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Parliamentary privilege

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This research paper examines the concept of parliamentary privilege as it exists at Westminster and compares this to the more limited legal protections and immunities enjoyed by the devolved institutions. The paper also considers the nature and handling of breaches of privilege and contempt.

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Key Points

Parliamentary privilege, which at Westminster dates back several centuries and has evolved through custom, practice and law, refers to the rights and immunities enjoyed by the Houses of Parliament. While the privilege is Parliament's rather than the individual member's, it does attach to the activities of an MP in carrying out some but not all of their Parliamentary functions.

Key elements of parliamentary privilege are Parliament's right to regulate its own proceedings (otherwise known as its exclusive cognisance or exclusive jurisdiction) and protection for Members and others from being subjected to any penalty, civil or criminal, in any court or tribunal for what is said in the course of proceedings in Parliament (freedom of speech).

It has been observed that parliamentary privilege, as operated at Westminster, does not extend to any of the devolved legislatures as these are 'creatures of statute'. Whilst the devolution legislation gives the legislatures some statutory protections (e.g. regarding defamation and liability for contempt of court) these do not equal the breadth of parliamentary privilege enjoyed at Westminster.

Underlining the statutory restrictions on the Assembly to regulate its own proceedings, Schedule 3 of the Northern Ireland Act 1998 provides that disqualification for membership of the Assembly, privileges, powers and immunities of the Assembly, its members and committees greater than those conferred by the same Act are reserved matters.

Closely related to the concept of privilege is the concept of contempt and the term contempt is sometimes used interchangeably with the term 'breach of privilege'. Whilst any breach of the privileges of the House of Commons is a contempt, contempts exist which are not breaches of privileges.

The devolved legislatures may not claim a jurisdiction in relation to contempt in the way that is done by the UK Parliament. The devolution legislation does, however, contain a number of offences relating to actions which might interfere with the functioning of the Assembly, for example failure in certain circumstances to attend a committee or produce papers. In addition, other actions which interfere with the functioning of the Assembly may constitute offences in law outside the devolution legislation.

The House of Commons' Committee on Standards and Privileges, which has been described as '*...both the guardian of the Houses privileges and custodian of the standards of conduct of Members of the House*', plays a role in the investigation of

complaints relating to standards and to matters relating to privilege. The Parliamentary Standards Commissioner, however, appears to play a role only in regard to the former.

Each of the devolved legislatures has a standards committee and standards commissioner who is responsible for investigating alleged breaches of the codes of conduct. The Northern Ireland Assembly's Committee on Standards and Privileges, however, is the only committee of the devolved legislatures with a remit under Standing Orders to investigate breaches of privilege.

Standing Order 70 of the Northern Ireland Assembly, which reflects the procedure in the House of Commons for handling breaches of privilege, provides, amongst other things, that '... a specific matter affecting the privilege of the Assembly shall be referred to the Committee on Standards and Privileges'. In spite of similarities in the legal protections and immunities provided for in the relevant legislation governing the three devolved legislatures, there is no comparable Standing Order relating to privilege in the Scottish Parliament or National Assembly for Wales. Standing Order 70 has been taken from the Standing Orders of the 1973 Northern Ireland Assembly, which had privilege equivalent to that of the House of Commons, and therefore appears as an anomaly when compared with the Standing Orders of the Scottish Parliament and National Assembly for Wales.

A range of actions which are not being breaches of the relevant codes for Members or which relate to the activities of non-members may also merit investigation and, where appropriate, some form of disciplinary action. Where these relate to parliamentary resources (including staff and buildings), the Assembly Commission may undertake such investigations.

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1 Introduction

This paper looks at a number of aspects of parliamentary privilege and the extent to which it applies in the legislatures in the UK and Republic of Ireland. In particular, the paper addresses the following:

- The concept of parliamentary privilege and contempt in the House of Commons
- Parliamentary privilege in the Oireachtas
- Parliamentary privilege and contempt in the devolved legislatures
- The role of committees and commissioners for standards in considering matters of privilege and contempt

2 The concept of parliamentary privilege in the UK Parliament

It should be noted that both Houses of Parliament enjoy privilege. However, for the purposes of this paper it is the privileges of the House of Commons that are referred to.

Erskine May, accepted as the most authoritative text on Parliamentary practice in the UK, defines parliamentary privilege as the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by the Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. In terms of the specific elements that constitute parliamentary privilege, DOD's Handbook of House of Commons Procedure states that:

The ancient privileges of the Commons which are claimed by the Speaker at the beginning of each Parliament are:

- freedom of speech
- freedom from arrest
- freedom of access to the sovereign
- that the most favourable construction should be placed on all the House's proceedings

The other significant privileges held by the House collectively are the right to:

- provide for its own proper constitution (that is to determine who may be its Members)
- regulate its own proceedings (otherwise known as its exclusive cognisance)
- compel witnesses to attend and give evidence

- exercise penal jurisdiction (that is to punish those who attack or disregard its privileges or who commit contempts against it).¹

As regards privilege it has been noted that ‘While the privilege is Parliament’s rather than the individual member’s, it is clear that it can and does attach to the activities of an MP in carrying out some of his Parliamentary functions’.²

Freedom of speech and exclusive cognisance, as the two key elements of parliamentary privilege today, are considered below. It has been noted, however, that they are not two separate privileges, as the right to freedom of speech is a part of a wider privilege and there are no dividing lines between the two.³ The relationship between breach of privilege and contempt is also considered below.

Freedom of speech

The privilege of MPs to be free from questioning ‘out of parliament’ dates back at least to the reign of Richard II. Article IX of the 1689 Bill of Rights, which has been described as the single most important parliamentary privilege, states:

Freedom of speech and debates on proceedings ought not to be impeached or questioned in any court or place out of Parliament.

Article IX affords legal immunity (‘ought not to be questioned’) to Members for what they say or do in proceedings of Parliament. A first report by the Joint Committee on Parliamentary Privilege (the Joint Committee report), published in 1999, stated that this legal immunity is ‘comprehensive and absolute and Article IX should therefore be confined to activities justifying such a high degree of protection, and its boundaries should be clear’⁴.

The Joint Committee report also stated ‘The modern interpretation is now well established: that Article IX and the principle it encapsulates protects Members of both Houses from being subjected to any penalty, civil or criminal, in any court or tribunal for what they have said in the course of proceedings in Parliament.’ This extends as much to the ‘member who knows what he is saying is untrue as the member who acts honestly and responsibly’⁵. It also protects officers of Parliament and those non-members who participate in the proceedings of Parliament, for example witnesses giving evidence to a committee of Parliament.

