

BRIEFING PAPER:

COMPARATIVE ANALYSIS OF PROCEDURES GOVERNING THE RIGHT OF REPLY AND PRIOR NOTIFICATION IN LEGISLATIVE CHAMBERS

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INTRODUCTION

This briefing paper has been prepared for the Committee on Procedures to provide information on the procedures in place in different Legislatures regarding the 'right of reply' of a non member referred to during a debate and of any procedure in place whereby a Member would give advance notification to a non member if they intend to make negative comments about them.

Section 1 of this paper provides a brief explanation of parliamentary privilege, 'right of reply' and 'prior notification'. Section 2 discusses the current situation in the Northern Ireland Assembly and other Legislatures regarding parliamentary privilege, the 'right of reply' and 'prior notification'. Where any other Legislatures have procedures in place, these are briefly outlined.

SECTION 1

In order to carry out their duties Parliaments and their members need certain rights and immunities, these are known as Parliamentary privilege. It is a basic principle that Parliamentary privilege is the privilege of the House as a whole and not of the individual member. Without this protection members would be hindered in performing their parliamentary duties, and the authority of Parliament as a forum for expressing the views of citizens would be diminished. Privilege is intended to protect the House in respect of the conduct of its internal affairs.¹

Many Parliaments around the world may have some form of Parliamentary privilege, however each one may vary slightly according to the needs of that particular Legislature. One component central to Parliamentary privilege is that of freedom of speech. Freedom of speech allows members to speak without fear of penalty. This is fundamental to the effective working of Parliament, and in Westminster is achieved by the primary parliamentary privilege: the absolute protection of 'proceedings in Parliament' guaranteed by article 9 of the Bill of Rights 1689.²

'Right of reply' allows any persons who believe they have been unfairly criticised in Parliament to submit an official complaint. This person's complaint may be incorporated into the parliamentary record. The 'right of reply' was adopted first in the Australian Senate in 1988 and later, in the Parliament of New South Wales and in the legislative assemblies of Queensland, Western Australia, and the Australian Capital Territory. New Zealand has also adopted a similar system.³

¹ Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, Chapter 12 Para 12.01

<http://www.publications.parliament.uk/pa/ld/ldcomp/ldctso43.htm>

² Joint Committee on Parliamentary Privilege First Report, April 1999 Chapter 1 Para 12
<http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4305.htm>

³ Ibid, Para 219

'Prior notification' involves a Member giving advance notification to a non member if they intend to make potentially negative comments about them.

SECTION 2

NORTHERN IRELAND

The only Parliamentary privilege which applies to Members of the Northern Ireland Assembly relates to freedom of speech. The privilege of freedom of speech is an important aspect of Parliamentary privilege as it enables members to comment on the activities of individuals, companies, representative bodies, interest groups or anyone else they wish.⁴

Section 50 of the Northern Ireland Act 1998 states: ⁵

For the purposes of the law of defamation, absolute privilege shall attach to—
(a) the making of a statement in proceedings of the Assembly; and
(b) the publication of a statement under the Assembly's authority.

Therefore a Member of the Assembly could make reference to an individual, group of individuals or organisations and would not be committing an act of defamation under this privilege.

REPUBLIC OF IRELAND

At present the Dáil Éireann has procedures in place in relation to the 'right of reply' of individuals who have been referred to by a Member during a debate.⁶ Part 3 of Standing Order 59⁷ explains the procedure in place within the Dáil Éireann.

A person referred to by name in the remark may make a submission in writing to the Ceann Comhairle (the Speaker) claiming to have been adversely affected by such comment. The person must set out the reasons why the remark was defamatory, and why it constitutes an abuse of privilege, and request that their response be printed in the Dáil Debates.⁸

The Ceann Comhairle must make a decision either to pursue the request or to rule that no further action should be taken. The Ceann Comhairle may decide that the request is so trivial that no abuse of privilege has occurred.⁹

If the Ceann Comhairle decides that it is practical to pursue such a request he or she has the following options:

⁴ Joint Committee on Parliamentary Privilege First Report, April 1999 Chapter 4 Para 217
<http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4308.htm>

⁵ Northern Ireland Act 1998 Section 50, *Privilege*
http://www.opsi.gov.uk/acts/acts1998/ukpga_19980047_en_4#pt4-pb6-l1g50

⁶ Information gained by correspondence with the Dáil Éireann

⁷ Standing Orders of the Dáil Éireann

http://www.oireachtas.ie/documents/proceduraldocuments/StandingOrders2007_English_and_Irish.pdf

⁸ Explanatory Memorandum of Standing Order 59 gained through correspondence with the Dáil Éireann

⁹ Ibid

- Direct the member involved to give a personal explanation either withdrawing unconditionally or clarifying the original remark, or
- Refer the request to the Committee on Procedures and Privileges¹⁰ for consideration.

