in *Rost v Edwards* to be correct, the law should be changed to make it clear that keeping the registers, and

[23] *Erskine May,* 24th edition (London, 2011), pp 235-236
[24] *Rost v. Edwards* [1990] 2 QB 460

the registers themselves, should be proceedings in Parliament, and therefore would be protected by parliamentary privilege.[25] The current law is, however, unambiguous that the registers are not proceedings in Parliament.

55. More recently, there was a significant concern when the defendants in criminal trials relating to MPs' and peers' expense claims raised the suggestion that they could not be prosecuted on the basis that submitting claims for expenses was part of proceedings; however, this argument was unanimously rejected by the Supreme Court in *R v Chaytor* and by the courts below.[26]

56. A further issue relates to the work of the Parliamentary Commissioner for Standards. In 1998 an application by Mohamed Al Fayed for judicial review of a decision of the Parliamentary Commissioner was dismissed on the grounds that such matters were properly within the exclusive cognisance of Parliament.[27] The Joint Committee stated that once a complaint is taken up for investigation by the Parliamentary Commissioner it becomes a proceeding in Parliament, a view reflected in the guidance of the Commissioner. The Joint Committee further recommended that this be placed on a statutory footing.[28] However, this does not seem to be an area of significant ambiguity.

57. One area of possible ambiguity is the extent to which absolute privilege attaches to material that could be considered "preparatory to" or "incidental to" proceedings – for example, early drafts of speeches or submissions to select committees, or material collected to inform such drafts. This particular issue arose in the instance of the arrest of Damian Green MP, where the police seized material that may have been privileged, but as the case was never brought to court the extent of that privilege was not tested.[29]

58. The Australian Parliamentary Privileges Act 1987 does extend absolute privilege to material "incidental to" proceedings, which includes material used in the preparation of speeches, questions, and other activities that the Member undertakes in Parliament. The Joint Committee on Parliamentary Privilege suggested the definition may be "too loose" and recommended instead the use of "necessarily incidental to" proceedings.

59. Neither of these approaches would eliminate the current ambiguity, however; and by making statutory provision, the determination of whether any particular material was subject to privilege or not would be considered by the courts as a matter of modern statutory interpretation, which may have the unintended effect of eroding or weakening parliamentary privilege.

60. The lack of a statutory definition can be seen as allowing for flexibility and allows for evolution of the concept over time. Sir William Blackstone in Book 1 of his Commentaries said:

> *If therefore all the privileges of parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of parliament. The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite.*[30]

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[25] The correctness of *Rost v Edwards* was doubted in the Privy Council case of *Prebble v Television New Zealand* [1995] 1 AC 321.
[26] *R v. Chaytor and others,* [2010] UKSC 52.
[27] *R v. Parliamentary Commissioner for Standards ex parte Al-Fayed* [2001] 1AC 295 HL
[28] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, para 126
[29] Committee on Issue of Privilege, Session 2009–10, *Police Searches on the Parliamentary Estate,* HC 62 [incorporating HC 1040-i, -ii and –iii of Session 2008-09]. See in particular chapter 6.
[30] Sir William Blackstone, *Commentaries on the Laws of England* (London, 1765), Book 1, 164

61. Recent court cases and recent legislative and administrative changes, such as the establishment of the Independent Parliamentary Standards Authority in the aftermath of the parliamentary expenses scandal, serve further to weaken the argument that there is a lack of clarity.

62. The Government believes that the current situation is satisfactory, and it is not persuaded of the need for change. The Government therefore does not plan to legislate in this area.

Q2: Do you think that "proceedings in Parliament" should be defined in legislation?

Privilege and communication with MPs

63. It has been argued that absolute privilege should be extended to correspondence, including emails, between constituents and their MPs.

64. Although there have been very few cases in which the House has considered the question of whether parliamentary privilege applies to communications between a constituent and their MP, it is clear that correspondence between MPs and their constituents has never been considered to be a proceeding. Certain correspondence (although not most correspondence between MPs and their constituents) might be held to be already subject to absolute privilege if closely connected or preparatory to parliamentary proceedings.

65. The case of *R v Rule* in 1937 determined that letters from constituents to MPs are not proceedings in Parliament.[31] It stated instead that letters from constituents to MPs might instead enjoy qualified privilege in the law of defamation, if they are about matters of public concern, local or national, or might reasonably be said to relate to the MP's (or Minister's) functions and responsibilities.

66. This means that a Member or a constituent has a good defence to defamation proceedings so long as they acted in good faith and without malice – although it should be noted that if the letter raises a purely personal matter having nothing to do with any business of the House there is no privilege.

67. Similarly, the House of Commons narrowly decided in 1958 that a letter from an MP to a Minister was not a proceeding.[32] That decision has since been considered by at least four parliamentary committees to be right in law, although some have argued that the law ought to be changed.[33]

68. In 2011, the Joint Committee on the Draft Defamation Bill recommended that the Government adds a provision in the Defamation Bill *"protecting all forms of communication between constituents and their MP (acting in his or her official capacity as an MP) by qualified privilege"*.[34]

69. The 1999 Joint Committee on Parliamentary Privilege did not recommend changing the law and extending "proceedings" to cover correspondence between MPs and Ministers. While it recognised an argument that it was difficult to draw a line of principle between parliamentary questions and such correspondence, the Committee concluded that a line had to be drawn somewhere, and that there was insufficient evidence of a current problem in practice to justify a re-drawing.

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[31] *R v Rule* [1937] 2KB 375

[32] *Strauss case,* (1958)

[33] Report from Select Committee on Parliamentary Privilege, HC 34 (1967–68); Second Report of Joint Committee on Publication of Proceedings (1969–70) HL 109, HC 261; Report of the Committee of Privileges, HC 417 (1976–77); and Joint Committee on Parliamentary Privilege (1998–99) HL 43 / HC 214.

[34] Joint Committee on Draft Defamation Bill, First report of Session 2010–12, *Draft Defamation Bill,* HL 203 HC 930, para 52

Arguments for and against extension of privilege

70. So far as defamation is concerned, Gatley on Libel and Slander states that qualified privilege protects a member of the public who passes information about a person's conduct to 'those who control or are concerned with the conduct in question' or 'the person who has the power or duty to remove, punish or reprimand the offender, or merely to inquire into the subject-matter of the complaint'.[35] This is subject to the usual test that the member of the public is acting in good faith and without malice.

71. It is not entirely clear that the degree of protection of privilege described above exists in the very different context of constituents wishing to discuss court proceedings with their MP where this has apparently been restricted by a court order, but the Committee on Super-Injunctions chaired by the Master of the Rolls said in their recent report that:

> *it seems possible that the same privilege would be extended to a person who wished to communicate to an MP information which was otherwise precluded from dissemination by an injunction. However, Erskine May appears to suggest that such a communication would only be protected if it was connected with proceedings in Parliament and was not communicated by the constituent in a personal capacity.*[36]

72. In one circumstance there clearly now is some protection for constituents who wish to discuss injuncted matters with a Member of either House, and that is in the circumstances of family court proceedings. 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 representative or peer to give advice, investigate any complaint or raise any question of policy or procedure.[37]

73. Though an individual's right to approach their MP is an essential part of the democratic process, this has to be balanced against the rights of others, including potentially the right to a fair trial and the right to privacy. Extending qualified privilege to all forms of correspondence could allow constituents effectively to ignore any legislation or court order that required information to be kept confidential. This would potentially include breaches of the Official Secrets Act 1989 or the Contempt of Court Act 1981, and could undermine the rule of law.

74. For example, extending qualified privilege could undermine the right to privacy, and more particularly the ability of the courts to protect it through anonymity injunctions (as parties to an anonymity injunction would be able to freely ignore it in communicating with their MP, who could then circumvent the order in Parliament).

75. Whilst acknowledging the importance for both constituents and MPs that there is an open dialogue between them, the Government believes that the current situation is appropriate, and that extending qualified privilege to <u>all</u> forms of correspondence is neither necessary nor desirable. Given the limited protections already extant here, extending qualified privilege to all correspondence between MPs and constituents would seem to run the risk of potentially encouraging correspondence to MPs intended to circumvent court orders and damage the privacy

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[35] Patrick Milmo, QC; W V H Rogers MA (Cantab); Richard Parkes, QC, Godwin Busuttil, Professor Clive Walker eds, *Gatley on Libel and Slander* (London, 2010)

[36] Report of the Committee on Super-Injunctions, *Super-Injunctions, Anonymised Injunctions and Open Justice*, 2011

[37] Practice Direction 14E – Communication of Information relating to proceedings, HM Courts and Tribunals Service, *www.justice.gov.uk*

or reputation of third parties, in effect extending the protection of privilege to those matters where there seems to be little justification for it applying. Constituents would already be able to obtain the necessary protection in defamation proceedings due to the qualified privilege attaching to correspondence made in good faith and without malice.

76. Due to these broader difficulties, and as the position in the context of defamation proceedings is already clear under the common law, the Government view is that on balance it would be preferable to allow the current position which enables the courts to determine the boundaries of privilege in individual cases to continue, rather than introduce a statutory qualified privilege for constituents' correspondence.

Q3: Do you agree with the recommendation of the Joint Committee on Parliamentary Privilege that the current protection of qualified privilege for Members' correspondence is sufficient?

Defining "place out of Parliament"

77. It can be argued that there is a lack of clarity as to what a "place out of Parliament" means. The Joint Committee on Parliamentary Privilege recommended that a "place" should be defined in statute to include any tribunal having power to examine witnesses on oath, so any statutory inquiry would be a "place".[38]

78. Such a definition would provide clarity and certainty as to which type of organisation or body could not question or impeach proceedings in Parliament.

79. The Parliamentary Privileges Act 1987 (Australia) replaces the phrase "court or place ..." with "any court or tribunal", and defines tribunal as any person or body having power to examine witnesses on oath, an approach which was broadly supported by the Joint Committee on Parliamentary Privilege. If such an approach were adopted in the UK, non-statutory inquiries would not be included as they do not have powers to examine witnesses on oath.

80. The term "court or place out of Parliament" has never been read as meaning *any* place, as this would have the absurd effect of stopping questioning of what was said in Parliament on the streets or in newspapers. Instead, in keeping with legal principles of interpretation, the assumption has been that the term applies to bodies which are similar to courts – the most obvious being tribunals.

81. Indeed, the Joint Committee acknowledged that, were a court to adjudicate on the matter, it would be likely to find that the statutory definition suggested by the Joint Committee would actually reflect the current situation.

82. The Government therefore does not believe it is necessary or desirable to define "court or place out of Parliament" as there is no evidence that this is not generally well understood.

Q4: Do you think that "place out of Parliament" should be defined in legislation?

The use of parliamentary proceedings in the courts

83. There is no blanket prohibition on the use of parliamentary debates and proceedings in court. In 1981, the House of Commons discontinued the practice of requiring leave of the House before

[38] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, para 96

such debates and proceedings could be referred to in court. The prohibition in Article IX is on "impeaching or questioning" such proceedings only. There is a question as to whether it is desirable that the boundaries of such usage be enshrined in statute.

84. Over recent decades, courts have made the following uses of "proceedings":

- Where there is an ambiguity in primary legislation, clear statements made by the minister promoting the Bill may be relied upon as an aid to interpreting that legislation *(Pepper v Hart 1993);*[39]
- When evaluating whether primary legislation is compatible with the European Convention on Human Rights, courts may rely on ministerial statements as background information *(Wilson v First County Trust Ltd (No 2) 2003);*[40]
- Hansard can be referenced to prove what was done and said in Parliament "as a matter of history", provided that this is not used to suggest that the words were "improperly spoken" *(Prebble v Television New Zealand 1995);*[41]
- In judicial reviews, courts have admitted Ministerial statements to Parliament to demonstrate what Government policy is *(ex parte Brind 1991);*[42] and
- Similarly, the Privy Council accepted that a Minister's statement in Parliament could be relied upon to explain the motivation for executive action outside of Parliament (even to the extent that that statement was evidence that the action was an improper exercise of power) *(Toussaint 2007).*[43]

85. The reason that these apparent exceptions have arisen is that none of these uses of proceedings by the court is seen to "impeach or question" proceedings; in each case, the courts are interrogating matters of fact. These uses of parliamentary materials by the courts are widely accepted in Parliament, Government and the courts as representing sensible, pragmatic positions.

86. The Joint Committee on Parliamentary Privilege noted the shared interest courts and Parliament have in scrutinising the activities of Government, and concluded that it would be "bizarre" if "challenges to the legality of executive decisions could be hampered by ring-fencing what ministers said in Parliament and excluding such statements from the purview of the courts". The Joint Committee argued that the current position should be enshrined in law, along the lines of the provision in the Australian Act.

87. The Joint Committee's suggested approach was to provide in law that Article IX "should not preclude the use of parliamentary proceedings in court for the purpose of judicial review of governmental decisions or in other court proceedings in which a governmental decision is material."[44]

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[39] *Pepper v. Hart* [1993] 1 AC 593
[40] *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40
[41] *Prebble v Television New Zealand* [1995] 1 AC 321
[42] *R v Secretary of State for the Home Department, ex parte Brind* [1991] AC 696
[43] *Toussaint v. Attorney General of Saint Vincent and the Grenadines* [2007] UKPC 48
[44] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege,* para 55

88. It is not clear that such statutory provision would maintain the existing status quo, which the Joint Committee appeared to consider was satisfactory. The Government believes that the current situation, whereby the courts can use proceedings in Parliament as long as they are not questioned or impeached, is perfectly satisfactory, and that providing a definition in statute, in the absence of a complete codification of privilege, would not be necessary or desirable.

Q5: Do you think that the situations when the courts can use proceedings in Parliament should be set out in legislation?

Chapter 3 – Freedom of speech and criminality

89. There have been questions in recent years as to whether the protection afforded to freedom of speech in Parliament might act as an obstacle to the prosecution of criminal offences.

90. The potential barrier to any prosecution would be the prohibition on the questioning of proceedings in Parliament by a court, as set out in Article IX of the Bill of Rights 1689:

> *the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.*

91. In Scotland the Claim of Right Act 1689 states:

> *That for redress of all grievances, and for the amending, strengthening, and preserving of the laws, Parliament ought to be frequently called and allowed to sit, and the freedom of speech and debate secured to the members.*

92. As set out in Chapter 2, the protection of freedom of speech provided by parliamentary privilege is a vital part of the constitutional fabric of the United Kingdom. It is intended to enable Parliament to fulfil all of its proper functions, without interference from the Crown or the courts. In particular, both the Bill of Rights and the Claim of Right Act highlight the freedom of speech and debate which are clearly central to the ability of parliamentarians to reach informed decisions, whether in considering proposals for legislation, scrutinising Government performance or debating issues of concern to members of the public.

93. There is though a strong argument that it would be wrong if MPs or peers accused of serious criminal offences could use parliamentary privilege to avoid criminal prosecutions, where these are not related to the key elements of freedom of speech and debate. The 1999 Joint Committee on Parliamentary Privilege suggested disapplying the protection of privilege in cases of corruption or bribery, so that proceedings in Parliament could be questioned in court, and the previous Government published draft legislation to disapply the protection of privilege in bribery and corruption cases.[45]

[45] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, para 167

94. One way to prevent such a situation would be to enable the use of proceedings in Parliament as evidence in criminal courts, unless there is a clear reason why it should not be admissible. It can be argued 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. The logic of this argument would be that the protection of privilege should not as a general rule be available where proceedings in Parliament are relevant to court proceedings in a criminal case.

95. At the end of this chapter of the Green Paper there are therefore illustrative clauses which would disapply the protection of privilege as a general rule to enable proceedings in Parliament to be used as evidence in a prosecution. The approach used here is to provide that the disapplication applies generally, subject only to some limited specified exceptions.

96. There are precedents for statutory limitations on free speech in parliamentary proceedings. Erskine May states that "although Article IX of the Bill of Rights has not been textually amended since its enactment, a number of statutes still in force... have made amendments by implication."[46] The Parliamentary Oaths Act 1866, the Parliamentary Witnesses Oaths Act 1871 and the Perjury Act 1911 can all be seen as implying the effective amendment of the protection of privilege. These provisions have been in existence for a long time, and have not led to a curtailment of the freedom of speech in Parliament.

97. Clauses 1 to 3 have therefore been drafted to have the effect of disapplying the protection of privilege in all criminal cases, except where specified offences are being prosecuted.

98. If this approach were followed, there would only be exceptions 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. These offences are listed in the Schedule.

99. Parliamentary privilege would still protect Members and other participants in proceedings from civil action – for example from proceedings for defamation, or for civil contempt of court (for example if they named someone who was subject to an anonymity injunction). Each House would still have the power to limit the extent to which participants in its proceedings might breach the principles behind these laws, for example through the *sub judice* rules.

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".[47]

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.

[46] *Erskine May*, 24th edition (London, 2011), p 239

[47] Report of the Joint Committee on the Draft Corruption Bill, Session 2002–03, *Draft Corruption Bill,* HL 157 / HC 705, para 124, p43

Relevant offences

102. There are a number of criminal offences that theoretically could be committed in proceedings in Parliament by an MP, peer, or non-member. The questioning of parliamentary proceedings also may be relevant for criminal offences which are not alleged to have been committed in proceedings in Parliament, but for which proceedings in Parliament may be relevant evidence. In addition, the defendant may wish to have proceedings in Parliament questioned, as part of the defence case.