¹ DOD’s Handbook of House of Commons Procedure – Seventh Edition 2009 paras 4.3.2 and 4.3.6

² R v Chaytor and Others [2010] UKSC 52, 3 W.L.R 1707

³ As above

⁴ Joint Committee on Parliamentary Privilege, First Report, 1999: <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4303.htm>

⁵ Joint Committee on Parliamentary Privilege, First Report, 1999: <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4303.htm> para 38

Freedom of speech in debate

Erskine May notes that consideration has been given to imposing constraints on the exercise of freedom of speech in circumstances where statements made could be found defamatory or even criminal. However, various committees of Parliament have rejected this, while stressing the need for Members to exercise their privileges responsibly. Furthermore, in 2002 the European Court of Human Rights concluded that the absolute nature of parliamentary privilege did not violate articles 6 or 8 (right to a fair hearing and right to privacy) of the European Convention on Human Rights, however objectionable the statements complained of.⁶

Section 13 of the Defamation Act 1996 allows a member of either House to waive parliamentary privilege for the purposes of defamation hearings. This legislative provision was made in response to a libel action brought by Neil Hamilton against the Guardian newspaper over allegations that he had accepted cash to ask questions in Parliament. In its defence the Guardian attempted to call evidence about Mr. Hamilton's conduct and motives in tabling parliamentary questions and early day motions. The judge found that this was contrary to Article IX and stopped the proceedings on the grounds that it would not be fair to allow the plaintiffs to sue for libel if the defendant newspaper was not permitted to justify what it had written. The Joint Committee report noted that a fundamental flaw of Section 13 was that it undermined privilege because freedom of speech is the privilege of the House as a whole and not of the individual member in his own right, although an individual member can assert and rely on it.⁷

A place out of Parliament

The Joint Committee report noted that 'interpretation of this expression has never been the subject of a court decision' but added that 'to read the phrase as meaning literally anywhere outside Parliament would be absurd...freedom for the public and the media to discuss parliamentary proceedings outside Parliament is as essential to a healthy democracy as the freedom of Members to discuss what they choose within Parliament'.⁸

A place out of Parliament has generally been accepted to encompass tribunals and the Joint Committee recommended 'a statutory enactment to the effect that place out of Parliament means any tribunal having power to examine witnesses on oath, coupled with a provision that Article IX shall not apply to a tribunal appointed under the

⁶ Erskine May, 'Parliamentary Practice', 23rd edition, p.97, Lexis Nexis 2004

⁷ Joint Committee on Parliamentary Privilege, First Report, 1999: <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4303.htm>

⁸ As above (para 91)

Tribunals of Inquiry (Evidence) Act 1921 where both houses so resolve at the time the tribunal is established'.⁹

Proceedings in Parliament

Whilst no comprehensive definition of 'proceedings in parliament' exists, Erskine May provides a useful starting point:

The primary meaning of proceedings, as a technical parliamentary term...is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual member takes part in proceedings usually by speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee...Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers (non-members) also may take part in the proceedings of a House, for example by giving evidence before it or one of its committees, or by securing presentation of a petition.¹⁰

Not all the responsibilities of MPs necessarily relate to proceedings in Parliament. Commenting on constituency work Erskine May notes that:

Correspondence with constituents or official bodies, for example, and the provision of information sought by Members on matters of public concern will very often, depending on the circumstances of the case, fall outside the scope of 'proceedings in parliament' against which a breach of privilege will be measured.¹¹

In addition, as the expenses scandal made clear, conduct of a member of Parliament is not privileged merely because it occurs within the House of Commons. In December 2010, the Supreme Court ruled¹² that four former Members of Parliament could not claim parliamentary privilege in criminal proceedings relating to the parliamentary expenses scandal. The court emphasised that parliamentarians could never expect to be protected from submitting dishonest expense claims, as it was not a 'proceeding in Parliament'.

The stark reality is that the defendants are alleged to have taken advantage of the allowances scheme designed to enable them to perform their important public duties as Members of Parliament to commit crimes

⁹ As above

¹⁰ Erskine May, 'Parliamentary Practice', 23rd edition, pp110-111, Lexis Nexis 2004

¹¹ As above p143

¹² The jurisdiction of courts in matters of privilege is considered later in this paper.

of dishonesty to which parliamentary immunity or privilege does not, has never, and, we believe, never would attach¹³.

Exclusive cognisance

Exclusive cognisance or exclusive jurisdiction means control of Parliament over its own affairs and encompasses the principle that what happens in Parliament is a matter for control by Parliament alone. The Joint Committee commenting on exclusive cognisance observed that:

Parliament must have sole control over all aspects of its own affairs: to determine for itself what the procedures shall be, whether there has been a breach of its procedures and what then should happen... acceptance by the executive and the courts of law that Parliament has the right to make its own rules, and has unquestioned authority over the procedure it employs as legislator, is of scarcely less importance than the right to freedom of speech. Both rights are essential elements in parliamentary independence.¹⁴

It has also been noted that exclusive cognisance derives from the doctrine of the separation of powers which in the UK constitution:

...is restricted to the judicial function of government, and requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature.¹⁵

The Courts, however, do have a role in determining questions surrounding issues of privilege, as recent cases have shown. Addressing parliamentary privilege and the role of the courts and the House of Commons, the Attorney General in a memorandum expressed the view that:

It is clear that the determination of whether material is inadmissible as evidence in a criminal trial by virtue of Article IX is a matter for the court. Article IX is statute law and its interpretation, as with any other statute, is a matter for the courts. It is a question of law both whether particular material constitutes 'proceedings in Parliament' and whether the use that the material is being put to amounts to the impeaching of questioning of such proceedings.¹⁶

¹³ Supreme Court ruling and judgment 'R v Chaytor and Others', 10 December 2010: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0195_Judgment.pdf

¹⁴ Joint Committee on Parliamentary Privilege, First Report, 1999 (para ??)
<http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4303.htm>

¹⁵ R v Chaytor and Others [2010] UKSC 52, 3 W.L.R 1707

¹⁶ 'Parliamentary Privilege – Role of the Courts and the House of Commons' - Memorandum to the Leader of the House of Commons (Rt Hon Harriet Harman QC MP) submitted by the Attorney General (Baroness Scotland QC) 3rd April 2009

In terms of the House of Commons itself, the Attorney General also underlined that it may 'seek to intervene in any proceedings, under the name of the privileges of the house and had done so in a number of recent cases'.¹⁷

3 Contempt

The Joint Committee report noted that: 'Besides the areas in which the House claims a specific privilege—in particular, freedom of speech and freedom from civil arrest—it also claims a jurisdiction in contempt, against those who by their actions interfere improperly with the discharge of its functions'.¹⁸ The report then goes on to cite Erskine May's definition of contempt as:

...any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results.¹⁹

Addressing parliament's disciplinary and penal powers in matters of privilege or contempt, the Joint Committee report stated that these:

...are part of the control exercised by Parliament over parliamentary affairs. Parliament has long held these powers, over non-members as well as Members. Most institutions exercise a degree of discipline over their members. So long as the disciplinary offences and the punishments are reasonable, and the procedures are fair, this is unexceptionable. Parliament is unique in also possessing its own inherent powers of punishment over non-members. This penal jurisdiction derives from the status of the High Court of Parliament and the need for each House to have the means to carry out its functions properly. If non-members improperly interfere with Parliament or its Members or officers in discharging their public duties, Parliament for its own protection must have power to take appropriate action in response.

Such interference, whether by Members or non-members, is known as 'contempt of Parliament'. Violations of Members' rights and privileges are also known as 'breaches of privilege'. In this report we use the expression 'contempt of Parliament', as this focuses attention on the underlying mischief: interfering with Parliament in carrying out its functions.

Addressing the issue of contempt further, the Joint Committee report goes on to state that:

¹⁷ As above

¹⁸ As above (para 24)

¹⁹ As above

Contempts comprise any conduct (including words) which improperly interferes, or is intended or likely improperly to interfere, with the performance by either House of its functions, or the performance by a member or officer of the House of his duties as a member or officer. The scope of contempt is broad, because the actions which may obstruct a House or one of its committees in the performance of their functions are diverse in character. Each House has the exclusive right to judge whether conduct amounts to improper interference and hence contempt. The categories of conduct constituting contempt are not closed.