Where a request or submission has been referred to the Committee on Procedures and Privileges, the Committee has several options it could take. The Committee may decide not to consider the matter if it is frivolous and will report this to the House if this is the decision taken. If the Committee decides to consider the request, it may invite the member who made the remark and other members before it, however the Committee shall not rule on the truth of any statements made in the Dáil or of submissions referred to it.¹¹

The Committee in reporting to the Dáil on a request may recommend that no further action be taken by the Dáil or the Committee or if it decides an abuse of privilege has taken place recommend the following;¹²

- that the person making the submission be allowed to make a response to be published in the Official Report, or laid before the Dáil or recorded in some other appropriate manner agreed by the Committee
- that the member who made the remark should make a personal explanation either withdrawing the remark or clarifying the circumstances. Provided that if the member refuses to make a personal explanation the Ceann Comhairle shall at the commencement of business on the next sitting day or at the earliest opportunity, reprimand the member in his or her place.

SCOTLAND

There is no concept of “parliamentary privilege” in relation to the Scottish Parliament or its members in the sense understood by Westminster. The Scotland Act 1998 has a number of provisions designed to give protection to Parliament so that it can conduct its business.¹³ For example, Section 41 of the Scotland Act 1998 states:

For the purposes of the law of defamation—

(a) any statement made in proceedings of the Parliament, and

(b) the publication under the authority of the Parliament of any statement,

shall be absolutely privileged.

The Scottish Parliament does not have any procedure in place regarding ‘right of reply’ or ‘prior notification’. A non-member may wish to place a complaint which they

¹⁰ The Committee on Procedure and Privileges considers matters of procedure, recommends any additions or amendments to the Standing Orders and considers and reports as and when requested to do so on Members' privileges.

<http://www.oireachtas.ie/viewdoc.asp?fn=/documents/committees29thdail/cppDail.htm>

¹¹ Explanatory Memorandum of Standing Order 59 provided through correspondence with the Journal Office of the Dáil Éireann

¹² Ibid

¹³ The Scottish Information Commissioner

http://www.itspublicknowledge.info/Law/FOISA-EIRsLinks/FOISA_FOIAComparative.asp

may do so in a number of ways. For example, they may do so by writing to the Speaker of the Assembly, complaining to the Member in question or the individual could Petition the Parliament or another Member to take action on their behalf.¹⁴

PARLIAMENT OF NEW SOUTH WALES

The individual privileges enjoyed by members of the Parliament of New South Wales are freedom of speech in parliamentary proceedings, exemption from jury service and, if the House is sitting exemption from compulsory attendance in court as a witness.¹⁵ The privilege of protection against arrest for civil action has not been conferred on the New South Wales Parliament, unlike the House of Commons as it was not considered reasonably necessary for its operation.¹⁶

As was mentioned earlier the 'right of reply' procedure was adopted first in the Australian Senate in 1988 and later, in the Parliament of New South Wales. The New South Wales Parliament published a *Practice, Procedure and Privilege* book which provides comprehensive information on the procedures and practice of the Legislative Assembly. Chapter 29 of Part One of the book details the procedure of 'A Citizen's Right of Reply'.¹⁷

Since 1996, the Legislative Assembly in New South Wales has passed resolutions establishing a procedure for persons to have a right of reply when they are adversely mentioned within the House. The resolutions provide that, if a person or corporation is referred to in the Assembly by name or in such a way that they can be readily identified, and if the person considers that they have been adversely affected by that reference, that person may write to the Speaker to request that their response be published in Hansard.¹⁸

It is worthy of note the 'right of reply' is not an automatic right to have a response published but a procedure by which a person may seek this remedy. In November 2006 an amendment to the Citizens' Right of Reply procedure was introduced. Persons are now required to make a request for a right of reply within 6 months of the relevant comments being made in the Legislative Assembly, unless the applicant can show exceptional circumstances to explain the delay.¹⁹

An individual who has been referred to in the Legislative Assembly by name or in such a way as to be readily identified, may write to the Speaker claiming that they have been adversely affected by such a comment. The person must set out the reasons why the remark was defamatory, why it constitutes an abuse of privilege and request that their response be printed in Hansard.²⁰

¹⁴ Information gained through correspondence with the Scottish Parliament

¹⁵ The Parliament of New South Wales Practice, Procedure and Privilege Book Part Two Chapter 1, Pg 283

[http://www.parliament.nsw.gov.au/prod/la/precedent.nsf/0/12142ED493BA0CB3CA25737E00227381/\\$file/NSWLA_Part2_Chapter01.pdf](http://www.parliament.nsw.gov.au/prod/la/precedent.nsf/0/12142ED493BA0CB3CA25737E00227381/$file/NSWLA_Part2_Chapter01.pdf)

