

The Media Lawyers Association

Defending freedom of expression

Response to Green Paper on Parliamentary Privilege published in April 2012

This response is submitted on behalf of the Media Lawyers Association ("the MLA") which is an association of in-house media lawyers from newspapers, magazines, book publishers, broadcasters and news agencies. A list of the MLA's members is set out in Annex 1.

Introduction

We note that many of the matters considered in the consultation paper pertain primarily to the rights of Parliament and Parliamentarians and we do not propose to comment on many of these areas. We have, however addressed the questions that specifically concern the rights and freedoms of the media in which we have a direct interest.

Chapter 4 – Freedom of Speech and Civil Law

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

Yes, subject only to the amendments proposed in response to questions 27 and 28 below.

However, if Parliament were to see fit to introduce a right of reply procedure as set out at paragraphs 176 to 182, we would oppose the introduction of any secondary obligation on those who are reporting such matters. i.e. if a parliamentarian were obliged to contact the subject of an injunction prior to naming them in Parliament, then we believe that the reporting of the proceedings should be permitted in the way further discussed in the response to question 27 below without an additional obligation of the broadcaster/publisher to approach the subject of the injunction again prior to broadcast/publication, as is the case under the existing law.

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 Do you think section 13 of the Defamation Act 1996 should be repealed?

As section 13 imposes a restriction on freedom of speech and is unnecessary as evidenced by the fact that it has not been utilised since its introduction, we agree with the proposal that it should be repealed and we do not believe that it needs to be replaced.

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?

We believe that the potential chilling effect referred to at paragraphs 188-189 of the consultation paper is a very real prospect.

The introduction of a power for each House to waive privilege would introduce considerable uncertainty into the protection of the freedom of members to make

statements in Parliament and for the media to report such statements. It would therefore make the decision on whether or not to report potentially privileged Parliamentary proceedings considerably more difficult and would be likely to inhibit freedom of speech not only within Parliament itself but also in the media in relation to reporting of Parliament.

Chapter 7 – Select Committee Powers

Question 23 – Is there a need to address select committees’ powers to summon witnesses, documents and records?

We take no issue with the proposed codification of existing powers, however we believe that, should such codification occur, it is essential that express provision should be made to ensure respect for journalistic confidentiality and to allow witnesses and media organisations to protect confidential sources.

Chapter 8 – Reporting of Parliamentary Proceedings

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

We agree that the provisions of the Parliamentary Papers Act 1840 should be brought into line with the common law and therefore support the change to the burden of proof as encompassed in the proposed change to s.1.

As an organisation representing the interests of both broadcasters and print media outlets, we also welcome the suggested changes to s.2 making the position clear in relation to broadcasts of parliamentary proceedings.

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?

Recent incidents whereby the names of individuals protected by court orders were revealed in Parliament have caused difficulties for the media because there is no express statutory protection in reporting such matters where the court order related to private or confidential information (as opposed to allegedly libellous information - where there is a qualified privilege by virtue of Schedule 1 of the Defamation Act 1996). This is an unacceptable lacuna, particularly in light of recent developments in the privacy law and the increased number of court orders that have been granted to protect private information.

In particular, the naming in Parliament of anonymised parties in the cases of ***MNB v News Group [2011] EWHC 528 (QB)*** on 10 March 2011, ***Doncaster v Haigh [2011] EWHC B16 (Fam)*** on 26 April 2011 and ***CTB v News Group & Thomas [2011] EWHC 1326 (QB)*** on 23 May 2011 (each by John Hemming MP on the floor of the Commons) caused considerable debate. In each of these incidents the disclosure of the name of the individual concerned was in clear contravention of a court order and, while the Speaker did attempt to intervene after the disclosures had been made, it does not appear that the MP concerned faced any formal sanction from the House.

The legal proceedings in these cases related to matters other than defamation, so the defence of qualified privilege afforded by the Defamation Act 1996 to reports of

parliamentary proceedings would not apply. We support the Committee's proposed changes to the Defamation Act which would extend absolute privilege to reports of Parliamentary proceedings in respect of defamation claims (as also set out in clause 7 (1) of Lord Lester's draft Defamation Bill), but it seems illogical that the media should get absolute privilege for fair and accurate reports of court proceedings, and (if the proposed changes to the Defamation Act come into effect), and absolute privilege for reports of Parliamentary proceedings in respect of defamation claims, but have no equivalent protection from contempt proceedings, particularly when reporting statements made in Parliament which may be in breach of either privacy or Family Division orders, or indeed any other court order which grants anonymity to an individual or organisation in any type of proceedings.

It appears that the common law cannot be relied upon to provide a defence in these circumstances. As cited at paragraph 6.28 of the Report of the Committee on Super-Injunctions, Lord Woolf stated in 1978 that, while *Wason v Walter* (1968) 4 QB 73 established a limited common law protection in defamation proceedings for honest, fair and accurate reporting of Parliamentary proceedings, there was "*no reported case which authoritatively decides the extent of protection against proceedings for contempt available in respect of fair and accurate reports of proceedings of Parliament.*" Almost 35 years later the position seems unchanged.

While verbatim, contemporaneous accounts of Parliamentary proceedings, such as the live feed on BBC Parliament, appear to be covered under the provisions of the Parliamentary Papers Act 1840 (as amended), the position in relation to newspaper reports, news bulletins, current affairs programmes and print features is less clear and remains a grey area of the law (as noted at paragraph 308 of the consultation paper). It makes no sense that such matters could be reported by a live feed, but not subsequently.