The Joint Committee report also provided the following comprehensive, though not definitive, list of types of contempt:

- interrupting or disturbing the proceedings of, or engaging in other misconduct in the presence of, the House or a committee
- assaulting, threatening, obstructing or intimidating a member or officer of the House in the discharge of the member's or officer's duty
- deliberately attempting to mislead the House or a committee (by way of statement, evidence, or petition)
- deliberately publishing a false or misleading report of the proceedings of a House or a committee
- removing, without authority, papers belonging to the House
- falsifying or altering any papers belonging to the House or formally submitted to a committee of the House
- deliberately altering, suppressing, concealing or destroying a paper required to be produced for the House or a committee
- without reasonable excuse, failing to attend before the House or a committee after being summoned to do so
- without reasonable excuse, refusing to answer a question or provide information or produce papers formally required by the House or a committee
- without reasonable excuse, disobeying a lawful order of the House or a committee
- interfering with or obstructing a person who is carrying out a lawful order of the House or a committee
- bribing or attempting to bribe a member to influence the member's conduct in respect of proceedings of the House or a committee

- intimidating, preventing or hindering a witness from giving evidence or giving evidence in full to the House or a committee
- bribing or attempting to bribe a witness
- assaulting, threatening or disadvantaging a member, or a former member, on account of the member's conduct in Parliament
- divulging or publishing the content of any report or evidence of a select committee before it has been reported to the House.

The report noted that in the case of Members the following, additionally, would constitute contempt:

- accepting a bribe intended to influence a member's conduct in respect of proceedings of the House or a committee
- acting in breach of any orders of the House
- failing to fulfil any requirement of the House, as declared in a code of conduct or otherwise, relating to the possession, declaration, or registration of financial interests or participation in debate or other proceedings.

At times 'breach of privilege' and 'contempt' appear to be used as interchangeable terms, or at least any intended distinction between the two is unclear. It has been argued, however, that there is a difference and that the difference is significant. Evidence submitted in 1968 to the Select Committee on Parliamentary Privilege, for example, addressed the difference in some detail, stating that:

The difference between breach of privilege and contempt is of more than terminological interest since it touches on a major issue of principle about the limits to the Houses' powers. Though the right to commit for contempt might itself as matters stand be classified as one of the privileges of the House, it is not amongst those specifically claimed by the Speaker at the beginning of each Parliament. Modern commentators have tended to deprecate the practice of speaking of all offences punished by the House as breaches of privilege on the ground that the power to punish for contempt is in principle not confined to those offences which can be identified as infringements of some specific head of privilege (Freedom of Speech, Freedom from Arrest and Molestation etc.). It might perhaps be imagined that if the true essence of contempt is that it "prevents the House from carrying out its work ... as any legislature is entitled to" and if the function of the House is that of unimpeded debate and legislation, there cannot be a great many acts which are contemptuous but which "cannot be identified as a breach of privilege"--either the privilege of freedom of debate and proceedings or the right to be free from

molestation (given the wide interpretation which the House has placed upon "proceedings" and "molestation" in its resolutions). Nevertheless there are acts and affronts punished as contemptuous which do not in a direct sense either infringe the privilege of free debate nor directly "prevent the House from carrying out its work". The Clerk of the House in the words just quoted was answering Sir Kenneth Pickthorn who remarked that he had "been taught often the distinction between contempt and breach, but I always forget it as soon as I am taught it". In the past the House itself does not at all times seem to have drawn the distinction very clearly. Various forms of disobedience to the House's orders, for example, were stigmatised in the Journals sometimes as contempt and sometimes as unwarranted interferences with its privileges. The forms of recalcitrance in issue, however--refusals to attend as witnesses, non-compliance with rules about petitioning or unlicensed publication of debates--were plainly connected with the House's proceedings and classifiable as impediments, as almost any conceivable order by a legislative body naturally would be. More recently reflections on the House or its Members have usually been labelled by the Committee of Privileges as contempts (cf. the *Junor* and *Hogg* cases with the cases of *Jordan* and *Strauss*). But the insistence on an ambit for contempt which is not in principle restricted to acts infringing established heads of privilege raises the very question which has notoriously been in issue between the courts and Parliament. Its historical significance has been in its reinforcement of the House's claim to be the sole interpreter of the content and application of its privileges. It has never lain easily with the view that, at least where the House states the grounds for a committal, the courts are competent to decide whether the House has exceeded the limits of its known powers.²⁰

More specifically, DOD's Handbook of House of Commons Procedures notes that:

Contempts are often conflated with breaches of privilege. Any breach of the privileges of the House is a contempt. However, a contempt may be an action which, while not in breach of one of the privileges of the House, is an act of disobedience to its commands, is a libel against one of its Members or officers, is an attempt to obstruct or impede it in the performance of its functions, or is an attack on its authority and dignity.²¹

Regarding specific acts of contempt, evidence from the Clerk of the House to the Standards and Privileges Committee in February 2010 noted that actions of contempt which have been proceeded against include:

²⁰ Evidence submitted by Study of Parliament Group to the Select Committee on Parliamentary Privilege and printed with its Report of Session 1967-68, HC 34, as Appendix V to the Minutes of Evidence (pp 187-95).

<http://www.spg.org.uk/spgev20.htm> (accessed 14th January 2011)

²¹ DOD's Handbook of House of Commons Procedure – Seventh Edition 2009 para 4.3.8

- impugning the conduct of a Member and threatening him or her with further exposure if he or she took part in debates;
- threatening to communicate with a Member's constituents to the effect that, if they did not reply to a questionnaire, they should be considered as not objecting to certain sports;
- publishing posters containing a threat regarding the voting of a Member in a forthcoming debate;
- informing a Members that to vote for a particular bill would be treated as treasonable by a future administration;
- summoning a Member to a disciplinary meeting of his trade union in consequence of a vote given in the House
- threatening to end investment by a public corporation in a Member's constituency if the Member persisted in making speeches along the lines of those in a preceding debate²².

However, addressing the use of disciplinary and penal powers in relation to contempt, the Joint Committee report noted that:

The exercise of the House's penal jurisdiction in the very wide area of contempt is of course moderated by the resolution of 1977, which derived from the 1966-67 inquiry, that the jurisdiction will be exercised as sparingly as possible and only when the House is satisfied that it is essential to act in order to provide reasonable protection from improper obstruction causing or likely to cause substantial interference with its functions.²³

4 Parliamentary privilege in the Oireachtas

It has been noted that, whilst the concept of parliamentary privilege was not fully adopted by the post-1922 state, the Irish Constitution²⁴ protects the right of parliamentary self regulation and there are limits to the extent of judicial intervention. Article 15.10 of the Irish Constitution states that:

Each House shall make its own rules and Standing Orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its Members, and to protect itself and its Members against any person or persons interfering with, molesting or attempting to corrupt its Members in the exercise of their duties.

²² Evidence to the Committee on Standards and Privileges, February 2010

²³ Joint Committee on Parliamentary Privilege, First Report, 1999 (para 29)

²⁴ <http://www.constitution.ie/reports/ConstitutionofIreland.pdf>

As regards freedom of speech, Article 15.12 states that:

All official reports and publications of the Oireachtas or of either House thereof and utterances made in either House wherever published shall be privileged.