103. Where criminal offences have been committed recently in Parliament, such as when a person participating in proceedings has been assaulted, the existence of parliamentary privilege has not prevented a prosecution being brought. The fact that the criminal offence has taken place *during* proceedings is not the same as stating that it has taken place *in* proceedings. Erskine May states "it would be hard to show how a criminal act committed by a Member ... could form part of the proceedings of the House."[48]

104. In the case of the vast majority of criminal offences, it is very difficult to see how they could ever be committed in parliamentary proceedings (although there could be confessions made in proceedings). Examples of offences that could not be committed in proceedings would include any form of theft, arson, or falsification of a passport.

105. It is therefore in practice not likely that the disapplication of the protection of privilege would be relevant in all that many situations; however, there are some situations where it is possible that not being able to question proceedings in Parliament could prevent a criminal prosecution being successfully brought, and some examples are set out below.

Bribery and corruption

106. One area where concern has been expressed that the protection of privilege could prevent a successful prosecution being brought is for bribery and corruption offences. Currently, for example, an MP could be accused of accepting a bribe to change his or her vote on an issue, or to ask questions in Parliament. It would be likely that the offer of bribery took place outside of proceedings, while the conduct took place in proceedings. However, the evidence that actually demonstrates the action for which the bribe was paid could not be questioned in court (even though it might be able to be cited as fact), which could potentially undermine any criminal proceeding.

107. To prove bribery or corruption it may be sufficient to prove that the offer of a bribe was made or sought, or that an unlawful agreement was reached, and so not necessary to demonstrate that the bribe actually led to any particular conduct. In such a scenario proceedings in Parliament would not need to be questioned, hence the protection of privilege would not need to be disapplied. It is possible to cite successful prosecutions in the USA and elsewhere which support this line of argument – the lead case being *US v Brewster* in 1972.[49]

108. However, notwithstanding that some bribery cases have been successfully prosecuted in other jurisdictions through direct proof that a bribe was offered or solicited, it does not necessarily follow that prosecutors should be required to rely on such an approach in all investigations into alleged bribery. As in other criminal cases, prosecutions can in principle also be made by producing a patchwork of evidence of different types, where no individual component is sufficiently compelling

[48] *Erskine May*, 24th edition (London, 2011), p 242
[49] *US v Brewster* (1972) 408 US 501

but the cumulative effect is overwhelming. Proceedings in Parliament could very easily form a necessary part of that patchwork. The key question would seem to be whether it is right in principle to deny the courts access to any relevant evidence when the allegation is as serious as bribery.

109. A dissenting opinion from the Brewster case, related in particular to the way the indictment was framed, suggested that any consideration of whether a bribe was taken will naturally also cause a court to question (if only by inference) whether the recipient of the bribe then acted on it. In light of the dissenting opinion, it seems at the least open to question whether a bribery case against an MP or peer accused of taking payments to change their vote could be successfully conducted without the ability to question proceedings in Parliament. This raises the issue of whether disapplication of privilege is needed if Members are to be subject to this criminal offence.

110. Equally, it is very possible that a defendant in such circumstances would seek to use proceedings (possibly comparable to his or her own alleged criminal conduct) in a case, and would claim he or she could not mount a defence and obtain a fair trial without reference to such proceedings.

111. The previous Government and the Joint Committee on Parliamentary Privilege saw the need for legislation here as greater than the danger of the potential chilling effect.[50] The draft clauses would have the effect that proceedings in Parliament can be examined in prosecutions for bribery and corruption as part of the general disapplication of parliamentary privilege in criminal proceedings.

Other offences

112. As well as the bribery and corruption example discussed above, other hypothetical possibilities of criminal offences for which proceedings in Parliament could contain relevant evidence include:

- making a false or misleading statement which induces a person to make an investment (section 397 of the Financial Services and Markets Act 2000);
- conspiracy to defraud, contrary to common law (for example, if an MP were to agree to make an untrue speech questioning the financial stability of a company, in order to profit from a drop in its share price); and
- blackmail (for example an MP could in theory use a debate in Parliament to make statements that, unknown to the audience in the House, but known to the target outside the House, amount to an act of blackmail).

113. Notwithstanding the unlikeliness of the situations, the arguments here are the same as those for bribery. To enable criminal proceedings to take place it could be necessary for the prosecution and the defence to be able to question the motives behind any such statement or action, rather than simply being able to show that it was said. It is difficult, if not impossible, to think of circumstances in which it would be appropriate for anyone to commit any of these offences in proceedings. This being the case, the chilling effect in allowing prosecutions for these offences to use parliamentary material would be limited: participants participating in good faith in proceedings would have no reason to be nervous owing to a fear of being prosecuted for any of these offences. There could,

[50] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege,* para 167. The Joint Committee on the Draft Corruption Bill, (para 134-135) had the same view. See also the Draft Corruption Bill 2003, the Draft Bribery Bill 2009, and the Joint Committee on the Draft Bribery Bill, Report of session 2008–09, para 224-228

though, remain the fear that participants could be called to court as witnesses and end up having to justify what they said.

114. In addition, it is possible that evidence contained in proceedings in Parliament might be introduced by the prosecution where such evidence may not directly show the commission of an offence, but would be supporting evidence which would serve, for example, to prove the motive for the offence.

115. Clause 1 would provide that the protection of privilege would be disapplied to enable proceedings in Parliament to be questioned in criminal proceedings generally, including where a prosecution was brought for the above offences. An alternative approach would be to limit any disapplication to some or all of the above offences.

Q6. Do you believe that the protection of privilege should be disapplied in cases of alleged criminality, to enable the use of proceedings in Parliament as evidence?

Q7: If so, do you believe that this disapplication should apply to all cases of alleged criminality unless specifically excepted, or should disapplication be restricted to certain specific offences such as bribery?

Offences to be excluded

116. A general disapplication of the protection of privilege would cover all criminal offences. Were there to be no exceptions to this rule, there would undoubtedly be a chilling effect which would limit the freedom of speech of Members, and have a negative effect on the frank deliberations of Parliament.

117. Parliament is the paramount forum of the nation. It passes legislation, is a forum for debate, and scrutinises the activities of the Government, and in doing so – as in carrying out all of its functions – it should be able to have access to any fact or opinion which might influence its deliberations, in order to make the best possible decisions. Participants in proceedings should not therefore be deterred from expressing their genuinely held opinions or sharing information with the House by having to even consider whether they may be acting in breach of laws which limit free speech outside of proceedings.

118. An example might be if either House was debating legislation on obscenity. In order to do so, Members might regularly need to make reference to material that currently might be considered to be in breach of the law, and discuss whether the position ought to change. In having that discussion, Members would potentially be severely curtailed in their ability to contribute to any debate if they had to consider whether each statement they made risked being itself a breach of the current law. This would in turn clearly restrict the value of the debate, and could result in less fully considered legislation. Similarly, the activities and report of a select committee in, for example, an investigation into hate speech, could be curtailed by fear of a prosecution.

119. The draft clauses at the end of this chapter reflect a view that there is a category of such criminal offences, which might broadly be described as "speech offences", to which individuals should continue not to be subject while they are participating in parliamentary proceedings. Broadly, these offences can be committed by speech or the dissemination of information. In addition, parliamentary proceedings should not be able to be questioned by the courts if a third party is being prosecuted for any of these offences. This reflects the primary purpose of parliamentary privilege: the protection of free speech and debate in Parliament.

120. Subsection (2) of clause 1 would provide that certain criminal offences, which are listed in the Schedule, would be excepted from the disapplication of the protection of privilege. Proceedings in Parliament would not be able to be questioned by the courts in proceedings for those offences and the current situation would continue to apply. The list is intended to be illustrative rather than exhaustive at this stage, as arguments can be made as to the desirability of including or excluding these or other offences from the list of exceptions.

121. Clause 2 contains a limited power to amend the list in the Schedule, which would only be exercisable if the Minister considered it necessary to do so as a result of a change in the criminal law made after any legislation on privilege had been passed. As offences can be created by secondary legislation, as well as by primary legislation, it is considered necessary to include this power. As drafted, the power would be subject to the affirmative resolution procedure: that is, it would have to be approved by each House before becoming law.

122. This power is designed to ensure that new offences can be added to the list, obsolete offences deleted to keep the list up to date, or tecŸical amendments to the criminal law reflected. The limitation at subsection (2) would prevent the overall scope of the Schedule being altered other than by primary legislation.

123. The list set out in the Schedule includes the following speech offences:

- Use of threatening words or behaviour intended to stir up racial or religious hatred, under the Public Order Act 1986 as amended by the Racial and Religious Hatred Act 2006;
- Use of threatening words or behaviour intended to stir up hatred on the grounds of sexual orientation, under the Public Order Act 1986 as amended by the Criminal Justice and Immigration Act 2008;
- Threatening or abusive behaviour under Criminal Justice and Licensing (Scotland) Act 2010;
- Encouragement of terrorism, under the Terrorism Act 2006;
- Criminal contempt of court under the Contempt of Court Act 1981 (which makes it a strict liability offence to publish material which creates a substantial risk of prejudice or impediment to active court proceedings. "Publication" includes communication by speech); and
- Breach of the Official Secrets Act 1989.

124. Although these offences would remain protected by parliamentary privilege, it would be open to the two Houses (as now) to make rules limiting the speech of their Members and other participants in their proceedings. For example, the *sub judice* rules of the two Houses limit the circumstances in which Members are permitted to discuss cases in which proceedings are active in UK courts. Similar rules could in principle be adopted to limit (for example) the exposure of official secrets, were they so desired by either House.

Offences related to passing information

125. There are a number of offences related to passing information which could be committed when information is passed to an MP or peer. Examples include:

- Disclosure of documents, information or other articles relating to security, intelligence, defence or damaging to international relations (Official Secrets Act 1989);

- The obtaining, disclosing or procuring of personal information without the consent of the data controller (Data Protection Act 1998);

- Wrongful disclosure breaking taxpayer confidentiality (Commissioners for Revenue and Customs Act 2005); and

- Disclosure of information that might prejudice a trial (Contempt of Court Act 1981).

126. In such cases the alleged act of criminality would have been likely to have been committed not by the MP or peer but by the person passing the information to them. However, it may be that the only way to establish that such information was passed would be to examine proceedings in Parliament to show that the information was acted upon. In such a case a successful criminal prosecution may depend on what was said by a Member in proceedings, which is not currently admissible in court.

127. The Government does not condone unlawful conduct by holders of protected information. However, participants in parliamentary proceedings should not have to worry in stating information to the House that criminal consequences could flow to others as a result. Such a situation would be an example of the chilling effect, and could potentially act to deter whistleblowers. The list of exceptions set out in the Schedule therefore includes a number of offences related to the passing of information, so that proceedings in Parliament continue to attract the protection of privilege in regard to these matters. As now, where unlawful disclosure of information has occurred, criminal proceedings can be brought without the use of proceedings in Parliament.

Q8: Do you agree that if the protection of privilege were disapplied in criminal cases, exceptions would need to be made?

Q9: If so, are the offences specified in the draft Schedule the correct ones? If not, which offences should be included or excluded?

Specific acts of incitement

128. It is in theory currently possible in proceedings in Parliament for a speaker to incite or encourage any criminal act, not just in abstract terms but directly and specifically.

129. Under the clauses as currently drafted, such acts of incitement or encouragement to any criminal offence would be included in the list of exceptions for which the protection of privilege would continue to apply.

130. The question arises as to whether that is desirable, or whether it would be preferable to disapply the protection of privilege so that proceedings in Parliament could be used to bring a criminal charge of incitement to a specific act of violence. Arguably, there is a qualitative difference between expressing views in the course of a debate in general terms, and inciting or encouraging specific acts of violence.

131. The Government is interested in views as to whether incitement to violence should be considered as a "speech offence", and so continue to be protected by parliamentary privilege due to the importance of protecting freedom of speech in proceedings in Parliament, or whether such protection should be disapplied.

Q10: Should the protection of privilege be disapplied where a person incites specific acts of violence or terrorism in proceedings in Parliament?

Misconduct in public office

132. It is possible that an MP could be charged with misconduct in public office, a common law offence in England and Wales. Committing "misconduct in a public office" can be a serious criminal offence punishable by a maximum sentence of life imprisonment. There is no exhaustive definition of what misconduct covers: indeed action which amounts to misconduct is highly likely to also be contrary to other laws. As a result the boundaries of the offence are uncertain, and despite there being relatively few prosecutions each year, a disproportionately high number of those cases are appealed.

133. When the first successful prosecution was made recently under the Bribery Act 2010, the guilty party (a court clerk) was also convicted of misconduct in public office, which had the effect of extending the sentence. It would be considered to be difficult if privileged evidence could be considered in light of one offence, e.g. bribery, and not in light of any misconduct in public office charge for the same behaviour.

134. On the other hand, due to the uncertainty as to precisely what activities the offence covers, it is possible that a charge of misconduct in public office could be brought relating to an offence which is on the list of exceptions in the draft Schedule. It would be wrong in principle if a charge of misconduct in public office were to be substituted for a charge on the list of exceptions, and proceedings in Parliament thereby questioned in court through a back door route for conduct which Parliament had specifically decided to protect.

135. For that latter reason the common law offence of misconduct in public office is on the list of exceptions.

136. In 2010, in relation to Damian Green MP's arrest, the Committee on Issues of Privilege (Police Searches on the Parliamentary Estate) made the following comment and recommendation:

> *In our view the current law on misconduct in public office remains unsatisfactory, not least because it is punishable with up to a life sentence. We recommend that the Law Commission re-visit its 1997 recommendation that misconduct in public office be made a statutory offence, in the light of developments of the past dozen years.*

137. The Law Commission is due to undertake a review of the offence of misconduct in public office, starting in early 2014, aiming to open a consultation in early 2015 and produce a final report in summer 2016.[51] If legislation were enacted on the basis of the draft clauses published here, the position of the offence of misconduct in public office could be reconsidered after the Law Commission's review.

[51] Misconduct in Public Office, Law Commission, http://lawcommission.justice.gov.uk/areas/misconduct.htm

Q11: Do you agree that the offence of misconduct in public office should be on the list of exceptions?

Safeguards

138. When the 1999 Joint Committee recommended that Members of both Houses should be brought within the law of bribery through disapplication of the protection of privilege, it considered that a safeguard was necessary to protect against vexatious prosecutions and the unnecessary questioning of parliamentary materials by the courts. The Government has therefore explored what form such a safeguard might take.

139. The purpose of any safeguard would be to ensure that there is a check at an appropriately senior level on the use of evidence of proceedings in Parliament, which balances the importance of protecting freedom of speech and debate in Parliament, and therefore minimising any chilling effect, against the importance of ensuring that justice is done in criminal cases. In practice such an assessment would be likely to include a consideration of the likelihood of conviction if such evidence is not considered by the court.

140. The Joint Committee's preferred safeguard was that prosecutions of Members of either House should require the personal consent of the Attorney General or, in Scotland, the express consent of the Lord Advocate. The Committee did however note that the then Attorney General told them it would be unsatisfactory for the Attorney General, as a Member of the House of Commons, to have the task of deciding whether another Member should be prosecuted, a view shared by successive Attorneys General.

141. The draft clauses in this chapter would therefore instead provide a similar safeguard to the consent of the Attorney General, by requiring the consent of the relevant prosecuting authority to the use of proceedings in Parliament as evidence in a prosecution. The relevant prosecuting authority would be, in England and Wales, the Director of Public Prosecutions (DPP), the Director of the Serious Fraud Office, or the Director of Revenue and Customs Prosecutions; and in Northern Ireland, the Director of Public Prosecutions for Northern Ireland, or the Director of the Serious Fraud Office. If the relevant prosecuting authority were unavailable, the clause provides that it would be possible for consent to be given by a designated person (subsection (7) of clause 3 would ensure that personal consent would also be required in Northern Ireland, and disapply the usual ability of delegation there).

142. Subsection (3) of clause 3 would provide that when giving consent, the relevant prosecuting authority would have regard to the public interest in the consent being given, considering the circumstances of the case including the seriousness of the offence and the public interest in the continuing protection of privilege, including the protection of freedom of speech and debate in Parliament.

143. The position in Scotland is distinct and requiring the consent of the Lord Advocate is not deemed necessary. Solemn proceedings (which cover the most serious cases) run in the name of the Lord Advocate and are prepared and conducted by Crown Counsel. Crown Counsel act on the delegated authority of the Lord Advocate and must authorise such proceedings. They ensure consistency in prosecution approach to such proceedings. The use of evidence of proceedings in Parliament, bearing in mind the rarity of any cases in the courts in Scotland, would be carefully considered. For these reasons explicit provision does not need to be set out in the draft clauses.

144. The safeguard of requiring the consent of the relevant prosecuting authority would be in addition to the normal operation of the rules of evidence, determining that only relevant and reliable evidence is admissible. These rules prevent the unnecessary questioning of evidence of proceedings in Parliament either by the prosecution or the defence, where such questioning would not be relevant for the trial in question.