¹⁶ Ibid, Pg 283

¹⁷ Parliament of New South Wales Website

<http://www.parliament.nsw.gov.au/prod/la/precedent.nsf/wppbook>

¹⁸ The Parliament of New South Wales Practice, Procedure and Privilege Book Part 1 Chapter 29, Pg 255

[http://www.parliament.nsw.gov.au/prod/la/precedent.nsf/0/59BB1BDBEEDAB779CA25737E0022736B/\\$file/NSWLA_Part1_Chapter29.pdf](http://www.parliament.nsw.gov.au/prod/la/precedent.nsf/0/59BB1BDBEEDAB779CA25737E0022736B/$file/NSWLA_Part1_Chapter29.pdf)

¹⁹ Ibid, Pg 255

²⁰ Ibid, Pg 256

The Speaker of the House must make a decision either to pursue the request or to rule that no further action should be taken. The Speaker must also be satisfied that the submission was received within 6 months after the relevant comments were made in the House unless the applicant can show exceptional circumstances to explain the delay. If the Speaker decides to pursue the request, he/she shall refer the submission to the Standing Orders and Procedure Committee.²¹

The Standing Orders and Procedures Committee at this point have several options of action, they may decide not to consider a submission referred to it as they may view it to be not sufficiently serious or alternatively they may decide to consider a submission. If the Committee decides to consider a submission they may make either of the following recommendations:²²

- that no further action be taken by the Committee or the Legislative Assembly
- that a response by the person who made the submission be published by the Assembly or incorporated into Hansard.

UK PARLIAMENT

The House of Lords and the House of Commons enjoy similar Parliamentary privileges which include:²³

- *freedom of speech;*
- *control by the House of its affairs ("exclusive cognisance");*
- *power to discipline its own members for misconduct and punish anyone, whether a member or not, for contempt of Parliament;*
- *exemption from Acts of Parliament within the precincts of either House unless there is express provision that they should apply;*
- *freedom from interference in going to, attending at, and going away from Parliament;*
- *freedom from arrest in civil cases;*
- *exemption from subpoenas to attend court as a witness;*
- *freedom from service of court documents within the parliamentary precincts;*
- *absolute protection of all papers published by order of either House.*

The UK Parliament does not have any procedure in place regarding 'right of reply' or 'prior notification'. A non-member may wish to place a complaint and they may do so in a number of ways. For example, they may do so by writing to the Speaker of the Assembly, complaining to the Member in question or the individual could Petition the Parliament or another Member to take action on their behalf.²⁴

²¹ Ibid, Pg 256

²² Ibid, Pg 256

²³ Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, 2007 Chapter 12 Para 12.01

<http://www.publications.parliament.uk/pa/ld/ldcomp/compos.htm>

²⁴ Information gained through correspondence with the UK Parliament

The House of Commons Procedure Committee examined the 'right of reply' scheme in Australia in their first report in 1988-89. The Committee recognised the advantages of a system explaining it provided a clear and relatively uncomplicated method for an aggrieved person and thought it might deter some members from making wholly unfounded remarks damaging to individuals.²⁵

However the Procedure Committee was concerned that a complaint might not appear until several weeks after the allegation, robbing it of any immediacy. They also thought it possible that if the system was used frequently and well publicised, every person criticised in the House would feel bound to submit a reply, since failure by an aggrieved person to take advantage of the procedure might be regarded as acceptance of the truth of the allegations.²⁶

The above thoughts of the House of Commons Procedure Committee which were recorded in their report of 1988-89, were also upheld by the Joint Committee on Parliamentary Privilege in their first report published in 1999. In the report by the Joint Committee on Parliamentary Privilege it explains how it was not convinced that the experience of the Australian Legislatures since 1989 regarding the procedure on the 'right of reply' reversed the criticisms made by the House of Commons Procedure Committee in the report of 1988-89. The Joint Committee was therefore unable to recommend the introduction of a right of reply scheme at Westminster.²⁷

The report went further to explain that simply publishing the text of any reply would mean that the truth or falsity of the criticism would not be established. The statement itself even if published in Hansard, would not necessarily attract publicity matching the original comments.²⁸ A final consideration which the report commented on was that there was little demand for a 'right of reply' scheme at Westminster.²⁹

²⁵ Joint Committee on Parliamentary Privilege First Report, April 1999 Chapter 4

<http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4308.htm>

²⁶ Ibid, Chapter 4

²⁷ Ibid

²⁸ Ibid

²⁹ Correspondence with the UK Parliament confirmed that as yet no further action has been taken regarding this report.