Standing Order 59 in the Dáil outlines how ‘defamatory utterances’ in the house will be dealt with, including provision for referral to the Committee on Procedure and Privileges:

59.(1) A member shall not make an utterance in the nature of being defamatory and where a member makes such an utterance it may be prima facie an abuse of privilege...

(2)(a) If the defamatory nature of the utterance is apparent at the time it was made during the course of proceedings, the Ceann Comhairle shall direct the utterance be withdrawn without qualification.

(b) If the member refuses to withdraw the utterance without qualification the Ceann Comhairle shall treat the matter as one of disorder: **Provided that the member may claim that the matter be referred to the Committee on Procedure and Privileges in which case no further action shall be taken thereon by the Ceann Comhairle at that point.**

In circumstances where an utterance is referred to the Committee, the Committee will decide whether the issue is serious enough to take forward, or if it should be dismissed. If taken forward, the Committee may invite the member who made the utterance and such other Members as the Committee may deem appropriate to appear before the Committee to put their case. The Committee may decide to take no further action or it may require the member to explain to the house the reason for making the statement and withdraw it without qualification. If the member refuses to cooperate, the Ceann Comhairle will reprimand the member at the commencement of business on the next sitting day.

A member may also give the Ceann Comhairle prior notice of his or her intention to make a statement which may be defamatory, but which the member believes is in the public interest to be made. In these circumstances, the prior notice will be considered when applying the provisions outlined above.

Addressing the power of the courts or other authorities of Members of the Oireachtas, Standing Order 15.13 states that:

The Members of each House of the Oireachtas shall, except in case of treason as defined in this Constitution, felony or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of, either House, and shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself.

The Standing Orders of the Dáil also allow a person who believes they have been defamed in the course of proceedings to request that an appropriate response be incorporated in the official report. Such a request will be

considered initially by the Ceann Comhairle who may refer it to the Committee on Procedure and Privileges.

The issue of privilege arose during the Mahon Tribunal which examined allegations of political corruption in the Republic of Ireland. The then Taoiseach, Bertie Ahern, took legal action against the Tribunal arguing that it could not ask questions about statements he made in the Dáil or even refer to those statements while he was giving evidence to the Tribunal. The High Court ruled in favour of Mr. Ahern:

A consideration of the terms of Article 15.13 and the relevant case law demonstrate that the article protects a member of the national Parliament from both direct and indirect attempts to make such a person amenable to anybody other than the Houses themselves in respect of any utterance made in such Houses...Drawing Mr. Ahern's attention to statements made by him in Parliament which are inconsistent with statements made outside it, may incorporate a suggestion that the words spoken in Parliament were untrue or misleading. That is not permissible...I do not accept the contention of the Tribunal that the purpose of such an exercise is to ensure that the evidence before the Tribunal is complete. Rather, there is a clear suggestion which imputes impropriety to Mr. Ahern in respect of utterances made in Parliament. The court cannot permit the Tribunal to engage in such activity...Before departing from this topic, and so there can no doubt about it, I repeat that Mr. Ahern's counsel accepts that the Tribunal may record in its report that statements were made by him in Parliament. It may reproduce those statements in whole or in part in its report. It may not, however, suggest that such words were untrue or misleading or inspired by improper motivation. It will be for the reader of the report to draw his own conclusions.²⁵

5 Parliamentary privilege and contempt in the devolved legislatures

Addressing the issue of parliamentary privilege in the three devolved legislatures, it has been noted that: 'It is important to appreciate that parliamentary privilege, as operated at Westminster, does not extend to any of these parliaments/assemblies, which are creatures of statute'.²⁶ The same author also noted that: 'The decision not to extend privilege to these devolved bodies by legislation stands in contrast to the privileges of the House of Commons conferred on the Stormont Parliament under the Government of Ireland Act 1920'.²⁷

Furthermore:

²⁵ Ahern -v- Judge Mahon & Ors, judgment delivered 8th May 2008:

<http://www.courts.ie/Judgments.nsf/23fd4a34bad801d980256ec50047a0a8/6753897f5b81709c80257450002e4122?OpenDocument>

²⁶ 'The regulation of parliamentary standards – a comparative perspective', The Constitution Unit, University College London, May 2002 p 18

²⁷ As above

The decision not to confer privilege...was not the subject of major debate during the passage of the devolution legislation, and so the reasoning behind this policy change was not explored in any depth...the devolution legislation gave the new bodies some statutory protection for the issuing of reports, the summoning of witnesses and the regulation of their Members in varying degrees. But these statutory powers do not equal the breadth of parliamentary privilege enjoyed by the Commons. They are also reviewable by the courts...moreover, changes to this broad framework are dependent on legislation at Westminster...since the devolution legislation is amendable by the UK Parliament only. The devolved bodies are not in a position to clarify their own powers²⁸.

The issue of the relationship between the courts and the legislature, which is fundamental to the concept of parliamentary privilege, was addressed in the context of the Scottish Parliament in 1999, when the courts were asked in effect to rule on the extent to which they could intervene in the proceedings of the Parliament. The matter related to a proposed Member's Bill, the introduction of which was challenged on the grounds that the MSP promoting the Bill had breached Members' interests rules by accepting outside assistance in the drafting of the Bill. Although the court initially recognised the Parliament as a statutory entity, it was nevertheless prepared to rule that it should be able to determine its own rules and procedures. However, on appeal the Lord President outlined his reasons for reversing the original decision, in a ruling which also has relevance to the Northern Ireland Assembly and National Assembly for Wales:

The (original ruling) gives insufficient weight to the fundamental character of the Parliament as a body which – however important its role – has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law...Some of the arguments of counsel for the first respondent appeared to suggest that it was inconsistent with the very idea of a parliament that it should be subject in this way to the law of the land and to the jurisdiction of the courts which uphold the law...On the contrary, if anything, it is the Westminster Parliament which is unusual in being respected as sovereign by the courts...While all United Kingdom courts which may have occasion to deal with proceedings involving the Scottish Parliament can, of course, be expected to accord all due respect

²⁸ 'The regulation of parliamentary standards – a comparative perspective', The Constitution Unit, University College London, May 2002

to the Parliament as to any other litigant, they must equally be aware that they are not dealing with a parliament which is sovereign²⁹.

Scottish Parliament

The Presiding Officer of the Scottish Parliament issued guidance on the matter of parliamentary privilege in August 1999 (see Annex 1). In summary, the bulletin makes clear that any privilege enjoyed by the Scottish Parliament is conferred by or under the Scotland Act 1998 and that the term “parliamentary privilege” as understood in the Westminster context cannot be applied to proceedings in the Scottish Parliament.

The guidance highlights that ‘Any privileges (i.e. legal protections and immunities) applicable to the Parliament are those conferred by or under the Scotland Act 1998. In this context the guidance highlights the following:

Section 28 (5) which prevents the validity of proceedings in relation to a bill being questioned once it becomes an Act.

Section 40 which limits the types of remedies, which can be sought against the parliament and which also confers certain protections in relation to defamation and contempt of court.

Section 41 which confers absolute privilege for the purposes of the law of defamation on anything said in the Scottish Parliament and on any statement published under the authority of the Parliament.