145. The possibility of vexatious private prosecutions might also be perceived as a risk. However, a requirement for the consent of the relevant prosecuting authority would mean that the authority would be made aware of any private prosecution being brought seeking to rely on evidence of proceedings in Parliament, and would be able to refuse or grant consent. Additionally, the DPP would be able to exercise the existing power to take over private prosecutions and continue or halt them, all of which mitigates the risk of vexatious private prosecutions, while allowing those properly brought to continue. A similar situation pertains in Northern Ireland, where private prosecutions are not common. In Scotland private prosecutions are very rare and require an application to the High Court: there were only two in the whole of the twentieth century.

146. For a number of the offences in which proceedings in Parliament may be relevant, including cases brought under the Bribery Act 2010, the DPP or DPP (NI) is in any case required to give personal consent to any prosecution being brought. No change is proposed to this, so the requirement to obtain this consent for bribery and other specified offences would remain.

147. It should be noted that gaining consent for the use of evidence of proceedings in Parliament would be novel. Consent is usually, but not exclusively, given due to the type of offence committed (e.g. consent is required to prosecute for bribery offences). The requirement to gain consent to the use of evidence would apply to proceedings for any criminal offence that is not on the list of exceptions where it is desired by the prosecution to rely on proceedings in Parliament as evidence.

148. To avoid devising a wholly new mechanism, the Government also considered an alternative option whereby a judge, possibly in the High Court, would be required to give consent to the use of evidence of proceedings in Parliament. The shortcomings of this approach are primarily that a court would be involved in deciding whether the courts should be questioning proceedings in Parliament. For this reason this route has not been pursued.

Defence use of material

149. The Joint Committee did not consider whether a safeguard was necessary before use of proceedings in Parliament as evidence by the defence in a criminal prosecution. This may reflect a lesser concern about any potential chilling effect arising from defence use of proceedings in Parliament; the chilling effect of allowing defence use would be expected to be minimal, as it would be unlikely to directly lead to criminal liability for any individual not already under prosecution. The draft clauses do not therefore provide any requirement for the defence to obtain consent to use of proceedings in Parliament as evidence. The rules of evidence, determining that only relevant and reliable evidence is admissible, would of course continue to operate as normal.

150. Subsection (3)(b) of clause 1 would provide that, where the defence chose to introduce proceedings in Parliament as evidence, the prosecution would then be allowed to use proceedings in Parliament without recourse to the relevant prosecuting authority.

Q12: Do you believe that, if the protection of privilege were disapplied in certain circumstances, a safeguard would be desirable before proceedings in Parliament could be used in evidence by the prosecution in specific cases?

Q13: If so, do you support the approach in the draft clauses?

Retrospection

151. The draft clauses published here would only take effect with regard to criminal proceedings for offences committed after any legislation came into force, and would not be applied retrospectively.

152. This would be to ensure that a person could not be prosecuted, for example, for saying something before a select committee that would suggest that a criminal offence had been committed by that person, when at the time the witness could have legitimately assumed that the protection of privilege would apply to any evidence given.

153. Clause 1 subsection (4) would also provide that if, on the day that an offence is alleged to have been committed, or on the last day if it is alleged to have been committed on more than one day, an offence is on the list of exceptions, then it would be treated as being on the list of exceptions regardless of whether it is subsequently removed, and so therefore proceedings in Parliament cannot be questioned in court. This would apply equally to an offence which is subsequently added – the continued protection of privilege would only apply if the offence was listed at the time it was alleged to have been committed.

Disapplication of parliamentary privilege with regard to non-members

154. It is possible that some offences (e.g., blackmail, acting upon a bribe, or talking up share prices) could be committed in proceedings by non-members, most notably witnesses to select committees (although non-members can otherwise participate in proceedings).

155. Other offences could be committed where the offence did not take place in the proceedings themselves, but where the consideration by the court of proceedings in Parliament would be essential to the effective prosecution of the case. This could be the case in, for example, an allegation of bribery against the person alleged to have given the bribe. This might be either because the prosecution needs to rely on the evidence, or because without recourse to such evidence the defendant might successfully claim that he or she could not have a fair trial.

156. For these reasons, there is a case for the protection of privilege being disapplied for non-members on the same basis as for Members.

157. However, disapplying parliamentary privilege for non-members highlights particular difficulties. Foremost among these is the potential chilling effect for witnesses giving evidence to select committees. This approach would end the current situation where a witness can give evidence knowing that the evidence cannot be questioned by the courts (unless the evidence is given under oath, which is very rare). It would also increase the risk (inherent in the proposals more generally) that evidence given to a select committee might be the subject of subsequent cross-examination in court, even if the witnesses were not themselves the subject of prosecution.

158. The Government is interested in any views as to whether this approach would in practice have a significant effect on the nature and tone of select committee proceedings. It would likely mean that witnesses would be more careful about the evidence they gave to a select committee, and more likely to claim a right to legal advice in giving evidence, possibly even refusing to answer a question. This may especially be the case in high-profile select committee hearings dealing with matters where criminality may be an issue. The issue of select committee powers is addressed elsewhere in the Green Paper.

Self-incrimination

159. If it were possible for proceedings in Parliament to be admissible as evidence in criminal proceedings, this would raise the potential for self-incrimination, most notably for the statements of witnesses examined in select committees. The right to a fair trial[52] includes the right "to remain silent and not to contribute to incriminating himself".[53] In protecting against self-incrimination, the nature and degree of compulsion used to obtain the evidence, the existence of safeguards and ultimate use of evidence are all relevant. Staff of committees would need to make witnesses to committees aware of the possibility of self-incrimination and the committee would need to be aware of this in their questioning.

160. The Joint Committee on Parliamentary Privilege set out a list of contempts of Parliament in their report, which included "without reasonable excuse, refusing to answer a question or provide information or produce papers formally required by the House or a committee."[54] While it would be up to the House to determine what constitutes a reasonable excuse, the risk of self-incrimination might be considered to be one, limiting the degree of compulsion required. In addition, the safeguard of requiring the consent of the relevant prosecuting authority for the prosecution use of evidence of proceedings in Parliament would protect against the use of proceedings in Parliament as evidence where the public interest was not in favour of prosecution (this could include where the evidence was considered self-incriminatory). These factors would diminish the risk of self-incrimination.

Limited disapplication

161. An alternative option would be for a more limited disapplication of the protection of privilege only for when a non-member is being tried on the same facts as an MP or peer, along the lines of the proposal put forward in clause 15 of the draft Bribery Bill 2009.

162. Clause 15 provided that the protection of privilege should be disapplied in a limited manner for non-members, so as to capture a non-member being prosecuted on the same facts as an MP or peer, but not a general disapplication for non-members. These provisions were not included in the Bribery Act 2010 (although the reasons for this were connected to general concerns about privilege, rather than the specific proposals about the treatment of non-members alone).

Q14: Do you believe the protection of privilege should in certain circumstances be disapplied for non-members as well as for Members?

Q15: If so, do you believe this should be:

a) in all the same situations as for Members; or
b) only when a non-member is being tried on the same facts as a Member?

[52] Article 6 of the European Convention on Human Rights.
[53] *Funke v France* (1993) 16 EHRR 297; *Saunders v UK* (1996) 23 EHRR 313
[54] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, para 264

Draft clauses

Evidence relating to proceedings in Parliament

1 Admissibility of evidence relating to proceedings in Parliament

(1) No enactment or rule of law preventing the freedom of speech and debates or proceedings in Parliament being impeached or questioned in any court or place out of Parliament is to prevent any evidence being admissible in proceedings for an offence.

(2) Subsection (1) does not apply to proceedings for an offence that is specified in the Schedule to this Act.

(3) Subsection (1) does not apply to evidence sought to be led by the prosecution in proceedings in England and Wales or in Northern Ireland unless—

(a) consent to the leading of that evidence by the prosecution has been given in accordance with section 3, or

(b) evidence has already been led by the defence that would not have been admissible apart from this section.

(4) The reference in subsection (2) to an offence being specified in the Schedule to this Act is to its being specified in the Schedule as it has effect—

(a) on the day the offence is alleged to have been committed, or

(b) where the offence is alleged to have been committed over a period of two or more days, or at some time during a period of two or more days, on the last of those days.

2 Power to amend Schedule

(1) The Minister may by order made by statutory instrument amend the Schedule to this Act.

(2) That power may only be exercised if it appears to the Minister appropriate to do so as a result of a change in the criminal law made after this Act is passed.

(3) An order under this section must not be made unless a draft of the statutory instrument containing it has been laid before, and approved by a resolution of, each House of Parliament.

(4) An order under this section may make transitional, transitory or saving provision.

(5) In this section "the Minister" means the Lord President of the Council or the Secretary of State.

3 Consent to use by prosecution of evidence of proceedings in Parliament

(1) The function of giving consent for the purposes of section 1(3)(a) is to be exercised by the relevant prosecuting authority.

(2) "The relevant prosecuting authority" means—
  (a) in relation to proceedings in England and Wales—
    (i) the Director of Public Prosecutions,
    (ii) the Director of the Serious Fraud Office, or
    (iii) the Director of Revenue and Customs Prosecutions;
  (b) in relation to proceedings in Northern Ireland—
    (i) the Director of Public Prosecutions for Northern Ireland, or
    (ii) the Director of the Serious Fraud Office.

(3) In deciding whether to give consent the relevant prosecuting authority must have regard to—
  (a) the circumstances of the case, including the seriousness of the alleged offence, and
  (b) the need to protect the freedom of speech in Parliament.

(4) Consent must be—
  (a) in writing, and
  (b) given personally by the relevant prosecuting authority.

(5) Subsection (4)(b) does not apply to consent given in relation to proceedings in England and Wales if—
  (a) the relevant prosecuting authority is unavailable, and
  (b) the consent is given personally by a designated person.

(6) "A designated person" means a person who is designated in writing by the relevant prosecuting authority acting personally as authorised to give consent for the purposes of section 1(3)(a) when the relevant prosecuting authority is unavailable.

(7) Subsection (4)(b) does not apply to consent given in relation to proceedings in Northern Ireland if—
  (a) apart from that provision, the consent could be given by the Deputy Director by virtue of section 30(4) or (7) of the Justice (Northern Ireland) Act 2002 (exercise of functions of Director by Deputy Director), and
  (b) the consent is given personally by the Deputy Director.

(8) "The Deputy Director" means the Deputy Director of Public Prosecutions for Northern Ireland.

SCHEDULE

Section 1

OFFENCES TO WHICH SECTION 1 DOES NOT APPLY

Common law offences

Contempt of court under the strict liability rule (within the meaning of the Contempt of Court Act 1981: see section 1 of that Act).

Misconduct in public office.

Statutory offences

An offence under section 4 of the Offences Against the Person Act 1861 (conspiring or soliciting to commit murder).

An offence under any of the following sections of the Incitement to Disaffection Act 1934—

(a) section 1 (endeavouring to seduce member of forces from duty or allegiance);
(b) section 2 (having possession or control of document in connection with an offence under section 1).

An offence under section 2 of the Obscene Publications Act 1959 (prohibition of publication of obscene matter).

An offence under section 42 of the Police (Scotland) Act 1967 (causing disaffection in police force etc).

An offence under section 1 of the Indecent Displays (Control) Act 1981 (indecent displays).

An offence under section 51 of the Civic Government (Scotland) Act 1982 (obscene material).

An offence under any of the following sections of the Public Order Act 1986—

(a) section 4A (intentional harassment, alarm or distress);
(b) section 5 (harassment, alarm or distress);
(c) section 18 (use of words or behaviour or display of written material);
(d) section 19 (publishing or distributing written material);
(e) section 29B (use of words or behaviour or display of written material);
(f) section 29C (publishing or distributing written material);
(g) section 29E (distributing, showing or playing a recording).

An offence under any of the following articles of the Public Order (Northern Ireland) Order 1987 (S.I. 1987/463 (N.I. 7))—

(a) article 9 (use of words or behaviour or display of written material);
(b) article 10 (publishing or distributing written material);

(c) article 11 (distributing, showing or playing a recording).

An offence under section 6 of the Ministry of Defence Police Act 1987 (causing disaffection in Ministry of Defence Police etc).

An offence under any of the following sections of the Official Secrets Act 1989—

(a) section 1 (security and intelligence);
(b) section 2 (defence);
(c) section 3 (international relations);
(d) section 4 (crime and special investigation powers);
(e) section 5 (information resulting from unauthorised disclosures or entrusted in confidence);
(f) section 6 (information entrusted in confidence to other States or international organisations);
(g) section 8 (safeguarding of information).

An offence under section 91 of the Police Act 1996 (causing disaffection in police force etc).

An offence under section 55(3) of the Data Protection Act 1998 (obtaining, disclosing or procuring the disclosure of personal data without the consent of the data controller).

An offence under section 68 of the Police (Northern Ireland) Act 1998 (causing disaffection in police force etc).

An offence under any of the following sections of the Terrorism Act 2000—

(a) section 12 (support of a proscribed organisation);
(b) section 59 (incitement of terrorism overseas: England and Wales);
(c) section 60 (incitement of terrorism overseas: Northern Ireland);
(d) section 61 (incitement of terrorism overseas: Scotland).

An offence under section 19 of the Commissioners for Revenue and Customs Act 2005 (wrongful disclosure of revenue and customs information that reveals identity of a person).

An offence under any of the following sections of the Terrorism Act 2006—

(a) section 1 (encouragement of terrorism);
(b) section 2 (dissemination of terrorist publications).

An offence under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) (threatening or abusive behaviour).

Ancillary offences

A relevant ancillary offence.

An offence under the law of England and Wales or of Northern Ireland is a "relevant ancillary offence" if it is—

(a) an offence committed by aiding, abetting, counselling or procuring its commission,
(b) an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime), or
(c) an offence of attempting or conspiring to commit an offence specified in this Schedule.

An offence under the law of Scotland is a "relevant ancillary offence" if it is—

(a) an offence which is committed art and part only,

(b) an offence of aiding, abetting, counselling, procuring or inciting the commission of an offence, or

(c) an offence of attempting or conspiring to commit an offence specified in this Schedule.

Chapter 4 – Freedom of speech and civil law

Introduction

163. The general principle is that the protection of privilege, as embodied in Article IX of the Bill of Rights, should protect participants in parliamentary proceedings from civil action, e.g. defamation proceedings, as part of the importance of protecting freedom of speech. The possibility does arise that this protection can be 'abused' by wilful flouting of the law without repercussion. However, the Government believes that in general the importance of the protection of the freedom of speech outweighs such concerns.

Freedom of speech and injunctions

164. One of the most topical questions surrounding privilege is what (if anything) should be done to prevent or minimise the use of absolute privilege to circumvent the legal effect of injunctions. Examples of injunctions which were effectively breached in proceedings in Parliament include those preventing public discussion of the alleged dumping of toxic waste by Trafigura and those preventing the naming of individuals involved in court cases.[55] While "super-injunctions" are a relatively recent concern, the issues here are similar to a longstanding concern about anonymity injunctions and the balance between the legal and human rights of others and the ability of parliamentarians to make statements about them in proceedings under the protection of absolute privilege.

165. In a previous situation of an MP disregarding an injunction, the House of Commons Procedure Committee summarised the issue by saying that Parliament, or in some cases just one single Member of Parliament, could effectively render a court's carefully arrived at judgment useless and ineffective.[56] The naming of an individual in Parliament may effectively break the court order, and there is nothing that the individual, or other people concerned with that person's wellbeing, can do about it.

166. It would clearly be a matter of some concern if privilege were routinely used to flout court orders designed to protect the privacy or security of individuals. The Government takes very seriously the importance of respecting court orders.

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[55] *(1) RJW and (2) SJW v (1) Guardian News and Media Limited and (2) Persons unknown*, 11 /09/2009

[56] Procedure Committee, Second Report of Session 1995–96, *References to Matters Subject to Injunctions*, HC 252, para 9-10

167. As was made clear in the Deputy Leader of the House of Commons' statement on 19 December 2011, however, the Government does not think that it is appropriate to legislate on this issue. If so desired, each House could consider making changes to their own internal procedures to address this problem. The Joint Committee on Privacy and Injunctions, in its report published on 27 March 2012, considered the option of creating a new self-denying ordinance along the lines of the existing *sub judice* rules, which could also allow for the House to take disciplinary action against Members who breached the rules.[57]

168. In essence, the *sub judice* rules provide that matters awaiting adjudication in a court of law should not be debated in Parliament, except in certain limited circumstances. In the House of Commons, the occupant of the Chair (such as the Speaker of the House or a Committee Chair) may direct any Member who breaches the *sub judice* rule to refrain from doing so. However, if a Member refers a case to the Chair in advance, the Chair can exercise discretion in whether to disapply the *sub judice* rule and allow discussion. The House of Lords has a similar *sub judice* rule, although the Lord Speaker has no role in applying it.