The Report of the Committee on Super-Injunctions concluded that "in general, media reporting of Parliament would not appear to fall under the protection of the 1840 Act. It will not because such media publications. . . *"will not be printed by order of Parliament, nor would [they be] a copy or extract of such a publication."* (at paragraph 6.26 of the Report.) The Report goes on to conclude (at paragraph 6.33) that: "It therefore appears to be an open question whether, and to what extent, the common law protects media reporting of Parliamentary proceedings where such reporting appears to breach the terms of a court order and is not covered by the protection covered by the 1840 Act. What is clear is that unfettered reporting of Parliamentary proceedings (in apparent breach of court orders) has not been established as a clear right."

We note that the reasoning set out at paragraph 312 of the consultation paper suggests the Government believes that the broadcaster/publisher should be required to demonstrate a clear public interest which over-rides the protection afforded by the Court order in question. This approach will not significantly change the status quo and would give rise to considerable uncertainty in light of the need of the media to make rapid decisions as to how it contemporaneously reports proceedings in parliament. Requiring the broadcaster/publisher to demonstrate a public interest (rather than introducing an extended privilege defence) would leave the media in a position of considerable legal uncertainty and would require a forensic legal examination of the story prior to publication/broadcast in circumstances where there is a pressing need to convey the story to the public. Furthermore, in most if not all instances, the media is unlikely to be in possession of sufficient material to enable it to make a proper decision on this. This is likely to lead some organisations to decide not to cover some matters which parliamentarians consider to be of public interest as

they do not want to run the risk of legal action. Media organisations will also be conscious that the question of whether the public interest in publication/broadcast over-rides the public interest in the Court's order is likely to be viewed very differently by Parliament and the Judiciary and we submit that in terms of proportionality and balance, if Parliament has permitted something to be said within its confines, then the media should be entitled to report it (fairly and accurately).

We believe that it is unsatisfactory therefore to pass over the present opportunity to properly clarify the position. We agree therefore that this area of the law is in need of clarification and support the introduction of an extended privilege defence that applies specifically to circumstances in which a court order would otherwise be held to have been breached.

It appears to us that the proposed changes to s 2(4) of the Parliamentary Papers Act 1840 should be extended to deal with this issue, and could do so if it were made clear that that is Parliament's express intention (as suggested by the Joint Committee of Privacy and Injunctions) that privilege from any risk of contempt should apply to media reports of parliamentary proceedings.

If Parliament does not take this opportunity to clarify the law further by way of legislation, then ultimately this will be a question to be decided by the Courts who are likely to rule in favour of the primacy of their own rulings, thus creating a chilling effect on the media. We therefore strongly support the wider change as proposed by the Joint Committee on Privacy and Injunctions.

Media Lawyers Association
30 September 2012

ANNEX 1:

List of MLA members:

1. **Anova Books Group Limited**, publisher of books and related publishing services specialising in non-fiction subject matter.
2. **Associated Newspapers Limited**, publisher of the Daily Mail, the Mail on Sunday, Metro and related websites.
3. **The British Broadcasting Corporation**, a public service publisher of 8 UK-wide television channels, interactive services, 9 UK-wide radio/audio stations, national and local radio/audio services, bbc.co.uk and the BBC World Service.
4. **British Sky Broadcasting Limited**, a programme maker and broadcaster, responsible for numerous television channels, including Sky News and Sky One.
5. **Channel 5 Broadcasting Limited**, a public service broadcaster of the Channel 5 service and 2 digital channels, interactive services and related websites.
6. **Channel Four Television Corporation**, public service broadcaster of Channel 4 and three other digital channels, plus new media/interactive services, including websites, video on demand and podcasts.
7. **The Economist Newspaper Limited**, publisher of the Economist magazine and related services.
8. **Express Newspapers**, publisher of the Daily Express, the Sunday Express, the Daily Star, the Daily Star Sunday and related websites.
9. **The Financial Times Limited**, publisher of the Financial Times newspaper, FT.com and a number of business magazines and websites, including Investors Chronicle, Investment Adviser, The Banker and Money Management.
10. **Guardian News & Media Limited**, publisher of the Guardian, the Observer and Guardian Unlimited website.
11. **Independent Print Limited**, publisher of the Independent, the Independent on Sunday, the Evening Standard, i and related websites.
12. **Independent Television News Limited (ITN)**, producer of ITV News, Channel 4 News, Channel 5 News, internet sites and mobile phones.
13. **ITV PLC**, a programme maker and a public service broadcaster of the channels ITV1 (in England and Wales), ITV2, ITV3, ITV4 and CITV, interactive services and related websites.
14. **The National Magazine Company Limited**, publisher of consumer magazines including Cosmopolitan, Good Housekeeping, Harper's Bazaar and Reveal.

15. **News Group Newspapers Limited**, publisher of The Sun and related magazines and websites, and part of NI Group Limited.
16. **The Newspaper Society**, which represents the publishers of over 1200 regional and local newspapers, 1500 websites ,600 ultra local and niche titles, together with 43 radio stations and 2 TV channels .
17. **PPA (The Professional Publishers Association)**, which is the trade body for the UK magazine and business media industry. Its 250 members operate in print, online, and face to face, producing more than 2,500 titles and their related brands.
18. **The Press Association**, the national news agency for the UK and the Republic of Ireland.
19. **Telegraph Media Group Limited**, publisher of the Daily Telegraph, Sunday Telegraph and related websites.
20. **Thomson Reuters PLC**, international news agency and information provider.
21. **Times Newspapers Limited**, publisher of The Times and The Sunday Times and related websites, and part of NI Group Limited.
22. **Trinity Mirror PLC (including MGN Limited)**, publisher of over 140 local and regional newspapers, 5 national newspapers including the Daily Mirror, Sunday Mirror and The People and over 400 websites.
23. **Which?**, the largest independent consumer body in the UK and publisher of the Which? series of magazines and related websites.