Section 42 which disapples the rule of strict liability for contempt of court in relation to publications made in, or in reports of, proceedings of the Scottish Parliament in relation to a Bill or subordinate legislation.

In addition to the legal protections and immunities or privileges which it confers upon the Scottish Parliament, the Scotland Act 1998 also creates a number offences relating to actions which might interfere with the functioning of the Scottish Parliament:

Section 25 makes it an offence for a person who is required to attend the Parliament to give evidence or to produce necessary documents to fail to do what is required by the notice served on him in response to a notice under section 24(1).

Section 26 - This section deals with various matters relating to the giving of evidence and production of documents to the Parliament including administering the oath to witnesses, the creation of a criminal offence where a person refuses to take the oath and the payment of allowances and expenses. It applies to everyone who gives evidence or produces

Opinion of the Lord President 16 February 2000, Reclaiming Motion for Petitioners, Whaley, Adams and Furness v Lord Watson of Invergowrie (The Scottish Parliament http://www.scotcourts.gov.uk/opinions/p2055_99.html)

documents to the Parliament, not just those who do so in response to a notice under section 24(1)³⁰.

Outside of the provisions contained within the Scotland Act 1998, the Scottish Parliament may not claim a jurisdiction in relation to what might be considered contempts in the way that is done at the House of Commons. The Scottish Parliament may though rely on offences in law outside the devolution legislation to protect it from interference which would impact upon its work.

The National Assembly for Wales

As is the case of the Scottish Parliament, any privilege enjoyed by the National Assembly for Wales is conferred by or under the Government of Wales Acts and the term “parliamentary privilege” as understood in the House of Commons context cannot be applied to its proceedings.

The legal protections and immunities of the National Assembly for Wales, which mirror those of the Scottish Parliament, are contained largely in sections 41-43 of the Government of Wales Act 2006. Section 93 also contains provision similar to Section 28 (5) of the Scotland Act 1998 which prevents the validity of proceedings in relation to a bill being questioned once it becomes an Act.

Sections 39 and 40 of the 2006 Act, which create offences relating to actions which might interfere with the functioning of the National Assembly for Wales, mirror those relating to the Scottish Parliament.

The Northern Ireland Assembly

A relatively comprehensive historic background to the Assembly and parliamentary privilege is contained in a House of Commons Library Research Paper prepared in relation to the Northern Ireland Bill (as the Northern Ireland 1998 Act was at the time of its writing). The paper notes that:

Under the Government of Ireland Act 1920 Stormont enjoyed Parliamentary privilege equivalent to that of Westminster:

18.-(1) The powers, privileges, and immunities of the Senate and House of Commons of Northern Ireland, and of the Members and of the committees thereof, shall be such as may be defined by Act of the Parliament in question, and, until so defined, shall be those held and enjoyed by the Commons House of Parliament of the United Kingdom and its Members and committees at the date of the passing of this Act.

³⁰ Scotland Act 1998

Through Stormont's lifetime it followed Westminster procedure, practice and precedents. The Northern Ireland Constitution Act 1973 conferred equivalent privileges on the Northern Ireland Assembly:

26.-(1) The Powers, privileges and immunities of the Assembly and of the Members and committees thereof shall be the same as those for the time being held and enjoyed by the House of Commons and its Members and committees but this subsection has effect subject to section 25(7) above and to any provision made by Measure³¹.

As is the case of the Scottish Parliament and the National Assembly for Wales, any privilege enjoyed by the Assembly is conferred by or under the relevant devolution legislation and the term "parliamentary privilege" as understood in the House of Commons context cannot be applied to proceedings of the Assembly.

The legal protections and immunities of the Assembly, which mirror those of the Scottish Parliament and the National Assembly for Wales, are contained largely in section 50 of the Northern Ireland Act 1998. Section 5 of that Act also contains provision similar to Section 28 (5) of the Scotland Act 1998 which prevents the validity of proceedings in relation to a bill being questioned once it becomes an Act. It should be noted that freedom of speech for Members applies only to the law of defamation. Therefore, it does not protect Members from the operation of the law in relation to other matters, for example incitement to racial hatred.

Section 50 - Privilege

- (1) 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.
- (2) A person is not guilty of contempt of court under the strict liability rule as the publisher of any matter—
- (a) in the course of proceedings of the Assembly which relate to a Bill or subordinate legislation; or
 - (b) to the extent that it consists of a fair and accurate report of such proceedings which is made in good faith.
- (3) In this section—
- "statement" has the same meaning as in the Defamation Act 1996;
- "the strict liability rule" has the same meaning as in the Contempt of Court Act 1981.

Schedule 3 of the Northern Ireland Act provides that disqualification for membership of the Assembly; privileges, powers and immunities of the Assembly, its Members and committees greater than those conferred by section 50 are reserved matters.

The Assembly's Standing Order 70 sets out how 'matters of privilege' can be raised by Members and dealt with by the Speaker. It is worth noting, that in spite of similarities in the legal protections and immunities created in the relevant legislation governing the three devolved legislatures, there is no comparable Standing Order relating to privilege

³¹ Northern Ireland Constitution Act 1973

in the Scottish Parliament or NAFW. When drafting Standing Orders for the 1998 Northern Ireland Assembly, the Committee on Standing Orders “obtained the Standing Orders of a number of Parliaments and legislatures, including the House of Commons at Westminster, the European Parliament and Dail Éireann, to use as a guide. Following discussion, the Committee decided to use the Standing Orders drawn up for the use of the 1973 Northern Ireland Assembly as a base on which to build”³². As a result Standing Order 70 mirrors Standing Order 46 of the 1973 Northern Ireland Assembly, to which a different level of privilege attached. Standing Order 70 appears to be somewhat of an anomaly.

Standing Order 70 of the Northern Ireland Assembly

- 1) Any member who wishes to raise a matter of privilege shall give the Speaker notice of his or her intention and acquaint the Speaker of the details of the matter in writing.
- 2) At any time after any questions have been disposed of, other than when a division is in progress, a member who has given notice and details as above may rise in his or her place and claim to move that a specific matter affecting the privilege of the Assembly shall be referred to the Committee on Standards and Privileges.
- 3) If in the opinion of the Speaker a prima facie case of breach of privilege has been made out by a member under paragraph (1) of this Standing Order and if it also appears to the Speaker that the matter has been raised at the first available opportunity then the Speaker shall so inform the Assembly and refer the matter to the Committee on Standards and Privileges. Provided that when a matter of privilege is raised of which the Speaker has not received sufficient notice, the Speaker may defer informing the Assembly of his or her decisions on the matters aforesaid until the next sitting day.
- 4) Any member complaining to the Assembly of a statement in a newspaper, book or other publication as a breach of privilege shall hand in to the Speaker a copy of the newspaper, book, publication or any other medium containing the statement in question.