169. The Joint Committee on Parliamentary Privilege explained the *sub judice* rule as follows:

> *The present rule rightly tries to strike a balance between two sets of principles. On the one hand, the rights of parties in legal proceedings should not be prejudiced by discussion of their case in Parliament, and Parliament should not prevent the courts from exercising their functions. On the other hand, Parliament has a constitutional right to discuss any matters it pleases.*[58]

170. In 1996 the House of Commons Select Committee on Procedure suggested that the onus lay with Members, individually and collectively, to maintain high standards of conduct, and stated:

> *if there were strong evidence to suggest that breaches of court orders as a result of proceedings of the House represented a serious challenge to the due process of law, we would not hesitate to recommend a further limitation on the rights of free speech enjoyed by Members, whatever the practical difficulties... We do not, however, consider it necessary to take action as a result of one specific case, given the importance the House rightly attaches to protecting the right of Parliament to freedom of speech... We urge Members to exercise the greatest care in avoiding breaches of court orders.*[59]

171. The Joint Committee on Parliamentary Privilege was as reluctant as its predecessors to limit freedom of speech more than is necessary, and recommended that "at present no action should be taken to limit freedom of speech in respect of court injunctions."

172. Similarly, the recent Joint Committee on Privacy and Injunctions stated that "the threshold for restricting what Members can say during Parliamentary proceedings should be high. We do not believe that the threshold has yet been crossed."[60]

173. The Joint Committee went on to consider what should happen if the threshold were to be deemed to have been crossed:

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[57] Joint Committee on Privacy and Injunctions, First Report of Session 2010–12, *Privacy and Injunctions*, HL 274 / HC 1443, paras 220–231

[58] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, para 191

[59] Committee on Procedure, Second Report, HC (1995–96) 252, para 16 and Annex

[60] Joint Committee on Privacy and Injunctions, *Privacy and Injunctions*, para 230

> *If the revelation of injuncted information becomes more commonplace, if injunctions are being breached gratuitously, or if there is evidence that parliamentarians are routinely being "fed" injuncted material with the intention of it being revealed in Parliament, then we recommend that the Procedure Committees in each House should examine the proposals made to us for new restrictions with a view to implementing them.*[61]

174. The Joint Committee's preference was however that the principle of comity should be observed, so that Parliament and its Members respect the jurisdiction of the Courts, just as the Courts respect the jurisdiction of Parliament:

> *The absolute privilege for freedom of speech granted by Article IX of the Bill of Rights 1688 is part of the very foundation of our parliamentary democracy. This privilege places a significant responsibility on parliamentarians to exercise it in the public interest. The presumption should be that court orders are respected in Parliament; and that when a member does not comply with one he or she can demonstrate that (it) is in the public interest or enables the parliamentarian to discharge his or her parliamentary duties (such as representing constituents).*[62]

175. The Government fully agrees with the Joint Committee that there is a significant responsibility on parliamentarians to exercise freedom of speech in a way which reflects the public interest.

Q16: The Government does not think that any legislative change to restrict freedom of speech in proceedings in Parliament in respect of court injunctions is desirable or necessary. Do you agree?

Rights of warning or reply

176. Similarly to the manner in which injunctions can be broken, defamatory statements can be made in Parliament, with absolute privilege applying. This means that people who believe they have been defamed have no legal recourse.

177. Two suggestions have been raised in the context of defamatory statements made in Parliament – that the subjects of those statements should either have a right to prior warning, which could also apply to the breaking of an injunction, or a right of reply, or both.[63, 64] The right of prior warning would allow an individual to take whatever action was deemed appropriate to protect his or her interests, for example, informing family members of what was about to occur. The right of reply would allow for an individual who felt maligned to comment on the allegations directly, so that, for example, the response is reported in Hansard.

178. Such schemes are in operation in the Australian Senate and the New Zealand Parliament among other places.

179. In 2010 the House of Lords Committee on Privileges and Conduct re-opened this question when the Joint Committee on Human Rights was highly critical of the behaviour of Trevor Phillips, with the Lords Committee on Privileges and Conduct citing with approval the procedure for tribunals of inquiry under the Inquiry Rules 2006 whereby any person subject to criticism in an inquiry is sent a "warning letter", and given a "reasonable opportunity" to respond. These are known as the

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[61] Joint Committee on Privacy and Injunctions, *Privacy and Injunctions,* para 231
[62] Joint Committee on Privacy and Injunctions, *Privacy and Injunctions,* para 219
[63] Committee for Privileges and Conduct, Session 2009–10, *Mr Trevor Phillips: Allegation of Contempt,* HL 15
[64] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege,* paras 217-223

"Salmon principles".[65] The Lords Procedure Committee was invited to consider the application of this approach within the House of Lords, and recommended that the issue be dealt with by means of new guidance to select committees, which would be issued by the Committee Office to clerks and chairmen.[66]

180. The problem with the concept of a right of prior warning is that it would be difficult to enforce, and, except when there are clear-cut situations such as criticism of a person in a select committee report, it might be difficult for Members and the House to know when the right is engaged, and when a statement might be defamatory. This would leave Members in an unsatisfactory position. Although in retrospect a breach of the right of prior warning could be addressed by the House, this may not be of much comfort to the person who was the subject of the comments.

181. The difficulty with the concept of a right of reply is that it suffers from a lack of effectiveness for the defamed person. Their rebuttal might make it into Hansard or published committee proceedings some weeks later, but would be unlikely to generate publicity matching the original statement. In the situation of the breaking of an anonymity injunction a right of reply is of course of limited use to someone whose anonymity has been breached by an MP or peer.

182. For the reason above and others, the Joint Committee on Parliamentary Privilege rejected a right of reply scheme.[67] The Government believes this remains a matter for each House. Although legislation could in theory be used to compel both Houses to have a right of reply scheme, the necessity for doing so has not been established; if such schemes were thought desirable, both Houses have the power to establish them without legislation.[68]

Waivers and civil law – defamation

183. A different but related situation would be when a person alleges that he or she has been defamed, and is seeking to use proceedings in Parliament as part of their case (either to bring defamation proceedings or to defend themselves against them). This was the situation that Parliament looked to address in passing section 13 of the Defamation Act 1996, which allows a person (not necessarily an MP) to waive the protection of privilege in relation to proceedings in Parliament, so far as they concern him or her, where his or her conduct in those proceedings is at issue in a defamation case.

184. Section 13 was brought in following a failed attempt by Neil Hamilton MP to sue *The Guardian*. Mr Hamilton claimed that he had been gravely defamed by *The Guardian's* allegation that he had accepted payments in return for tabling parliamentary questions but, because the court ruled that *The Guardian* was precluded by parliamentary privilege from introducing evidence to question his conduct and motives in tabling the questions concerned, Mr Hamilton was himself precluded from clearing his own name.

185. Section 13 has been the subject of some discussion ever since it came into force, with some suggesting it should be repealed. The main reason for criticism has been that freedom of speech is

[65] So named after Lord Justice Salmon, who, in 1966, devised six cardinal principles of fair procedure under the Tribunal and Inquiries Act 1921.

[66] Procedure Committee, Fourth Report Of Session 2010-11 *Election of Lord Speaker; Tabling of oral questions; Criticism of individuals in House of Lords Select Committee Reports*, HL 127, para 18

[67] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege* para 223

[68] It is worth noting *A v UK* [2002] ECHR 35373/97, a judgment of the European Court of Human Rights which looked at privilege under Article IX of the Bill of Rights and considered means of redress open to an individual following defamatory comments made by an MP in proceedings (para 86).

generally regarded to be the privilege of each House as a whole, and not of individual Members (an important principle in allowing each House to set rules governing its Members' conduct). Section 13 has also been criticised as being imbalanced, in that it allows one party to proceedings to choose to use the parliamentary record, but not the other. In addition, it may be considered anomalous that the power of waiver exists only in defamation cases.

186. We are not aware of any instances in which anyone has used this power of waiver.

187. The Joint Committee on Parliamentary Privilege recommended repealing section 13 and replacing it with a general power for each House to waive the protection of privilege, subject to an internal process which would not need to be set out in statute.[69] Lord Lester of Herne Hill included such provision in his Defamation Bill, a House of Lords Private Member's Bill.[70]

188. The advantage of the existing power of waiver is that in certain circumstances it allows Members and other participants in proceedings to bring cases for defamation, where otherwise privilege would preclude it. A broader power of waiver could in theory allow each House to make its individual Members subject to civil law proceedings against them (such as for defamation or contempt of court) if it believed their transgression was so serious as to warrant waiving privilege.

189. The main disadvantage with a broader approach along those lines is that in practice no one speaking in Parliament and relying on privilege could be confident that privilege would not subsequently be lifted. Arguably, the power of waiver would therefore have a chilling effect on free speech. In addition, a case-by-case waiver would require the particular situation to be assessed in Parliament, and a decision reached as to whether the protection of privilege should be waived, which may have a prejudicial effect on any trial, as Parliament would have already reached a view on some of the evidence in question.

190. The Joint Committee on Parliamentary Privilege dealt with this risk by proposing that the power of waiver should be subject to a condition that there could be no question that anyone would be exposed in consequence to a risk of legal liability. This, however, would make it of very limited usefulness.

191. Having said that section 13 has been the subject of criticism, it may be worth noting that no one commented on it in evidence to the Joint Committee on the draft Defamation Bill, which consequently did not discuss it in its report.

192. There is therefore a question as to what, if anything, needs to be done in relation to section 13 of the Defamation Act 1996. It could be repealed without replacement, amended, or left as it is, given that the existing power of waiver has never been used. The Government would welcome views on this matter.

Q17: Do you think that section 13 of the Defamation Act 1996 should be repealed?

Q18: If so, do you think that section 13 of the Defamation Act 1996 should be replaced with a power for each House to waive privilege, and do you have views on how that should operate?

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[69] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, para 69

[70] Defamation Bill [Lords], [Bill 003 (2010-12)]

Waivers and tribunals of inquiry

193. There is also an issue as to whether a waiver would be useful for the purposes of tribunals of inquiry, if there were a clearly expressed will within either House for a particular statutory inquiry to consider proceedings in Parliament.[71]

194. A recent example of this would be the current Leveson Inquiry into the Culture, Practice and Ethics of the Press, where the suggestion was made that the inquiry might be enabled to consider evidence given to select committees, as statements were made to select committees which were material to the matter under examination by the inquiry.

195. The Joint Committee on Parliamentary Privilege suggested the introduction of a mechanism to allow both Houses to resolve to waive the protection of privilege for the purposes of a specific inquiry.[72] The Tribunals of Inquiry (Evidence) Act 1921 had given Parliament a formal role in establishing some inquiries, and the Committee pointed out that Parliament could waive the protection of privilege at the same time as establishing an inquiry. However, the Inquiries Act 2005 removed the power of Parliament to establish tribunals. Subsequently the Public Administration Select Committee called for the establishment of a procedure to enable Parliament to be able to establish a Parliamentary Commission of Inquiry, but, in the absence of such provision, the Joint Committee's recommendation is no longer achievable.[73]

196. A question must in any case be asked about the desirability of the waiver recommended by the Joint Committee. This would seem to go against the idea that contributions to proceedings in Parliament are protected from legal action, and would mean that in practice no one speaking in Parliament and relying on privilege could be confident that privilege would not subsequently be lifted. Arguably, the power suggested by the Joint Committee would therefore have a chilling effect on free speech.

197. It is also not clear that such a change is necessary in practice. Even if an inquiry cannot take notice of statements made in Parliament, that does not prevent the public drawing their own conclusions. Nor does it prevent the inquiry from asking questions in a similar vein to those that were asked in Parliament; and nor does it prevent Parliament using the evidence to the inquiry in considering the veracity of the evidence given to a select committee, including whether a witness has deliberately or otherwise misled a select committee.

Q19: Is a general power for each House to waive the protection of privilege to permit inquiries to consider evidence given in proceedings desirable?

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[71] The Joint Committee on Parliamentary Privilege expressed the view that an inquiry established under the Tribunals of Inquiry (Evidence) Act 1921 would constitute a "court or place out of Parliament" under Article IX of the Bill of Rights. The 1921 Act has since been replaced by the Inquiries Act 2005, which also provides for inquires to take evidence on oath. The question of whether inquiries under that Act would constitute a "place" for the purposes of Article IX has not yet been judicially considered.

[72] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege,* para 96

[73] Public Administration Select Committee, Ninth Report of Session 2007-08, *Parliamentary Commissions of Inquiry,* HC 473, para 9

Part Two: Exclusive Cognisance

Chapter 5 – Application of legislation to Parliament

198. One part of Parliament's exclusive cognisance is the right of both Houses to organise their own affairs without interference. The principal purpose of this privilege is to allow Parliament itself to be the sole authority for setting its procedures and for deciding whether they have been followed. The proper role of the courts is to interpret legislation as passed by Parliament, not to question the process by which that legislation is passed. For example, internal decisions about which amendments to a Bill should be selected and how long they should be debated for cannot be challenged in the courts, or anywhere else. As the 1999 Joint Committee on Parliamentary Privilege expressed it:

> *"Here ... the purpose of parliamentary privilege is to ensure that Parliament can discharge its functions as a legislative and deliberative assembly without let or hindrance."*[74]

The Government supports this position; it has no intention of making any change in this area to allow others to question the process by which legislation is passed.

199. However, this privilege is sometimes argued to confer a much wider protection - exempting Parliament from having to comply with legislation governing day-to-day activities such as employment and health and safety; making it, in effect, a haven from the law. This chapter examines whether there is any basis for these claims and whether it is possible to legislate to provide greater certainty as to how the law applies to Parliament.

The application of the law *within* the parliamentary estate

200. One area where there is no uncertainty is on the application of law to those within the parliamentary estate. The fact that an individual commits an act within the bounds of the precincts of Parliament does not give it any special protection, unless that individual was participating in the proceedings of Parliament at the time. A recent example of this would be the arrest and conviction of Eric Joyce MP for assault in a bar inside the parliamentary estate; the fact that his actions took place within the grounds of Parliament had no impact on the ability of the police to arrest him, or of the courts to punish him.

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[74] Joint Committee on Parliamentary Privilege, First Report of Session 1998-99, *Parliamentary Privilege*, HL 43 HC 214, para 241

201. A second example, where apparent ambiguity was successfully resolved, would be the 1986 Zircon affair. This concerned a BBC documentary *"The Secret Story"* which was never broadcast and which contained information on a secret defence project code named "Zircon". Some Members wanted to arrange a showing in Parliament and the Attorney General applied for an injunction to prevent the programme being shown. The judge who heard the case refused to issue an injunction, on the grounds that the matter was privileged. The Speaker then intervened to ban the documentary being shown. The House of Commons Privileges Committee subsequently examined the issue and found that there was:

> *no precedent for the House affording its Members any privilege on the sole ground that their activities were within the precincts. The fact that the Zircon film was to be shown in the precincts therefore gave those responsible no privileged protection.*[75]

They also considered that the courts did have jurisdiction to grant an injunction, even though they had been unwilling to intervene in this case:

> *...the courts do have jurisdiction in relation to matters which are not covered by privilege ... the precincts of the House should not be treated as a sanctuary from the operation of the law. An injunction could, for example, be granted which would prevent those bound by the injunction (whether members or not) from disclosing material within the precincts of the House (except as part of a proceeding of the House). Disclosure in these circumstances would be in contempt of court.*[76]

Application of the law *to* Parliament

202. The area where there may be uncertainty is the extent to which statute law applies to either House of Parliament (as a corporate body or collective entity) in the absence of any specific provision applying the legislation to Parliament being written into an Act.

203. While Parliament plays a unique role in the political system, it also engages in a number of activities that it would share with any other large organisation. It employs and caters for a large number of staff and visitors, enters into contracts for the provision of goods and services, and manages and maintains a number of buildings. The Parliamentary Corporate Bodies Act 1992 established a corporate officer for each House who can sign contracts on behalf of the House to facilitate Parliament conducting this kind of business. The question is whether each House's right to organise its own internal affairs extends to such functions, and whether they attract the protection of privilege.

204. When the 1999 Joint Committee considered the matter it concluded that there was no reason why these services should be protected by privilege. As it put it:

> *It is difficult to see any good reason why claims for breach of contract relating to catering or building services ... should be excluded from the jurisdiction of the courts, or why a person who sustains personal injury within the precincts of Parliament should not be able to mount a claim for damages for negligence.*[77]

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[75] Privilege Committee, First Report of the Session 1986-87, *Speaker's Order of 22 January 1987 on a matter of national security*, HC 365, para 17

[76] Privilege Committee, *Speaker's Order of 22 January 1987 on a matter of national security*, para 30

[77] Joint Committee on Parliamentary Privilege, para 247

205. The Committee recognised the need for a dividing line between the internal activities of the House which were protected by privilege and those that were not. They considered that, while there are cases on the boundary between the two areas which are difficult to categorise, the protection of privilege should only be given to activities that are "so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament's sovereignty as a legislative and deliberative assembly."[78]

Herbert judgment

206. However, this relatively straightforward conclusion is complicated by the judgment in the A P Herbert case in 1934.[79] The case concerned the sale of alcohol on the parliamentary estate without the necessary licence; the Lord Chief Justice decided that the courts could not hear the case, because the House of Commons was acting collectively in a manner which fell within the area of the internal affairs of Parliament.