Standing Order 70 does, however, bear similarities to the procedure for raising alleged breaches of privilege at the Commons, which is described below³³. The issue of privilege has been raised on a number of occasions in the chamber in various contexts, as the following table illustrates:

Table 1: Examples of matters of privilege raised in the Assembly

Date	Reference
14 September 1998	Initial Presiding Officers ruling that under Paragraph 8 of the Schedule to the Northern Ireland (Elections) Act 1998, the privilege given to Members speaking in the House is qualified privilege. It is not the absolute privilege which pertains in other assemblies, and which will pertain when the Assembly takes power on the appointed day as set out in the Northern Ireland Bill.
14 December 1999	Speakers ruling that "prior to devolution there was no statutory requirement in respect of the Register" of Members Interests and that Members should be careful when raising matters of privilege on the floor of the House, in response to point of order from Norman Boyd.
22 February 1999	Initial Presiding Officers ruling on the investigation into the remarks made by Edwin Poots on 16 February 1999 on page 94 which found that although the remarks were

³² 'Progress report from the Committee on Standing Orders', October 1998 <http://www.niassembly.gov.uk/reports/nnia4.pdf>

³³ Erskine May, 'Parliamentary Practice', 23rd edition, Lexis Nexis 2004

	'disparaging', they were not abusing the privilege of the House, in response to point of order from Peter Robinson.
22 February 1999	Initial Presiding Officers ruling on the appointment of a Committee on Standards and Privileges, in response to points of order from Ian Paisley, Ian Paisley Jnr and Patrick Roche on whether remarks suggesting Sinn Fein has links with the IRA are an abuse of privilege.
7 October 2002	Speakers ruling that "I caution Members and remind them that in criminal matters the sub judice rule applies strictly from the moment a person is charged until the verdict and sentence have been announced. Members must also be aware that as regards parliamentary privilege covering what they say in the Chamber, it applies to the law of defamation and not to other matters. It will not give them protection, for example, in matters of contempt of court..."
3 March 2009	Debate on a motion brought by Lord Morrow on the need to preserve the confidentiality of information brought to them by constituents or sources

It appears, however, that only one matter has been referred by the Speaker to the Committee on Standards and Privileges under Standing Order 70.

In October 2002, Mr. Peter Robinson forwarded a letter to the Speaker of the House regarding a breach of Privilege surrounding events that took place in Parliament Buildings on 2nd October 2002. On this day there was a police search carried out on Sinn Fein offices in the building. Peter Robinson's letter was in reference to, on the same day, two members of Sinn Fein, an MLA and a Minister, allegedly being seen bringing members of the media into the building without adhering to the proper security procedures.

On Monday 7th October several Members raised points of order in the Assembly in regards to the events of October 2nd. In response to a statement made by Dr. Ian Paisley, the Speaker acknowledged that his colleague Mr. Robinson had deposited a letter regarding a breach of privilege through the proper procedure but also highlighted that *"There are many complex matters involved. Several bodies in the Assembly may have responsibilities with regard to this matter. The Assembly Commission is one, the Committee of Standards and Privileges in another, and the Speakers Office is another. Those are just three examples"*³⁴. The Speaker later confirmed that he had referred Mr. Robinson's letter to the Committee on Standards and Privileges, however he also emphasised that it was up to the committee to decide if they would discuss the matter or take it further. Mr Paisley Jr. asked the Speaker, with reference to Standing Orders 61 and 63, if the Keeper of the House was entitled to take action against intruders of the building. The Speaker made the point that those who are invited into the Building by Members of the Assembly are not perceived as intruders. However he also noted that *"The way in which visitors enter the Building may be a breach of privilege or order"*³⁵. He further added that this issue has already been raised by Peter Robinson in his letter and it is being looked in to. Mr Robinson raised a point of Order in regards to

³⁴ Northern Ireland Assembly, Monday 7th October 2002, available online; <http://www.niassembly.gov.uk/record/reports/021007.htm#2>

³⁵ As Above

the speaker's response to Mr. Paisley Jr. and requested the Speaker to “clarify, or reflect upon...your definition of an intruder”³⁶ as it may have repercussions that would affect the work of the Committee on Standards and Privileges when dealing with his letter regarding the breach of privilege. The Speaker emphasised that the definition and interpretation is not as simple as those who were ushered into the building were pass holders.

With regard to the police searches the speaker made the Assembly aware that there were aspects that he was unable to speak about on the Floor of the House as there was an active legal investigation on going. However, in response to a query by Mr. Beggs, the Speaker also stressed that being a Member or an employee in Parliament buildings does not make you immune from the law.

The Assembly was suspended on 14th October 2002 and therefore this matter was taken no further.

6 The role of committees and commissioners for standards in considering matters of privilege and contempt

This section of the paper considers the role that committees and commissioners play in considering matters of privilege and contempt.

It should be noted that there is a difference between the privileges enjoyed by individual Members of a legislature and the concept of ‘parliamentary privilege’. For example, if a Member is found to be in breach of the Code of Conduct, the standards committee of that legislature may decide, as a sanction, to withdraw that Member’s rights and privileges for a specified period. This could include their rights to salary and allowances or exclusion from using facilities.

House of Commons

Following the Nolan Report in 1995-96, the Privileges Committee and the Members’ Interests Committee were merged into the Committee on Standards and Privileges. The role of the previous Privileges Committee was to take evidence on behalf of the House to determine whether and to what extent a breach of privilege or contempt of the House had taken place. The current Committee is described in DOD’s Handbook of House of Commons Procedure³⁷ as ‘...both the guardian of the House’s privileges and custodian of the standards of conduct of Members of the House’.

The remit of the Committee is set out in Standing Order 149 and includes:

- to consider matters relating to privileges

³⁶ As Above

³⁷ DOD’s Handbook of House of Commons Procedure – Seventh Edition 2009 para 4.2.1

- to oversee the work of the Parliamentary Commissioner for Standards
- to examine the compilation, maintenance and accessibility of the register for Members' financial interests and other relevant registers
- the review of the registers
- to consider complaints brought to the Committee's attention by the Parliamentary Commissioner for Standards in relation to the registering or declaring of interests and alleged breaches of any code of conduct approved by the House
- to recommend modifications to the code of conduct as necessary

The procedure for complaints relating to privilege or contempt is as follows:

A Member who believes that a breach of privilege or contempt of the House has occurred should raise the matter at the earliest opportunity by writing to the Speaker setting out the grounds of complaint. The Speaker will promptly reply in writing, indicating whether he proposes to give the matter the precedence over other business accorded to matters of privilege. If he does decide to grant it such status, he will announce that decision in the House; the Member seeking to raise the matter would then table a motion in appropriate terms which would appear on the following day's Order Paper at the head of all other business. The motion would normally be to refer the alleged breach or contempt to the Committee on Standards and Privileges for investigation and report.³⁸

The Committee is currently conducting an inquiry into the hacking of MPs' mobile phones, which was referred to it by the House on 9th September as a matter relating to privilege. The inquiry is not looking at specific allegations, but rather is considering whether the alleged hacking of the phones constitutes a contempt of Parliament.

Addressing the role of the Committee in relation to matters of privilege, the Attorney General in her April 2009 memorandum to the Leader of the House of Commons expressed the view that:

While the committee has the function of considering specific matters of privilege referred to it by the house, it does not itself determine whether material is subject to parliamentary privilege – it only makes a recommendation for the house to decide the matter by resolution...the fact that the House resolves that a particular material or categories of material are "proceedings in Parliament" within the meaning of Article IX of the Bill ...would not automatically have any effect on the admissibility of the material in a criminal trial. The material will only be inadmissible if the courts consider the use to which it is put amounts to the "impeaching or questioning" of parliamentary proceedings.

³⁸ As above para 4.3.12

In addition to the work of the Committee on Standards and Privileges, the Commons has recently appointed a '*Committee on issue of privilege relating to police searches on the Parliamentary Estate and internal processes of the House Administration for granting permission for such action*'. Following the search of a Member's office in the Parliamentary Estate by the police and the seizure of material, the Committee was appointed by the House of Commons on 13th July 2009 to '*...review the internal processes of the House Administration for granting permission for such action, to consider any matter relating to privilege arising from the police operation, and to make recommendations for the future*'. The Committee concluded that it did not consider that anything the police did amounted to a breach of privilege or a contempt of the House but the conduct of the police in this matter clearly fell below acceptable standards.³⁹

Commissioner for Parliamentary Standards

The Commissioner for Parliamentary Standards is appointed by the House and works to the Standards and Privileges Committee. This maintains the self-regulation of the Commons but introduces an independent element. As noted above, the Committee may also undertake its own investigations when a possible breach of privilege or contempt of the House is an issue. The Commissioner appears to play no role in these investigations.

Dail Éireann

Standing Order 99 establishes the Committee on Procedure and Privileges. Part of its remit is to:

- Consider matters of procedure generally and to recommend any additions or amendments to Standing Orders that may be deemed necessary
- Consider and report, as and when requested to do so, as to the privileges attaching to Members

In May 2010, the Committee published a report on parliamentary standards. The report followed an offensive remark made by a TD in the House on 11 December 2009 which led to general disorder. In investigating the issue, the Committee noted an incident in 1947 which had similarities to the situation that occurred in December 2009. At that time, the Committee on Procedure and Privileges found that:

The issue of the challenge by one Deputy and its acceptance by another was a breach of privilege on the part of both Members which, by virtue of the fact that an unseemly incident took place almost within view of the House while in session, was contempt of an aggravated nature⁴⁰.

The 2010 incident was investigated further by the sub-committee on privileges. The Sub-committee noted the almost immediate apology issued by the TD in question and considered that it would be appropriate to:

³⁹ <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmmisspriv/62/6211.htm>

⁴⁰ Report of the Committee on Procedure and Privileges

- restate, in an effective way, the standards of behaviour expected of Members; and
- seek to identify changes to procedures intended to ensure that, where disorder arises, its impact on the conduct of business is minimised

The Committee wrote to the TD in question ‘unreservedly condemning his totally unacceptable behaviour in the Dáil’ and copied the letter to every TD. The Subcommittee also noted a growing tendency to disregard Standing Orders and that compliance needed to improve.

The Scottish Parliament and National Assembly for Wales

Privilege has not emerged as a significant issue for the respective standards committees or standards commissioners in Scotland and Wales since the advent of devolution. Standing Orders establishing the respective standards committees in Scotland and Wales do not mention privilege as being part of their remit and to date neither the Scottish nor Welsh committees have been asked to address the issue. This is largely due to the very limited scope of privilege as it exists in the Scottish Parliament and National Assembly for Wales. Therefore, unlike the House of Commons, there are no separate mechanisms for the investigation of alleged breaches of privilege. However, whereas in the House of Commons the leaking of a committee report would be considered a breach of privilege, in Scotland and Wales such action would be an offence against the Code of Conduct and would fall under the remit of the standards commissioners for investigation⁴¹.

As mentioned earlier, a comparison of the Standing Orders relating to the standards committees in the devolved institutions shows that that the reference to privilege in Northern Ireland may be an anomaly when compared to the Scottish Parliament and National Assembly for Wales, with the focus of the committees’ work being the codes of conduct and register of Members’ interests.

Table 1: Standing Orders establishing the standards committees in the devolved institutions

Scottish Parliament	National Assembly for Wales	Northern Ireland Assembly
<ul style="list-style-type: none"> • the practice and procedures of the Parliament in relation to its business; • whether a member’s conduct is in accordance with these Rules and any Code of Conduct for Members, matters relating to Members’ interests, and any other matters relating to the conduct of Members in carrying 	<ul style="list-style-type: none"> • Standing Order 31 (Financial and other Interests of Members) • Any Assembly resolution relating to the financial or other interests of Members • Standing Order 32 (Recording of Membership of Societies) • Any Assembly resolution relating to Members’ standards of 	<ul style="list-style-type: none"> • to consider specific matters relating to privilege referred to it by the Assembly; • (b) to oversee the work of the Clerk of Standards; to examine the arrangements for the compilation, maintenance and accessibility of the Register of Members’ Interests and any other registers of interests established by the Assembly; and

⁴¹ Section 7.4 of the Code of Conduct of the Scottish Parliament and section 4 of the Code of Conduct of the National Assembly for Wales deal with issues of confidentiality.

<p>out their Parliamentary duties;</p> <ul style="list-style-type: none"> • the adoption, amendment and application of any Code of Conduct for Members; and • matters relating to public appointments in Scotland. 	<p>conduct</p> <ul style="list-style-type: none"> • Any code or protocol made under Standing Order 1.13 and in accordance with section 36(6) of the Act; and • Standing Order 31A (Recording of the Employment of Family Members with the Support of Commission Funds) 	<p>to review from time to time the form and content of those registers;</p> <ul style="list-style-type: none"> • (c) to consider any matter relating to the conduct of members, including specific complaints in relation to alleged breaches of the Code of Conduct which have been drawn to the committee's attention; • (d) to recommend any modifications to the Code of Conduct; • (e) to consider any reports of the Assembly Commissioner for Standards; • (f) to perform the functions described in Standing Orders 69B and 69C; • (g) to make reports (including reports to the Assembly) on the exercise of any of its functions or any other matter listed above.
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6 Conclusion

It is important to exercise caution when relying on the concept of parliamentary privilege as it exists at the House of Commons when considering the relatively limited freedoms enjoyed by the devolved legislatures. The Scottish Parliament, National Assembly for Wales and the Northern Ireland Assembly are 'creatures of statute' and are therefore answerable to the courts for their actions in a way that the UK Parliament is not. Any notion of privilege in the devolved institutions extends only to freedom of speech and as stated there are limitations on this. Given that the Assembly itself does not enjoy parliamentary privilege comparable to the House of Commons, Standing Order 70 of the Northern Ireland Assembly which reflects the procedure in the House of Commons for handling breaches of privilege, would appear to be an anomaly.

It may be useful to draw a distinction between 'parliamentary privilege' and the rights and privileges enjoyed by individual Members. Although parliamentary privilege in the House of Commons context does not extend to the devolved legislatures, the Members of the respective institutions still enjoy certain rights and privileges, such as access to the facilities of the legislature. These may be withdrawn by the respective standards committees if a Member is found to have committed a breach of the Code of Conduct.

It is also important to be aware of the dangers of using the language of parliamentary privilege in the devolved legislatures. For example, a privileged document in the context of the House of Commons may be more appropriately referred to as a

confidential document in the devolved legislatures (even though legal professional privilege may attach to the document). The investigation of any leak of such a document in the devolved legislatures would not be a breach of parliamentary privilege (or contempt) but rather a breach of confidentiality. Depending on the specifics of the case, such a matter could be handled by the Standards and Privileges Committee, the Chairs Liaison Group, a specific Assembly committee, or the Assembly Commission Regarding the Commission, in many cases it will be the appropriate body to investigate circumstances, where a member or non-member has made inappropriate use of parliamentary resources (e.g. IT, e-mail system, meeting or dining rooms) or in other ways misbehaved on parts of the Parliament Buildings complex.