207. Since the Herbert case, two views have existed on the extent to which statute law applies to Parliament. The first was that legislation never applies to Parliament unless it explicitly states that it applies; **where the legislation is silent it is taken as not binding on Parliament**. According to this view, for example, health and safety legislation and the smoking ban (created by Part 1 of the Health Act 2006) do not apply to Parliament as neither Act contains express provision to that effect.

208. The second view was that **the law applies to Parliament, without any need to explicitly state that it applies, except in cases where the law interferes with Parliament's internal affairs** (i.e. its exclusive cognisance). But where exclusive cognisance is concerned, the law only applies if it explicitly states that it does so, or if it does so by necessary implication. On this view, there is no general rule of law that legislation does not apply to Parliament.

209. The confusion caused by the Herbert judgment prompted the Joint Committee to recommend legislation clarifying the position. Legislation along those lines would reaffirm the importance of exclusive cognisance, but would make clear that the privilege of each House to administer its own affairs only applies to activities directly and closely related to proceedings in Parliament.

The current case for legislating

210. There would be a number of difficulties with legislating in this area. First, producing legislation would probably require a prior definition of what is meant by the phrase "proceedings in Parliament." As discussed in Chapter 2, the Government does not believe that it is possible to produce a satisfactory definition of this term. It might be possible in theory to legislate without providing such a definition, in line with the approach taken in the Bill of Rights where the term "proceedings in Parliament" is used but not defined, but this would be unlikely to achieve the aim of clarifying the position. Similarly using the phrase "directly and closely related" would also be open to interpretation by the court, and so would do little to clarify the position.

211. Secondly, it is not clear that there is a problem in practice. While it is certainly undesirable for there to be a perception that the law does not apply to Parliament, the two Houses by and large act as if they were bound by the law despite any legal uncertainty, so in most cases the effect is the same.

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[78] Joint Committee on Parliamentary Privilege, para 247

[79] *The King v Graham-Campbell ex p Herbert* [1935] 1 KB 594

212. Finally, since the Joint Committee came to its conclusions in 1999, the Supreme Court has examined the line between those activities of Parliament which are protected by privilege and those which are not. In the case of *Chaytor*, the Court found that the MPs' expenses scheme was not a parliamentary proceeding and was not protected by the House of Commons' right to administer its own affairs.

213. As part of this case the Court considered the issue of the application of legislation to Parliament:

> *Where a statute does not specifically address matters that are subject to privilege, it is in theory necessary as a matter of statutory interpretation to decide a number of overlapping questions. Does the statute apply within the precincts of the palace of Westminster? If it does, does it apply in areas that were previously within the exclusive cognisance of Parliament?*[80]

214. This analysis does not start from the position that statutes do not apply to Parliament – rather it appears to support the view that it is necessary to consider whether a statute is concerned with the internal affairs of either House to determine its application to Parliament.

215. The Court also made the following comment on the Herbert judgment:

> *Following Ex p Herbert there appears to have been a presumption in Parliament that statutes do not apply to activities within the Palace of Westminster unless they expressly provide to the contrary. That presumption is open to question.*

216. In light of the *Chaytor* judgment, the line likely to be taken by the courts in future appears to be reasonably clear. Courts remain respectful of parliamentary privilege and exclusive cognisance; but statute law and the courts' jurisdiction will only be excluded if the activities in question are core to Parliament's functions as a legislative and deliberative body.

217. This approach is similar to that taken by the Joint Committee in 1999, and is consistent with the position generally taken in practice by each House of Parliament. The Government therefore regards the current state of the law as satisfactory, and does not believe there is a need to bring forward draft legislation at this time.

Q20: In light of the Chaytor judgment, do you believe there is a need for legislation to clarify the extent of Parliament's privilege to organise its internal affairs?

[80] *R v. Chaytor and others,* [2010] UKSC 52, para 68

Chapter 6 – Regulation of Members

218. The right to regulate their own Members is an essential aspect of the two Houses' control of their own internal affairs. It is an important aspect of parliamentary sovereignty that only a Member's fellow parliamentarians can ultimately determine what the rules are that apply to parliamentary conduct, whether a breach of those rules has occurred, and if so whether there should be parliamentary sanctions such as suspension or even, in the case of the House of Commons, expulsion.

How is conduct regulated?

The House of Commons

219. The modern apparatus for regulation of Members of the House of Commons (MPs) derives largely from recommendations of the Committee on Standards in Public Life (CSPL). The CSPL was established in 1994, and its first report established the seven principles of public life and recommended the adoption by the House of Commons of a code of conduct for MPs and an independent investigator of alleged breaches of that code.[81] Those recommendations were accepted by the House, and the first Parliamentary Commissioner for Standards was appointed in 1995. Any person may make a complaint to the Commissioner that an MP has breached the Code of Conduct or any other rule of conduct of the House, and where complaints are accepted for investigation by the Commissioner, the results of those investigations and the relevant evidence are generally made public. The House also resolved on 2 December 2010 that the Commissioner should be given the power to initiate investigations without having received a complaint.[82]

220. The MPs' Code of Conduct also contains a requirement for Members to register and declare relevant financial interests on a Register of Members' Financial Interests, and to draw attention to any relevant interest in any proceeding of the House or its committees, or in any communications with Ministers, Government Departments or Executive Agencies.[83] Failure to do any of the above is a breach of that Code and may be investigated by the Commissioner (although the requirements to register and declare interests pre-date the adoption of a code).

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[81] First Report of the Committee on Standards in Public Life, *MPs, Ministers and Civil Servants, Executive Quangos*, Cm 2850, 11 May 1995

[82] HC Deb, 2 December 2010, col 1016

[83] *The Code of Conduct for MPs*, paragraph 16

221. The Commissioner makes findings of fact, but it is not within his remit to recommend sanctions for MPs. Instead he reports his findings to the House of Commons Select Committee on Standards and Privileges, whose role is to consider the Commissioner's findings and make a recommendation to the House. The House as a whole makes the ultimate decision on the imposition of any substantive sanctions, although the Government is not aware of a case where the House has failed to implement a recommendation of the Committee on Standards and Privileges in relation to discipline since that Committee's inception in 1995.

222. The principal powers available to the House are admonishment, suspension, withholding of salary, and expulsion. Where money has been wrongfully claimed, the House can require its repayment. The House has also asserted the right to withhold the resettlement grant paid to Members on departure from the House, although all remuneration is now the responsibility of the Independent Parliamentary Standards Authority.

223. The House of Commons rarely uses the power to expel MPs. In the last century the House has used the power to expel an MP on three occasions:

- August 1922, Horatio Bottomley (Independent, South Hackney) was expelled following a conviction for fraud and sentence of seven years imprisonment;
- October 1947, Garry Allighan (Labour, Gravesend) was expelled after lying to a committee and for gross contempt of the House after the publication of an article accusing MPs of insobriety and of taking bribes for the supply of information; and,
- December 1954, Peter Baker (Conservative, South Norfolk) was expelled after receiving a custodial sentence of seven years following a conviction for forgery.

224. In two of these cases, the MP concerned would now automatically lose his seat under the Representation of the People Act 1981 (see below).

225. The House's other powers have also historically been used cautiously. However, in the wake of the expenses crisis in the last Parliament a large number of MPs were disciplined. Four MPs were suspended during the last Parliament, five were required to apologise to the House and one resettlement grant was withheld, all in addition to the large number required by the House to repay money or expenses.[84]

226. In addition to decisions made by the House, the two Houses have also developed over time through statute a number of circumstances in which individuals are automatically disqualified from sitting as MPs:

- The Representation of the People Act 1981 provides that an MP is disqualified from the House if he or she is found guilty of an offence and receives a custodial sentence of more than 12 months, and is detained in the United Kingdom or the Republic of Ireland or is unlawfully at large;
- The Representation of the People Act 1983 provides that an MP is disqualified if found guilty of corrupt or illegal electoral practices;

[84] Recall of MPs Draft Bill, Cm 8241, December 2011, p13

- The Forfeiture Act 1870 disqualifies a person from sitting or voting as a Member of either House of Parliament where they have been convicted of treason;

- The House of Commons Disqualification Act 1975 lists offices which cannot be held by an MP, on pain of disqualification from the House;

- The Parliamentary Oaths Act 1866 provides that the seat of any MP who votes as such, or sits during any debate after the Speaker has been chosen, without having taken the oath (or made the affirmation) required by law, is vacated as if the MP were dead;[85]

- MPs are disqualified if they are subject to a bankruptcy restrictions order or a debt relief restrictions order in England and Wales, or the equivalent in Scotland or Northern Ireland;[86] and

- Section 141 of the Mental Health Act 1983 sets out a process by which MPs are to vacate their seats if they have a mental health condition and are authorised to be detained under mental health legislation for a period of six months or more. Although the provisions in section 141 have never been used, this section is symptomatic of an attitude towards mental illness which is out of touch with the modern understanding of mental health. The Government intends to repeal section 141 as soon as a suitable legislative opportunity arises.

227. The Government is currently consulting on draft legislation to give an MP's constituents the power of recall by petition, where an MP is convicted in the United Kingdom of an offence and receives a custodial sentence of 12 months or less, or where the House of Commons resolves that an MP should face recall.[87] The latter would be a new disciplinary power for the House.

The House of Lords

228. Arrangements in the House of Lords are not dissimilar to those in the House of Commons. Responsibility for investigating alleged breaches of the Code of Conduct for members of the House of Lords rests with the House of Lords Commissioner for Standards, who is an independent officer appointed by the House. Following his investigation, the Commissioner reports findings of fact to the Sub-Committee on Lords' Conduct and offers his own conclusion on whether the Code has been breached. The Sub-Committee reviews the Commissioner's findings, may comment on them and, where appropriate, recommends a sanction. The reports of the Commissioner and Sub-Committee are presented to the Committee for Privileges and Conduct, and the Member concerned has a right of appeal against both the Commissioner's findings and any recommended sanction. Having heard any appeal, the Committee for Privileges and Conduct reports to the House and the final decision rests with the House.[88]

229. The House of Lords has fewer powers than the House of Commons in that it cannot currently expel its members, although it has reasserted the power to suspend members.[89] This power is considered to be limited to suspension for the duration of the Parliament within which the power is exercised, although it is open to the House to impose a further suspension in a subsequent

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[85] Parliamentary Oaths Act 1866, s5
[86] Insolvency Act 1986, s426A
[87] Recall of MPs Draft Bill, Cm 8241, December 2011
[88] Guide to the Code of Conduct, para 4; the procedure was set out in Committee for Privileges, Second Report of Session 2009–10, *Guide to the Code of Conduct*, HL 81, then adopted by resolution on 30 March 2010 and amended by resolution on 9 November 2011.
[89] Committee for Privileges, First Report of Session 2008-09, *The Powers of the House of Lords in respect of its Members*, HL 87

Parliament (though this power has yet to be exercised).[90] It is also not open to members of the House of Lords to resign.[91]

230. There are also fewer statutory disqualifications for members of the House of Lords. Indeed, once they take up their seats, the only current circumstances in which an individual can be disqualified from membership of the House of Lords would appear to be if they commit the offence of treason, in which instance the Forfeiture Act 1870 would apply, or if they are subject to a bankruptcy restrictions order or a debt relief restrictions order in England and Wales or the equivalent in Scotland or Northern Ireland.

Proposed changes

231. For the most part, it is not for governments to determine how the two Houses go about their business, either in determining the contents of their codes of conduct or in the manner of their enforcement. However, where legislation is felt to be necessary, the Government plays the role of instigator. Legislative change has recently been suggested in discrete areas of the systems of self-regulation in both Houses.

The House of Commons: lay members of the Committee on Standards

232. In the wake of the expenses crisis, the CSPL once again reviewed the system of self-regulation in the House of Commons in 2009. Although the Committee concluded that for reasons of parliamentary privilege the principal elements of historic self-regulation should remain, it did recommend two changes to its operation:

- First, to increase the powers of the Parliamentary Commissioner for Standards so that he can conduct investigations proactively without receiving a complaint; and
- Second, that there should be at least two lay members who have never been parliamentarians on the Standards and Privileges Committee.[92]

233. As already noted, the first of these recommendations was implemented on 2 December 2010. On the same date the House of Commons also agreed without division to a resolution which endorsed the principle that lay members should sit on the Committee on Standards and Privileges and invited the Procedure Committee "to bring forward proposals to implement it".[93]

234. The Procedure Committee reported on 7 November 2011. The Committee recommended that the House consider whether those lay members should necessarily have full voting rights, and if so:

> *that the Government bring forward legislation to put beyond reasonable doubt any question of whether parliamentary privilege applies to the Committee on Standards where it has an element of lay membership.*[94]

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[90] See House Committee, Second Report of Session 2010-12, *Recovery of money wrongly claimed by Members*, HL 238

[91] A partial exception to this is the Lords Spiritual. When a Lord Spiritual retires as a Bishop, their membership of the House of Lords ceases. The current compulsory retirement age for Bishops is 70.

[92] Committee on Standards in Public Life, Twelfth Report 2009, *MPs' expenses and allowances,* recommendations 50 and 51

[93] HC Deb, 2 December 2010, col 1017

[94] Procedure Committee, Sixth Report of 2010-12 Session, *Lay membership of the Committee on Standards and Privileges*, HC 1606, para 53

235. The reference to a Committee on Standards rather than on Standards and Privileges reflects another recommendation "that it be a prerequisite of adding lay members that the Committee on Standards and Privileges be divided into two separate committees and that lay members be included only in the committee responsible for standards".[95]

236. The Procedure Committee's reasoning was that although the participation of lay members on committees as advisers is well established, their participation as decision-makers "raises serious doubts about whether parliamentary privilege would apply".[96] The then Clerk of the House warned that "there is a risk that the addition of lay members to a committee would alter its character to such an extent as to cast doubt on whether its proceedings were actually proceedings in Parliament protected by Parliamentary privilege".[97] The Committee cites similar discussion in 1876 about the right of non-members to vote in the proceedings of Committees on Private Bills.

237. The Procedure Committee noted that Lord Nicholls and Professor Bradley had disagreed with this proposition and had believed that lay members could be appointed with full voting rights without any serious risk of the courts questioning the privileged status of the Committee's proceedings.

238. The Government responded to the Committee's report on 29 February 2012. The Government agreed with the recommendation of dividing the Committee on Standards and Privileges into two, and responded to the recommendation on lay membership as follows:

> *The Government believes that proposals for lay members to be appointed to the Committee on Standards in the first instance on the basis proposed by the then Clerk of the House in his evidence to the Procedure Committee would be most likely to command the support of the House. Under these proposals, the lay members would take a full part in evidence-taking (including asking questions). Their position in the deliberative work of the Committee would be protected by a provision in Standing Orders requiring that any written opinion of a lay member on a Report agreed by the Committee must be published as part of any Report by the Committee. There should be a further requirement in Standing Orders that the Committee could not meet unless at least one lay member was present.*
>
> *A decision to proceed on this basis would provide a guarantee for the effective participation of lay members in the decision-making processes of the Committee. Such a decision could be taken without prejudice to subsequent consideration of full voting rights.*[98]

239. On 12 March the House agreed without division to a motion on the above basis, and associated amendments to the House's Standing Orders.[99] As a result there is now provision for separate select committees on Standards and on Privileges.

240. Notwithstanding this recognition that it was pragmatic to progress first with lay members without full voting rights, the Government also committed to "consider the case for legislation that would place the position of a Committee on Standards with lay members with full voting rights beyond doubt as part of its work on preparing the forthcoming draft Parliamentary Privilege Bill and the

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[95] As above, para 18
[96] As above, para 44
[97] As above, para 44
[98] Procedure Committee, Third Special Report of 2010-12 Session, *Lay membership of the Committee on Standards and Privileges: Government Response to the Committee's Sixth Report of Session 2010-12,* HC 1869, p2
[99] HC Deb, 12 March 2012, col 84

accompanying Green Paper".[100] This is because the Government continues to believe that it may be desirable in principle for the lay members of the Committee to have full voting rights, as was explicitly recommended by the CSPL.[101]

241. We note the arguments put by Professor Bradley and Lord Nicholls, and note too the assertion from the then Clerk of the House Sir Thomas Erskine May in 1876 that it was "not an illegal act" to appoint lay members with full voting rights (in this case known as Referees) to Committees on Private Bills.[102] It is not clear to us that the character of the Committee is necessarily sufficiently altered by the granting of full voting powers to its lay members as to call into question whether its proceedings remain privileged.

242. However, we have also carefully considered the points raised by the Procedure Committee and the then Clerk of the House. Given their views, the Government agrees that Members need certainty when participating in the Committee's discussions – either as members of the Committee, or as the subject of its investigations – that those discussions will remain privileged and therefore beyond the reach of the courts.

243. The draft clause overleaf is designed to provide that certainty. Subsection (4) also provides that if the name of the Committee on Standards changes, or its functions are transferred to another committee or committees, then the proceedings of that other committee or committees are also to be treated as proceedings in Parliament.

244. The draft clause does not address whether the proceedings of other committees in either House would remain privileged if lay members were appointed to them with full voting rights. The Government is not aware of any current plans to make such appointments.

Q21: Would you support legislation that clarified that the privileged status of proceedings of the Committee on Standards in the House of Commons would not be affected by the granting of full voting rights to lay members?

The House of Lords: resignation, suspension and expulsion

245. As has already been noted, the House of Lords does not have the power to expel its own members, and there are almost no circumstances in which individuals are disqualified from membership. Although the example of the House of Commons suggests that there are very few circumstances in which a House might want to expel its members, Members of the House of Commons are of course subject to political accountability in that they must periodically seek re-election. The electorate therefore has the ability to remove individual Members if it takes issue with their conduct – an ability that will be enhanced by the introduction of the power of recall.

246. Members of the House of Lords also cannot currently resign their position. All Lords Spiritual and Temporal who have established their right to them are issued new writs of summons before the meeting of each Parliament by direction of the Lord Chancellor from the office of the Clerk of the Crown in Chancery. Writs of summons can only be overridden by an Act of Parliament (whether generic, as in the House of Lords Act 1999, or personal, as in the Titles Deprivation Act 1917), so neither the House nor the member can prevent their continuing to issue in perpetuity. This applies

[100] Procedure Committee, *Lay membership of the Committee on Standards and Privileges: Government Response to the Committee's Sixth Report of Session 2010-12,* p2
[101] Committee on Standards in Public Life, *MPs, Ministers and Civil Servants, Executive Quangos,* para 13.68
[102] Report on the Select Committee on Referees of Private Bills, 17 March 1876, Q62

notwithstanding the agreement of the House to the recommendation of the Leader's Group on Members Leaving the House to introduce arrangements to allow members to retire from membership of the House permanently on a voluntary basis.[103]

247. Provision allowing members of a reformed House of Lords to resign is included in the Government's draft House of Lords Reform Bill, as is provision to create a disqualification regime largely mirroring that of the House of Commons, and to give the reformed House a power to expel its own members. These proposals have already received pre-legislative scrutiny from the Joint Committee on the draft House of Lords Reform Bill, and so are not reproduced in this paper.[104] The Government is currently considering the report of that Joint Committee, but any provisions on resignation, disqualification or expulsion of members of the House of Lords will be brought forward in a House of Lords Reform Bill rather than in any legislation on privilege.

Q22: Do you agree that, other than for lay members of the Committee on Standards in the House of Commons, there is no reason to legislate in any legislation on privilege regarding the regulation of Members of either House?

[103] Report of Leader's Group on Members Leaving the House, *Members Leaving the House,* HL 83, 13 January 2012, para 31

[104] Joint Committee on draft House of Lords Reform Bill, Report of Session 2010-12, *Draft House of Lords Reform Bill,* HL 284 / HC 1313

Draft clause

Lay members of House of Commons Committee on Standards

1 Lay members of the House of Commons Committee on Standards

(1) The House of Commons may give lay members of the Committee on Standards the power to vote in proceedings of the committee.

(2) Nothing done under or by virtue of subsection (1) affects the application of any enactment or rule of law preventing the freedom of speech and debates or proceedings in Parliament being impeached or questioned in any court or place out of Parliament.

(3) A reference in this section to a lay member of the Committee on Standards is to a member of the committee who is not a member of the House of Commons.

(4) A reference in this section to the Committee on Standards is to any committee of the House of Commons concerned with the standards of conduct of members of that House.

(5) Any question arising under subsection (4) is to be determined by the Speaker of the House of Commons.

Chapter 7 – Select Committee powers

Introduction

248. Select committees have come to play an increasingly important role in national political life, providing an official forum in which members of either House undertake detailed examination of the Government's actions. Since the creation of the modern system of departmental select committees in the House of Commons and the regular appointment of select committees on a sessional basis in the House of Lords, select committees have become one of the main ways in which Parliament holds the executive to account.[105] Both Houses' committees play an important role conducting detailed scrutiny of government policy and challenging and holding Ministers to account for their decisions. The creation of the modern system of select committees has been described as "one of the most important innovations in Parliament".[106]

249. In recent years there have been a number of reforms to select committees in the House of Commons. The Chairs of most Commons select committees are now elected by the whole House and members of these committees elected from within political parties. This has replaced the previous system where members of the committee were nominated by the Committee of Selection (whose membership primarily consists of Party Whips) and committees then elected their own Chairs. Committees have also started to play a greater role in scrutinising senior public appointments by holding pre-appointment hearings with Government's preferred candidates for a number of senior public offices.

250. The increasing role that these committees play in public life has raised questions about whether select committees have the powers they need to carry out these important functions, with the House of Commons Liaison Committee having recently launched an inquiry into this area. Most recently, the decision by the Culture, Media and Sport Select Committee in 2011 to summon James and Rupert Murdoch focused attention on the powers of select committees. In the event, both witnesses attended and provided evidence, but the rest of this chapter explores some of the issues this case raised.

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[105] Appointed under Lords Standing Order 64.

[106] The Power Inquiry, *Power to the People: The report of Power, An Independent Inquiry into Britain's Democracy,* 2006

Current position

251. Both Houses routinely delegate the power to call for "persons, papers and records" to the majority of their select committees as well as certain other committees such as Public Bill Committees.[107, 108] This means that those committees have the formal power to require witnesses, within UK jurisdiction, to attend their meetings, answer questions and produce any documents or records the committee wishes to see in order to carry out its functions. While select committees are able to obtain most of the information they need through voluntary agreement, this power is designed to ensure that, as a last resort, committees can compel individuals to provide them with the information they need. If an individual fails to comply with an order made using this power then the committee can report them to the relevant House, which will decide whether to find the individual in contempt of Parliament and, if so, what, if any, sanction to impose.

252. The Houses' power to punish non-members for contempt is untested in recent times. In theory, both Houses can summon a person to the bar of the House to reprimand them or order a person's imprisonment. In addition, the House of Lords is regarded as possessing the power to fine non-members.[109] The House of Commons last used its power to fine in 1666 and this power may since have lapsed.[110]

253. In 1978 the House of Commons 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.[111] Since that resolution, the Commons has not punished a non-member. There is no equivalent resolution in the House of Lords, but the House has not punished a non-member since the nineteenth century.

254. The Government agrees that Parliament should rarely have cause to sanction non-members. The Government is not aware of any case where an individual has failed to comply with a formal summons from a select committee or with an order to produce a document or record. Therefore, the evidence suggests that in practice there may not be an issue to address.

Q23: Is there a need to address select committees' power to summon witnesses, documents and records?

255. There are a range of options which have been put forward to address perceived problems with the powers of select committees. These are discussed below.

Legislative options

256. Notwithstanding the question of whether there is an issue to address, the 1999 Joint Committee on Parliamentary Privilege discussed options to put beyond doubt the ability of the two Houses to take punitive action in the event of non-compliance with an order made by one of their committees. The Joint Committee considered two broad approaches that could in principle be taken:

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[107] Although this only became routine practice in the House of Lords in 2009.
[108] House of Commons, Standing Order 84A (2)
[109] *Erskine May,* 24th Edition, p196
[110] Joint Committee on Parliamentary Privilege, First report of Session 1998–99, *Parliamentary Privilege,* HL 43-I / HC 214-I, para 272
[111] CJ (1977-78) 170

A. Legislate to give the two Houses enforceable powers by codifying their existing powers, possibly including giving the House of Commons a clear power to fine non-members; or

B. Create criminal offences of committing contempts of Parliament; this would allow Parliament's powers to be enforced through the courts.

These options are explored in more detail below.

Option A: Codifying existing powers

257. If the House of Commons wishes to punish a non-member for contempt it can either publicly reprimand them by calling them to the bar of the House, or order their imprisonment. The Joint Committee thought that the House should have an option between the two extremes and recommended that the House of Commons be given a clear power to fine non-members.[112] This would require legislation. This issue does not arise with the House of Lords, as it is already considered to have the power to impose fines, though the Joint Committee thought that in the event of legislation this power could be confirmed.[113]

258. Before considering such legislation, the Houses would first need to reflect on the processes they use to punish non-members and consider whether any changes needed to be made to ensure that they include the safeguards that are normally in place to ensure individuals receive a fair hearing.

259. Currently, if the House of Commons wished to punish a non-member for committing a contempt, the issue would first be considered by the Standards and Privileges Committee, which would come to a conclusion and recommend a punishment.[114] This would then be sent to the House for endorsement. A similar process would be followed by the Committee for Privileges and Conduct in the House of Lords.

260. The Joint Committee considered this process and concluded that it was unlikely that Parliament would be able to provide the kind of safeguards associated with modern due process:

> *Parliament is not a court of law ... We do not think it practicable for Parliament to provide, and to be seen to provide, the procedural safeguards appropriate today when penalising persons who are not members of Parliament.*[115]

To use the Joint Committee's own example, a debate by the whole House, for instance, on whether to impose a fine on a non-member, and if so how much, is far removed from current perceptions of the proper way to administer justice.

261. Making changes to the Houses' procedures to ensure an individual's right to a fair hearing would be likely to alter their character significantly. For example, Members directly involved in any case might have to be compelled to recuse themselves from considering a case; those alleged to have committed a contempt might have to be given a formal right to make submissions and a formal

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[112] Joint Committee on Parliamentary Privilege, para 279
[113] Joint Committee on Parliamentary Privilege, para 279
[114] The Standards and Privileges Committee will not become two separate Committees until after the first lay Members have been appointed (see Chapter 6 for a full discussion). In this Chapter we refer to the Standards and Privileges Committee for ease of reference.
[115] Joint Committee on Parliamentary Privilege, para 304

right to representation; Members sitting on committees deciding these cases might have to be given formal training; and an independent appeals mechanism would have to be introduced.

262. Legislation would be one way to set out the processes that both Houses should use when investigating alleged contempts by non-members. For example, it could require Members not to take part in proceedings deciding cases where they were personally affected by the alleged contempt. However, this might be regarded as contravening the principle that it is for each House to decide how to run its internal proceedings.

263. If the House of Commons did wish to explore the approaches open to it, one model that could perhaps be followed is that of the New Zealand Parliament where select committees have a responsibility to observe the principles of natural justice.[116]

Q24: Should the House of Commons be given a statutory power to fine non-members? If so, what steps should be taken to ensure this power was only used in line with the principles of natural justice?

Option B: Criminalising contempts

264. An alternative to codifying Parliament's existing penal powers would be to use the court system to sanction those who have committed contempts of Parliament. This would place beyond doubt that any punishment was imposed only after a fair and transparent process, which conformed to the principles of natural justice.

265. The principal objection to using the courts to enforce the Houses' privileges is that as they are Parliament's privileges, Parliament ought if possible to be responsible for enforcing them. It would not be unprecedented for Parliament to rely on the courts to enforce its privileges; there are existing criminal offences that could be used to punish contempts, such as the Perjury Act 1911, which could be used to prosecute someone who lied under oath to a select committee, and the Witnesses (Public Inquiries) Protection Act 1892 which could be used to punish those who interfere with witnesses who appear before a select committee. Nonetheless, either of the approaches set out below would necessitate a much more significant transfer of Parliament's authority to the courts.

266. Any approach to criminalising contempt would also almost certainly require the further disapplication of the protection of freedom of speech in parliamentary proceedings, and considerable direct questioning of proceedings in Parliament by the courts. While Chapter Three of this paper makes clear that the Government accepts that there are some circumstances in which it may be desirable for the courts to be able to question proceedings in Parliament, the proposals in that chapter would seek to limit those circumstances; legislation to criminalise contempts would inevitably have the opposite effect.

267. Again, the 1999 Joint Committee considered two approaches to this: creating a general offence of contempt of Parliament, or creating a number of specific criminal offences which criminalise those behaviours which are the greatest causes for concern. The remainder of this chapter considers the benefits and risks of each of these approaches.

[116] New Zealand Parliament, *Procedural Guides: Natural justice before select committees,* Office of the Clerk of the House of Representatives, 2010

Defining contempt

268. Contempt of Parliament is defined in Erskine May as "*any actions which, while not in themselves breaches of any specific privilege, obstruct or impede [either House of Parliament] in the performance of its functions, or are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its Members of its officers.*"[117] One approach to enforcing select committee powers would be to create a statutory definition of contempt, and then have the courts enforce it in a similar way.

269. The 1999 Joint Committee on Parliamentary Privilege's report contained a list of possible contempts which included:

- disrupting proceedings in either House or a committee;
- obstructing a Member or officer in the discharge of their duties;
- deliberately misleading either House;
- altering or falsifying papers belonging to either House;
- refusing to appear before a committee or answer its questions without reasonable excuse;
- attempting to bribe a Member;
- interfering with a witness; and
- leaking a committee report.[118]

However, it is not currently possible to set out an exhaustive list of what counts as a contempt of Parliament. This is because it is up to each House to decide whether a person's actions amount to improper interference in their work and, therefore, amount to a contempt.[119] It is possible for the House to determine that an action is a contempt even if there is no precedent of that behaviour previously being considered a contempt.[120] This provides the current system with a degree of flexibility. For example, it allowed the House of Commons to determine that hacking a Member's phone could potentially be a contempt, even though the tecŸology which made this action possible is a modern development.[121]

270. There have been attempts to create a legislative basis for contempt of Parliament in other countries – such as that contained in the Australian Parliamentary Privileges Act 1987. This does not contain a definition of contempt, but instead sets out a threshold which an action must meet to be considered an offence against a House. It states that:

> *"Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by*

[117] *Erskine May,* 24th edition, p 203
[118] Joint Committee on Parliamentary Privilege, para 264
[119] Joint Committee on Parliamentary Privilege, para 263
[120] *Erskine May,* 24th edition, p 203
[121] Standards and Privileges Committee, Fourteenth Report of the Session 2010-12, *Privilege: Hacking of Members' Mobile Phones,* HC 628, paras 51-52

> *a House or Committee of its authority or functions, or with the free performance by a member of the member's duties as a member."*[122]

271. When the 1999 Joint Committee considered the issue of defining contempt it recommended that a future Privilege Bill should contain a definition of contempt that was a combination of a threshold definition of contempt, like that contained in the Australian Parliamentary Privilege Act, and a non-exhaustive list of possible contempts.

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.

Q25: Should a statutory definition of contempt of Parliament be introduced that would be enforceable by the courts? If so, should it be defined by reference to general principles or to specific acts?

Criminalising specific conduct

273. An alternative to creating a general definition of contempt would be to create specific offences to address the individual contempts which are the greatest cause of concern. For select committees this might involve creating the following offences:

- Failure or refusal, without reasonable excuse, to appear before a committee of either House;
- Failure or refusal, without reasonable excuse, to answer questions asked by a committee of either House;
- Failure or refusal, without reasonable excuse, to produce documents requested by a committee of either House; and
- Altering, suppressing, concealing or destroying documents requested by a committee of either House.

274. The 1999 Joint Committee report concluded:

> *One important form of contempt is readily identifiable and definable as a criminal offence, namely, wilfully failing to attend before the House or a committee when summoned or to answer questions or produce documents, or deliberately altering, suppressing or destroying a document ... We recommend that such conduct should ... be made a criminal offence ...*[123]

275. Similar behaviour has already been criminalised by the legislation that established the devolved assemblies.[124] However, the situations of the Scottish Parliament, National Assembly for Wales

[122] Parliamentary Privileges Act 1987 (Australia), Section 4
[123] Joint Committee on Parliamentary Privilege, para 310
[124] Scotland Act 1998, Northern Ireland Act 1998, and the Government of Wales Act 2006

and Northern Ireland Assembly are not the same as the situation at Westminster. The legislation that created these criminal offences was also creating those bodies and, therefore, gave them the power to summon witnesses and documents. Any legislation to criminalise similar behaviour in Westminster would not need to create these powers anew; both Houses already possess the power to summon witnesses and call for documents and records. Instead, any legislation would introduce a criminal sanction for failing to comply with an order made using these existing powers.

276. There are a number of challenges to this approach. If legislation were created to criminalise non-compliance with select committee orders, it would be necessary to specify the circumstances in which failing to comply was an offence.

277. For example, there might be a number of legitimate situations in which a person is unable to comply with an order of a select committee. A person summoned to appear might be ill on the day of the hearing, or they might not possess a document which a committee ordered them to produce. In these cases it would clearly be wrong for a person to be guilty of a criminal offence.

278. Similarly, there might be situations where a court may regard it as reasonable for a person not to release information to a select committee. For example:

a. A witness might refuse to answer a question because it was not reasonable to require them to provide an answer (because it was personal, or not relevant to proceedings);

b. A witness might refuse to answer a question because it would require the witness to reveal information which they have a duty of confidentiality to withhold; this might be a legal obligation (such as under the Official Secrets Act) or a professional duty of confidence (for example legal professional privilege or doctor-patient confidentiality);

c. A document might not be released to a committee, or information in it might need to be redacted, if it contained information subject to a duty of confidentiality;

d. Information in a document may need to be redacted to remove personal information before it can be released to a committee; or

e. Information may have to be withheld from a committee if its release might prejudice prospective or ongoing judicial proceedings.

In any of these cases it may not be appropriate for an individual to have committed a criminal offence by withholding information.

279. If legislation were to be brought forward in this area, specific exemptions would need to be included to cover some of these situations. However, this would still inevitably leave some areas where a judgment would have to be taken as to whether an individual was within their rights not to comply with an order made by a select committee. The Government believes that, as is the case with regard to non-compliance with orders made by committees of the three devolved assemblies, a general defence would be needed that the accused person had a "reasonable excuse" for non-compliance. This in turn would inevitably give the courts a significant amount of discretion to question the reasonableness of a committee's order and lines of questioning. For example, if a witness refused to answer a question on the grounds that it was not relevant, this might lead to the courts needing to question the terms of reference of a committee's inquiry to determine a question's relevance.

Application to MPs, civil servants and judges

280. Another issue that would have to be resolved if specific contempts were criminalised would be how to deal with certain categories of people which it might not be appropriate to make subject to any criminal offences. For example, while MPs normally cannot be summoned by a select committee, they can be summoned by the Committee on Standards and Privileges. Should MPs who fail to attend following such a summons potentially commit a criminal offence?

281. The Government would also want to ensure that any legislation did not undermine the constitutional relationship between Ministers and civil servants. There is a long standing convention, as set out in the Osmotherley rules, that civil servants are accountable to Ministers who in turn are accountable to Parliament for the decisions and actions of their Department.[125] When civil servants appear before select committees it is on behalf of Ministers (except in the case of Accounting Officers appearing before the Committee of Public Accounts of the House of Commons), and it is for Ministers to decide which civil servants can best represent them before a committee. If civil servants could be prosecuted for any select committee-related criminal offences this would alter and undermine the constitutional position, and risk creating an unmanageable conflict of interests for civil servants, in relation to their statutory duties under the Civil Service Code. The Government, therefore, believes that if legislation were taken forward it should include an exemption for civil servants.

282. Consideration would have to be given as to whether exemptions would also be appropriate for members of the judiciary and for certain prosecutors. Committees of the devolved assemblies do not have the power to summon members of these groups, and it might be appropriate to include a similar provision in any Bill that applied to Westminster.[126]

Safeguards

283. Currently, when a committee believes that the actions of an individual may amount to a contempt of the House, it reports the matter to the House which will make the final decision as to whether the offence is sufficiently serious to warrant punishment. If criminal offences were created for failing to comply with orders of a select committee, this could remove each House's discretion in deciding when an action that interferes in their work is sufficiently serious to warrant punishment.

284. One way to avoid this problem would be to require the relevant House of Parliament to pass a resolution to consent to a prosecution of an individual for a select committee offence. This would have a number of benefits:

    a. It would clearly signal the House's agreement that the action or omission in question is sufficiently serious to warrant criminal sanctions being sought;

    b. It would reflect the historic role of each House in making the final finding of contempt;

    c. It would help ensure that a consistent approach was taken to seeking prosecution for these offences between different committees;

[125] The Osmotherly rules – formally called Departmental Evidence and Response to select committees – set out how departments should interact with select committees and contain guidance to civil servants on how to act when dealing with select committees.

[126] See for example Scotland Act 1998, section 23.

d. It would allow the House to re-affirm an order rather than move immediately to criminal prosecution, or consider whether non-criminal sanctions, such as the existing power to require an apology at the bar of the House, might be more appropriate; and

e. It would prevent third parties bringing malicious prosecutions or referring a case to the police or prosecuting authorities where the House in question did not believe a prosecution to be justified.

285. Before deciding whether to grant permission for a prosecution it would be open for the House to first refer the matter to its Privileges Committee (the Privileges and Conduct Committee in the Lords, or the Standards and Privileges Committee in the Commons) for detailed consideration. This procedure is often followed at the moment when an individual is alleged to have committed a contempt.

286. The Government believes that if legislation were introduced to criminalise certain offences relating to select committees, such an approach would probably be necessary. However, requiring a House to consent to a prosecution carries its own risk, in that it could risk prejudicing any subsequent trial, as a result of comment made during any debate on giving consent for a prosecution.

Interaction between jurisdictions

287. Not all actions that can currently be found to be contempts are covered by the specific offences which the Joint Committee recommended creating. Both Houses would still be able to find an individual in contempt for committing actions that were not covered by a criminal offence. However there is a risk that this approach could create a "hierarchy" of contempts with some contempts being viewed as more serious than others as they can be accompanied by criminal sanctions; this might not be welcome.

288. There would also be a risk that a House could, for the same action, both use its existing powers to punish a person for contempt and simultaneously seek a prosecution. This is, though, not a new risk. The ability of both Houses to find someone in contempt already overlaps with possible criminal offences. When the House of Commons Standards and Privileges Committee found that hacking an MP's phone was possibly a contempt, it concluded that Members should first seek remedies using the criminal law before the House of Commons considered using its own powers to punish such behaviour.[127] It also said that in the majority of cases once a court had reached a decision the House of Commons would take no further action.[128] Where something is both a contempt and a crime, criminal prosecutions normally take precedence, and there seems no reason why the same arrangement could not work for these new offences.

Sanctions

289. Finally, if legislation were pursued, consideration would have to be given as to what the appropriate sanction would be for committing any of the possible new offences. The Joint Committee recommended that it should be an unlimited fine and up to 3 months in prison. This broadly mirrors the sanction for committing a similar offence in the Scottish Parliament and Northern Ireland Assembly, which is up to 3 months' imprisonment or a fine of up to level 5 on the standard scale.[129]

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[127] Standards and Privileges Committee, *Privilege: Hacking of Members' Mobile Phones*, para 68
[128] Standards and Privileges Committee, *Privilege: Hacking of Members' Mobile Phones,* para 70
[129] Scotland Act 1998, section 25(4); Northern Ireland Act 1998, section 45(1)

290. The Government is not convinced that custodial sentences are appropriate for these kind of offences, as it believes that they should be reserved for the most serious, violent or persistent offenders. Further, there is no evidence that short custodial sentences would have either a deterrent or rehabilitative effect.

291. However, if a custodial sentence were not included this would mean that failing to appear before a select committee in Westminster would attract a lesser sanction than refusing to appear before a committee of one of the devolved assemblies; this does not seem satisfactory.

Q26: Do you think a criminal offence should be introduced of failing to comply with an order of a select committee? If so, how should the issues identified in this paper be addressed?

Part Three: Other Privileges

Chapter 8 – Reporting of parliamentary proceedings

Current position

292. In modern democracies it is considered vital that citizens are able to access a full record of what is said and done in their Parliament. It follows from that that both Houses of Parliament must be free to publish whatever material they see fit, and where they use external publishers, then those publishers must have the same protection as Parliament itself.

293. This is the principle behind the Parliamentary Papers Act 1840. This Act was introduced to reverse the judgment in the case of *Stockdale v Hansard*, in which it was found that parliamentary privilege protected papers printed by order of the House for the use of its own Members, but that this protection did not extend to papers made available outside the House to members of the public.[130]

294. Section 1 of the Parliamentary Papers Act provides an absolute immunity for a defendant in any civil or criminal proceedings for any publication of a "report, paper, votes or proceedings" made by order or under the authority of either House of Parliament. Section 2 provides the same protection for any individual who publishes an authenticated copy of any of the above.

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 – or (if commenced on account of the publication of a copy of a parliamentary paper) if such a copy is verified to be correct. The Government is aware of only one instance in which a Speaker's certificate has been produced under section 1 of the Act, which was in *Harlow v Hansard* 1845.[131]

296. The 1840 Act was born of a need to protect papers printed by order of the House – in the particular case of *Stockdale v Hansard*, a report by an inspector of prisons. The Act protects Hansard – more properly the Official Report – which is the edited verbatim report of proceedings of both the House of Commons and the House of Lords. It also protects votes, written ministerial

[130] *Stockdale v Hansard* (1837) 112ER
[131] *Erskine May*, 24th edition, p225

statements, written answers to parliamentary questions and observations on petitions. However, Hansard is far from the only publication made by or under the authority of either House. The Houses themselves produce and publish many papers to aid them in their daily business, and other examples of documents published by or under the authority of either House include select committee reports, transcripts of committee hearings, written evidence submitted to committees, and papers produced in response to an order for a return.

297. Most citizens will not, however, find out about proceedings in Parliament from any of the above sources. What information they derive, they will most likely see on television, hear on the radio, read in newspapers or magazines or, increasingly, read or watch on the internet.

298. Even in 1840, Hansard was not the sole source of information to the public about proceedings in Parliament, and section 3 of the Parliamentary Papers Act was introduced to extend some protection to publishers other than Hansard and the Houses themselves. Section 3 of the Act 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. Whether or not publication is in good faith or without malice is a matter for a jury.

299. Section 3 has twice been extended - by section 9 of the Defamation Act 1952, which explicitly extended this qualified privilege to any sound broadcasts, and, by Schedule 20 of the Broadcasting Act 1990, to television or internet broadcasts (broadcasts contained in a "programme service").

300. There is also protection beyond that provided by the Parliamentary Papers Act. There is a 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. This was established by the judgment in Wason v Walter 1868, a defamation case. "Fair" in this case has been taken to mean fair to all sides of a debate, rather than fair to a plaintiff who thinks he may have been defamed in the debate. This protection has extended beyond bland summaries of debates and as far as parliamentary sketches.[132]

301. The Defamation Act 1996 also gives a qualified privilege in defamation proceedings to anyone publishing:

- a "fair and accurate report of proceedings in public of a legislature anywhere in the world";
- a "fair and accurate copy of or extract from matter published by or on the authority of a government or legislature anywhere in the world"; or
- a "fair and accurate copy of or extract from a notice or other matter issued for the information of the public by or on behalf of a legislature in any member State or the European Parliament…"[133]

302. This privilege is qualified, in that it cannot be claimed where publication is "with malice", prohibited by law, not for the public benefit, or if it concerns matter which is not of public concern. Most of what is in the 1996 Act has its roots in common law privilege. Both the common law privilege and that in the Defamation Act are taken to apply to broadcasters as well as print reporters.

[132] As above, p226

[133] Paragraphs 1, 3 and 9 of Schedule 1. The Government's draft Defamation Bill would extend this protection to a fair and accurate copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of a legislature or government anywhere in the world.

303. Lastly, there is also a defence for publishers against offences concerning the incitement of religious hatred under the Public Order Act 1986, as amended by the Racial and Religious Hatred Act 2006.[134]

Options for change

304. The Parliamentary Papers Act has often been criticised as unclear. The 1999 Joint Committee, for example, felt that it was "drafted in a somewhat impenetrable early Victorian style" and that "the statutory protection would be more transparent and accessible if it were included in a modern statute, whose language and style would be easier to understand than the 1840 Act."[135] This call was echoed by the Culture, Media and Sport Select Committee in the House of Commons in 2010.[136]

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]

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

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[134] Public Order Act 1986, section 29K (1)
[135] Joint Committee on Parliamentary Privilege, First report of Session 1998–99, *Parliamentary Privilege,* HL 43-I / HC 214-I, paras 342 and 374
[136] Culture, Media and Sport Committee, Second Report of 2009-10 Session, Press Standards, *Privacy and Libel,* HC 362-I, para 101
[137] Joint Committee on Parliamentary Privilege, para 374
[138] As above, paras 362-3

Papers Act), and ensure they would be protected equally; however, the Government would welcome views as to whether the definition here is sufficiently exhaustive.

308. The other respect in which the current position has been questioned is with regard to reporting of statements which, if made outside of parliamentary proceedings, would be considered breaches of court orders – for example anonymity injunctions. Beyond the absolute privilege in sections 1 and 2 of the Parliamentary Papers Act, which the draft clauses in this chapter would extend unambiguously to any broadcasts of proceedings whose broadcasting has been authorised by either House, the extent of protection for such reporting has been argued to be unclear. Certainly there is no comparable statutory defence against proceedings for contempt of court as there is for defamation or public order offences. A Committee on Super-Injunctions chaired by the Master of the Rolls recognised that there is "an open question" as to the extent to which the current common law protection for reporting defamatory statements can also be read across to the reporting of information which is the subject of an injunction.[139] The Committee noted that the lack of clarity could be addressed through a Defamation Bill or a Privilege Bill, but that it was "a matter of substantive policy whether Parliament wishes to clarify the law in this area"; it also noted that the law may be clarified in the courts in due course.[140]

309. The Joint Committee on the draft Defamation Bill in October 2011 suggested adding a provision to that Bill which "provides the press with a clear and unfettered right to report on what is said in Parliament and with the protection of absolute privilege for any such report which is fair and accurate".[141] This proposal reflects an argument often made that it seems wrong in principle that anyone should be the subject of legal proceedings for publishing an accurate report of something that has been said in Parliament.

310. This recommendation goes to the heart of the purpose of the privilege of freedom of speech, and why it is important that things can be said freely in parliamentary proceedings that cannot be said in other circumstances. 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. If the purpose of Article IX were allowing MPs and peers to bring any matter of their choosing to the attention of the public, there is no obvious reason why their privilege of free speech should have been limited to speech within proceedings in Parliament.

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 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.

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[139] Report of the Committee on Super-Injunctions, *Super-Injunctions, Anonymised Injunctions and Open Justice,* 20 May 2011, para 6.33

[140] As above, para 6.34

[141] Joint Committee on the draft Defamation Bill, Session 2010-12, HL 203 / HC 930-I, para 51

[142] Joint Committee on Privacy and Injunctions, Session 2010-12, *Privacy and Injunctions,* HL 273 / HC 1443, para 237

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.

Q27: Do you support the changes to the law which would be made by clauses 1 and 2?

Q28: Do you believe other changes should be made to the law on reporting of parliamentary proceedings? If so, what changes do you believe should be made?

[143] As above, para 241

Draft clause

Publication and broadcasting of parliamentary proceedings etc

1 Burden of proof under section 3 of the Parliamentary Papers Act 1840

(1) Section 3 of the Parliamentary Papers Act 1840 (which confers protection in respect of proceedings for printing extracts from or abstracts of parliamentary papers) is amended as follows.

(2) The existing provision becomes subsection (1).

(3) After that subsection insert—

"(2) The extract or abstract shall be treated as shown to have been published bona fide and without malice unless the contrary is shown."

2 Broadcasting of parliamentary proceedings or documents

(1) This section applies to civil or criminal proceedings brought against a person ("P") in respect of a broadcast by P (or P's servants or agents) of—

(a) proceedings in Parliament, or

(b) the whole or part of the content of a parliamentary document.

(2) The court or tribunal must stay proceedings to which this section applies if—

(a) P provides the court or tribunal with a certificate of parliamentary authorisation, and

(b) before doing that, P gives the claimant or the prosecution a notice of P's intention to do so not later than rules of court or tribunal rules may provide.

(3) "A certificate of parliamentary authorisation" is a certificate which—

(a) states that the broadcast was made by or under the authority of the House or Houses of Parliament to which the proceedings or document mentioned in subsection (1)(a) or (b) relate, and

(b) is signed by the Speaker of the House of Commons, the Speaker of the House of Lords, the Clerk of the House of Commons or the Clerk of the Parliaments.

(4) If proceedings to which this section applies are not stayed under subsection (2), the claimant or the prosecution must prove that the broadcast was made with malice.

(5) In this section—

(a) "broadcast" means dissemination of images, text or sounds (or any combination of them) by any electronic means; and for the purposes of this section it is irrelevant whether or not a broadcast is live, is made on demand or is made to more than one person;

(b) "parliamentary document" means information in any form published by or under the authority of either House of Parliament;

(c) "tribunal" means any tribunal in which legal proceedings may be brought.

(6) In this section, in relation to proceedings in Scotland—

(a) "claimant" means pursuer;

(b) references to proceedings being stayed are references to—

(i) in the case of civil proceedings, proceedings being dismissed;

(ii) in the case of criminal proceedings, proceedings being deserted *pro loco et tempore*.

(7) In this section, in relation to proceedings in Northern Ireland, "claimant" means plaintiff.

(8) Nothing in section 1 or 2 of the Parliamentary Papers Act 1840 applies in relation to publication by means of a broadcast; and the following are repealed—

(a) section 9 of the Defamation Act 1952 and section 9 of the Defamation Act (Northern Ireland) 1955 (which extended section 3 of the Parliamentary Papers Act 1840 to wireless telegraphy);

(b) paragraph 1 of Schedule 20 to the Broadcasting Act 1990 (which extended section 3 of the 1840 Act to programme services).

Chapter 9 – Miscellaneous issues

Introduction

314. This Green Paper has discussed the principal privileges of Parliament thematically. However, not all privileges fall neatly into those categories. This chapter considers those "other privileges" that were identified by the 1999 Joint Committee on Parliamentary Privilege's Report and those contained in Standing Orders, and discusses whether there is a case for any changes in this area.

Freedom from arrest in civil matters

315. Members of each House have a privilege of freedom from arrest in civil matters. The historical basis for this privilege is that the duty on Members of both Houses to attend the sitting of Parliament overrides any other considerations; nothing should prevent a Member from attending a sitting of Parliament. However, this immunity from arrest only applies in civil and not criminal matters. It has never stopped Members being arrested or imprisoned if they have committed a crime.

316. In the House of Lords this privilege is expressed in Standing Order 82 (which dates from 1626):

> *The privilege of the House is that, when Parliament is sitting, or within the usual times of privilege of Parliament, no Lord of Parliament is to be imprisoned or restrained without sentence or order of the House, unless upon a criminal charge or for refusing to give security for the peace.*[144]

There is no comparable Standing Order regarding freedom from arrest in the House of Commons, but the first recorded usage of this freedom was in 1340 when the King released a Member from prison during the Parliament following that in which he had been prevented, by his detention, from taking his seat.[145]

317. When the Joint Committee examined this issue it noted that this privilege had lost most of its importance in 1870 when imprisonment for debt was abolished, as this was the most common situation where a person could be imprisoned in a civil matter. However, it noted that this privilege

[144] House of Lords Standing Orders relating to public business 2010, HL 116, Standing Order 82
[145] *Erskine May,* 24th edition, p 210

could still provide immunity from arrest for contempt in civil proceedings, for example in failing to obey a court order to hand over property.[146]

318. The Joint Committee recommended that this privilege should be formally abolished, as did its predecessor Committee in 1967. The Government agrees; there is no obvious continuing justification for Members of Parliament enjoying different treatment from any other citizen in civil proceedings.

Q29: Is there a continuing case for Members' freedom from arrest in civil matters?

Application of the Mental Health Act 1983 to members of the House of Lords

319. Members of the House of Commons can be detained under the Mental Health Act 1983 if they are suffering from a mental health condition. As no explicit provision was made for members of the House of Lords, the Lords Committee for Privileges considered whether their freedom from arrest, as expressed in Standing Order 82, would prevent them being detained under the Mental Health Act.[147] The Committee accepted the judgment of three Law Lords that it would be possible for members of the House of Lords to be detained, even though no explicit provision was made about the House of Lords, as the provisions of statutes would prevail against any existing privilege of Parliament.[148] However, it believed that for the avoidance of doubt legislation should be passed explicitly to apply the Mental Health Act 1983 to members of the House of Lords. When the Joint Committee considered this issue it came to the same conclusion.

320. The Government's position is that members of the House of Lords should be able to be detained under the Mental Health Act 1983, and it agrees with previous committees that the law currently applies to members of the House of Lords. Therefore, the Government does not believe that it is necessary to amend the legislation.

Exemption from attending court as a witness

321. Currently Members of either House do not have to comply with orders requiring them to attend court as a witness; this does not stop them voluntarily attending court to give evidence. The basis of this privilege, like that of freedom from arrest, is that the duty to attend a sitting of the House trumps any other obligations that might be placed on a Member. However, there is no requirement for a Member to show that attending court would prevent him or her attending business in Parliament, and the Joint Committee reported that there have been cases of this privilege being used by Members in personal cases, unrelated to their membership of a House of Parliament.[149]

322. The Joint Committee thought that there might be cases where a Member's duty to attend Parliament could be more important than the duty to attend court as a witness, but it did not think that this meant that Members should be allowed to choose for themselves which cases they would attend as a witness and which cases they would refuse. They recommended that Members should not be exempt but that a master or district judge should have to consent to a subpoena being issued against a Member. This was to prevent a Member being the subject of a vexatious summons – where a summons is issued for no reason other than to harass or inconvenience them.

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[146] Joint Committee on Parliamentary Privilege, First Report of Session 1998-99, *Parliamentary Privilege,* HL 43-I / HC 214-I, para 327

[147] Committee for Privileges, *Parliamentary Privilege and the Mental Health Legislation,* Session 1983-84, HL 254

[148] *Erskine May*, 24th edition, p245

[149] Joint Committee on Parliamentary Privilege, para 330

323. The Government agrees that there is no continuing justification for this privilege, and notes this exemption does not match the position on jury service where Members are no longer exempt.[150] Neither does it believe that the safeguard recommended by the Joint Committee is necessary. The process for a court awarding a summons contains sufficient safeguards, as the summoning party will have to demonstrate to the court why a witness's testimony is relevant to a case; if relevance cannot be shown then a summons will not be issued. If a Member was summoned on a day on which urgent House business arose it would also be possible for the Member to request their appearance to be delayed. As the Joint Committee noted, courts are already used to accommodating other witness, such as surgeons, who can need to be elsewhere at short notice.[151] Therefore the Government sees no rationale for Members being treated differently from non-members in this area.

Q30: Is there a continuing case for Members' exemption from attending court as a witness?

Service of court documents within the precincts

324. There have been cases where the serving of court documents within the precincts of Parliament on a day when a House is sitting has been regarded as a contempt. Whilst traditionally service of court documents within the precincts was regarded as a contempt because it was thought to obstruct the work of Parliament, the main concern expressed by the Joint Committee was that individuals and campaign groups might use the fact they are serving a document in Parliament to gain publicity for their causes. It argued that the existing rule did not interfere with the administration of justice as there were other mechanisms, such as postal delivery of court documents, that could be used to ensure that these documents were served. However, the Joint Committee recommended that it should be clarified that serving documents via post was not a contempt.

Q31: Do you agree with the Joint Committee that the serving of court documents in person within the precincts of the Palace on a sitting day should continue to be viewed as a contempt?

Abusive contempts

325. Abusive contempts are a sub-set of contempts of Parliament which involve *"words or action by any person which either House considers disrespectful, insulting or defamatory."*[152] On occasions in the past the two Houses of Parliament (and in particular the House of Commons) have treated insults, normally made through the press, which were aimed at the House or its Members as contempts. When the Joint Committee considered this issue it concluded that there was not a case for retaining abusive contempt as a separate category of contempts. It also noted that in Australia the definition of contempt set out in the Parliamentary Privilege Act 1987 has effectively abolished this type of contempt.

326. The Government agrees with this conclusion. Times have changed; the public attitude to Parliament, and to politics more generally, is certainly less deferential than it used to be. In the unlikely event that either House of Parliament did treat an insulting media report as a contempt, it would be likely to be criticised as an attempt to interfere with the freedom of the press. If a Member of either House felt that a press article was so critical that it amounted to libel, then the proper course

[150] Jury service for Members of Parliament, and officers of both Houses, was introduced by the Criminal Justice Act 2003.
[151] Joint Committee on Parliamentary Privilege, para 332
[152] Joint Committee on Parliamentary Privilege, para 268

of action would be to seek redress through the courts rather than asking the relevant House of Parliament to find the author in contempt.

327. For these reasons the Government does not believe that the two Houses should retain a power to penalise abusive contempts. As the decision that an individual has committed an abusive contempt is one for both Houses, there would be no need for legislation to abolish abusive contempts. Instead, both Houses may wish to consider formally resolving that they will not in future find individuals guilty of committing "abusive contempts."

Q32: Is there a continuing case for Parliament to retain a power to find individuals guilty of contempt on the basis of insulting or disrespectful language?

Privileges contained in Standing Orders

328. There are a few privileges of the House of Lords which are expressed in, though they do not necessarily derive from, the House's Standing Orders. One of these is the freedom of arrest set out in Standing Order 82, which is discussed above. For the purpose of a comprehensive consideration of parliamentary privilege, this section considers those other Lords Standing Orders which make explicit reference to the House's privileges. The content of Standing Orders is, of course, a matter for each House.

Lords Standing Order 16

329. This states that *"The printing or publishing of anything relating to the proceedings of the House is subject to the privilege of the House"* and was passed by the House of Lords in 1699.

330. While this Standing Order concerns the publishing of proceedings, it is different from the Parliamentary Papers Act 1840 (discussed in Chapter 8). The 1840 Act protects third parties from legal action for the publishing of papers by Order of either House of Parliament or of copies, abstracts or extracts from those publications. Instead, this Standing Order is an expression of the House's exclusive right to control the publication of its own proceedings, and the principle that an unauthorised publication of them would be a breach of privilege.

331. While it is difficult to be certain about what motivated the House of Lords to pass this Standing Order, it is likely that it reflects the reluctance of the House of Lords at that time to allow its proceedings to be discussed outside Parliament. This interpretation is supported by the preceding entry in the House of Lords Journal which reads:

> *"Then JoŸ Churchill, the Printer, who was summoned to attend, for printing a Book, (intituled, Cases in Parliament resolved and adjudged, upon Petitions and Writs of Error) was called in, and by Command of the House reprimanded for printing the same without leave of this House."*[153]

The last time the House considered taking action in this area (though without explicit reference to S.O. 16) appears to have been in 1847, in respect of alleged misrepresentation of speeches by "the Printer of the *Times* Newspaper and the Printer of the *Sun* Newspaper".[154]

332. The Government is not aware of any problem being caused by the existence of this Standing Order, nor of any claims of privilege being made on the basis of it. However, the Standing Order

[153] LJ, 27 February 1699
[154] *Erskine May*, p. 259, note 55

has not been invoked in recent times, and, as with abusive contempts (discussed above), it seems unlikely that the modern House would wish to take action over misrepresentation. Publication of internal House documents would continue to be protected by the Houses' exclusive cognisance, even if this Standing Order was repealed. Therefore it seems questionable whether this Standing Order has any continuing relevance.

Lords Standing Order 84

333. This states that *"in all cases wherein it is necessary to examine witnesses in perpetuam rei memoriam, it shall not be taken to be a breach of privilege of Parliament to file a Bill against a Peer in time of Parliament, and take out usual process for that purpose only."*

334. "In perpetuam rei memoriam" is a legal term that concerns testimony which needs to be made before the main trial goes ahead, for example where a witness is about to leave the country for a period of time or is terminally ill. An example would be where a person brought a bill to examine witnesses in order to prove the validity of a will, in case there was a challenge to it after the testator died. The witness would be examined 'in perpetuam rei memoriam' which means "for the perpetual remembering of a thing", in this case the witness's evidence.

335. This provision has fallen into disuse. There are now other legal procedural devices that can be used in this situation, for example applying to a court for an order for a person to be examined before a hearing takes place, under Civil Procedure Rule 34.8. On this basis, this Standing Order does not appear to serve any continuing purpose.

Lords Standing Order 85

336. This states that *"no oath shall be imposed by any Bill or otherwise upon Peers with a penalty in case of refusal to lose their places and votes in Parliament or liberty of debate therein".*

337. It is not clear what effect this Standing Order has. Members of the House of Lords do have to take an oath, or swear an affirmation, at the start of each Parliament to allow them take their place in the House of Lords and to vote and participate in debates. However, a refusal to take this oath would not permanently deny them the ability to sit and vote; they would still be able to take the oath at a later date to claim their seat.

338. In the highly unlikely event that a Bill was passed that did impose an oath by which peers had to take leave of their seats, then it is unlikely that this Standing Order would have any effect. This is because, as discussed in Chapter 5, where an Act makes specific provision about Parliament this takes precedence over parliamentary privilege. Therefore this Standing Order does not appear to serve any continuing purpose.

Privilege of peerage

339. The privilege of peerage is not strictly a parliamentary privilege, as it extends to all peers, and not all peers sit in the House of Lords. However, the issue was discussed in the Joint Committee report, and therefore we consider it briefly here.

340. The privilege of peerage has traditionally consisted of three parts:

i. The right of trial by peers;

ii. The right of access to the sovereign at any time; and

iii. The freedom from arrest.

We do not discuss here the House of Lords' role in arbitrating peerage claims, as this is being considered as part of the Government's proposals for reform of the House of Lords.

341. The first part, right of trial before a jury of other peers, was abolished by statute in 1948. The privilege of freedom from arrest has been claimed in only two cases since 1945.[155] The privilege of access to the Sovereign still formally exists, although the Government is not aware of it being exercised in recent times.

342. The Joint Committee recommended that the two remaining parts of the privilege of peerage be abolished. The Government agrees with this conclusion.

Q33: Is there a continuing case for the remaining privileges of peerage?

[155] Joint Committee on Parliamentary Privilege, para 329

Conclusion

343. Parliamentary privilege is not a widely understood concept. This Green Paper and the draft clauses contained in it are intended to facilitate a wider debate on this vital, but often overlooked, part of the constitution. Parliamentary privilege has developed over many centuries and it is important that the consequences of any reforms are properly understood.

344. The Government does not wish to introduce any legislation in this area without thorough consultation. Where draft clauses have been produced, their purpose is to aid debate and illustrate possible solutions; they do not represent proposals that the Government is committed to implementing.

345. Ultimately, these are Parliament's privileges, and it is for Parliament to decide on their future. The Government believes it would be appropriate for these issues to be scrutinised by a Joint Committee, and will be holding early discussions in both Houses about the establishment of and timetable for such a Committee.

How to respond to this consultation

346. Comments and views are sought from as wide a range of people as possible on the proposals contained in this Green Paper. If you wish to comment directly to the Government, please write before 30 September 2012 to:

Parliamentary Privilege Consultation
Area 4/S1
1 Horse Guards Road
London SW1A 2HQ

Or you can email us at: parliamentaryprivilegeconsultation@cabinet-office.gsi.gov.uk

Summary of questions

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Q1: Do you agree that the case has not been made for a comprehensive codification of parliamentary privilege?

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Chapter 2 – Freedom of speech: General issues

Q2: Do you think that "proceedings in Parliament" should be defined in legislation?

Q3: Do you agree with the recommendation of the Joint Committee on Parliamentary Privilege that the current protection of qualified privilege for Members' correspondence is sufficient?

Q4: Do you think that "place out of Parliament" should be defined in legislation?

Q5: Do you think that the situations when the courts can use proceedings in Parliament should be set out in legislation?

Chapter 3 – Freedom of speech and criminality

Q6: Do you believe that the protection of privilege should be disapplied in cases of alleged criminality, to enable the use of proceedings in Parliament as evidence?

Q7: If so, do you believe that this disapplication should apply to all cases of alleged criminality unless specifically excepted, or should disapplication be restricted to certain specific offences such as bribery?

Q8: Do you agree that if the protection of privilege were disapplied in criminal cases, exceptions would need to be made?

Q9: If so, are the offences specified in the draft Schedule the correct ones? If not, which offences should be included or excluded?

Q10: Should the protection of privilege be disapplied where a person incites specific acts of violence or terrorism in proceedings in Parliament?

Q11: Do you agree that the offence of misconduct in public office should be on the list of exceptions?

Q12: Do you believe that, if the protection of privilege were disapplied in certain circumstances, a safeguard would be desirable before proceedings in Parliament could be used in evidence by the prosecution in specific cases?

Q13: If so, do you support the approach in the draft clauses?

Q14: Do you believe the protection of privilege should in certain circumstances be disapplied for non-members as well as for Members?

Q15: If so, do you believe this should be:

(a) in all the same situations as for Members; or
(b) only when a non-member is being tried on the same facts as a Member?

Chapter 4 – Freedom of speech and civil law

Q16: The Government does not think that any legislative change to restrict freedom of speech in proceedings in Parliament in respect of court injunctions is desirable or necessary. Do you agree?

Q17: Do you think that section 13 of the Defamation Act 1996 should be repealed?

Q18: If so, do you think that section 13 of the Defamation Act 1996 should be replaced with a power for each House to waive privilege, and do you have views on how that should operate?

Q19: Is a general power for each House to waive the protection of privilege to permit inquiries to consider evidence given in proceedings desirable?

Part Two: Exclusive Cognisance

Chapter 5 – Application of legislation to Parliament

Q20: In light of the Chaytor judgment, do you believe there is a need for legislation to clarify the extent of Parliament's privilege to organise its internal affairs?

Chapter 6 – Regulation of Members

Q21: Would you support legislation that clarified that the privileged status of proceedings of the Committee on Standards in the House of Commons would not be affected by the granting of full voting rights to lay members?

Q22: Do you agree that, other than for lay members of the Committee on Standards in the House of Commons, there is no reason to legislate in any legislation on privilege regarding the regulation of Members of either House?

Chapter 7 – Select Committee powers

Q23: Is there a need to address select committees' power to summon witnesses, documents and records?

Q24: Should the House of Commons be given a statutory power to fine non-members? If so, what steps should be taken to ensure this power was only used in line with the principles of natural justice?

Q25: Should a statutory definition of contempt of Parliament be introduced that would be enforceable by the courts? If so, should it be defined by reference to general principles or to specific acts?

Q26: Do you think a criminal offence should be introduced of failing to comply with an order of a select committee? If so, how should the issues identified in this paper be addressed?

Part Three – Other Privileges

Chapter 8 – Reporting of parliamentary proceedings

Q27: Do you support the changes to the law which would be made by clauses 1 and 2?

Q28: Do you believe other changes should be made to the law on reporting of parliamentary proceedings? If so, what changes do you believe should be made?

Chapter 9 –Miscellaneous issues

Q29: Is there a continuing case for Members' freedom from arrest in civil matters?

Q30: Is there a continuing case for Members' exemption from attending court as a witness?

Q31: Do you agree with the Joint Committee that the serving of court documents in person within the precincts of the Palace on a sitting day should continue to be viewed as a contempt?

Q32: Is there a continuing case for Parliament to retain a power to find individuals guilty of contempt on the basis of insulting or disrespectful language?

Q33: Is there a continuing case for the remaining privileges of peerage?

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