Annex 1 – Business bulletin of the Scottish Parliament, 6 August 1999

At the meeting of the Parliament on Wednesday 23 June 1999, Mrs Margaret Ewing raised the question of "parliamentary privilege". The Presiding Officer wishes to offer the following guidance to members.

The starting point is that the Parliament, its members and staff are not beyond the law. Any "privileges" (i.e. legal protections and immunities) applicable in relation to the Parliament are those conferred by or under the Scotland Act 1998. The Parliament does not derive rights by reference to privileges which exist (whether by statute or otherwise) at Westminster and there is no concept of "parliamentary privilege" in relation to the Scottish Parliament or its members in the sense understood at Westminster.

The Scotland Act has a number of provisions designed to give sufficient protection to the Parliament to enable it properly to conduct its business. It prevents the validity of proceedings in relation to a Bill being questioned once the Bill becomes an Act of the Scottish Parliament (section 28(5)). It also limits the types of remedy, which can be sought against the Parliament (section 40). In addition it confers certain protections in relation to defamation and contempt of court and these are the subject of this guidance.

Defamatory statements

Section 41 of the Scotland Act provides that for the purposes of the law of defamation any statement made in "proceedings of the Parliament" and the publication under the authority of the Parliament of any statement is absolutely privileged. This means that any such statement cannot form the basis of an action for defamation. "Statement" in this context means "words, pictures, visual images, gestures or any other method of signifying meaning".

This section is intended to ensure that Members are free to debate and the Parliament to report on matters of public interest without fear of an action for defamation being raised. Although it provides absolute protection in that context, it does not shield members from the operation of the law in relation to other matters, for example incitement to racial hatred.

Contempt of court

The proceedings of the Parliament, unlike those at Westminster, are subject to the law of contempt of court. Rule 7.3.2 of the Standing Orders (Order in the Chamber) includes a requirement that members shall not conduct themselves in a manner which would constitute a contempt of court (or indeed which would constitute a criminal offence).

The Contempt of Court Act 1981 establishes a "strict liability" rule. This is "the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular proceedings regardless of intent to do so". This rule applies (with certain exceptions) to publications "which create a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced".

Section 42 of the Scotland Act provides that the strict liability rule does not apply in relation to any publication made (a) in "proceedings of the Parliament" in relation to a Bill or subordinate legislation or (b) to the extent that it consists of a fair and accurate report of such proceedings made in good faith. "Publication" in this context includes "any speech, writing, programme included in a programme service or other communication in whatever form, which is addressed to the public at large or any section of the public".

This section is intended to ensure that the Parliament is not prevented from legislating on any matter simply because anything said or done in the proceedings might be treated as a contempt of court under the strict liability rule. It is also designed to ensure that those reporting such proceedings are not hampered in their work of keeping the public properly informed.

Proceedings of the Parliament

Sections 41 and 42 of the Scotland Act refer to "proceedings of the Parliament". This expression is not defined in the Scotland Act, except to clarify that as well as proceedings at meetings of the Parliament, it includes proceedings of committees and sub-committees of the Parliament (section 126(1)).

The equivalent of the phrase "proceedings of the Parliament" in Westminster is "proceedings in Parliament". There is no comprehensive definition of the term at Westminster although some matters are defined in section 13 of the Defamation Act 1996. This is one of the matters upon which the Joint Committee on Parliamentary Privilege commented in its report published on 9 April 1999. At Westminster, "proceedings in Parliament" has generally been broadly interpreted and, although a definitive view cannot be given, it is expected that a similar broad construction will be placed on the expression "proceedings of the Parliament" in the context of the Scottish Parliament. For example, it is considered that in addition to proceedings during meetings of the Parliament, committees and sub-committees, "proceedings of the Parliament" also covers the lodging of PQs and giving notice of motions and amendments. Provided that a particular statement can be construed as being made in the context of proceedings of the Parliament, it will benefit from the protection given by the relevant section of the Scotland Act.

Publication of statements under the authority of the Parliament

Members may also wish to note Article 4 of the Scotland Act 1998 (Transitory and Transitional Provisions) (Standing Orders and Parliamentary Publications) Order 1999. This makes provision protecting a person against whom legal proceedings have been brought concerning a statement published by that person where the statement is published or has been published under the authority of the Parliament. It requires the court, on production of a certificate by the Clerk of the Parliament, to make an order bringing those proceedings to an end.

The expression "publication under the authority of the Parliament" is relevant for the purposes of section 41 of the Scotland Act (defamatory statements) and article 4 (above). Article 5 of the Order provides that any statement required or authorised to be published in pursuance of any of the rules set out in the Standing Orders should be treated as published under the authority of the Parliament.

NOTE

This guidance cannot and must not be regarded as a comprehensive statement on this complex area of law, which is expected to develop over time. The senior staff of the Parliament will be happy to provide further advice and assistance as required.

Annex 2 – Legal protections and immunities

The Government of Wales Act 2006	Scotland Act 1998	Northern Ireland Act 1998
<p>Section 93 (3) refers to the validity of Assembly Measures in relation to proceedings in the Assembly.</p> <p><i>“(3) The validity of an Assembly Measure is not affected by any invalidity in the Assembly proceedings leading to its enactment.”⁴²</i></p>	<p>Section 28 (5) refers to the validity of Acts in relation to proceedings in Parliament.</p> <p><i>“(5) The validity of an Act of the Scottish Parliament is not affected by any invalidity in the proceedings of the Parliament leading to its enactment.”⁴³</i></p>	<p>Section 5 (5) refers to the validity of Acts in relation to proceedings in Parliament.</p> <p><i>“(5) The validity of any proceedings leading to the enactment of an Act of the Assembly shall not be called into question in any legal proceedings.”⁴⁴</i></p>
<p>Section 39 (1) relates to offences committed by a person if they fail to attend proceedings of the Assembly</p> <p><i>(1) A person to whom a notice under section 38(1) has been given commits an offence if the person</i></p> <p><i>(a) refuses or fails without reasonable excuse to attend proceedings as required by the notice</i></p> <p><i>(b) refuses or fails without reasonable excuse, when attending proceedings as required by the notice, to answer any question concerning the subjects specified in the notice,</i></p> <p><i>(c) refuses or fails without reasonable excuse to produce any document required to be produced by the notice, or</i></p> <p><i>(d) intentionally alters, suppresses, conceals or destroys any such document.</i></p> <p>Section 40 refers to the administration of an oath to a person giving evidence during Assembly proceedings</p>	<p>Section 25(1) relates to offences committed by a person if they fail to attend proceedings of the Parliament when requested</p> <p><i>(1) Any person to whom a notice under section 24(1) has been given who—</i></p> <p><i>(a) refuses or fails to attend proceedings as required by the notice,</i></p> <p><i>(b) refuses or fails, when attending proceedings as required by the notice, to answer any question concerning the subjects specified in the notice,</i></p> <p><i>(c) deliberately alters, suppresses, conceals or destroys any document which he is required to produce by the notice, or</i></p> <p><i>(d) refuses or fails to produce any such document,</i></p> <p><i>is guilty of an offence.</i></p> <p>Section 26 refers to the administration of an oath to a person giving evidence during proceedings of the Parliament</p>	<p>Section 45(1) relates to offences committed by a person if they fail to attend proceedings of the Assembly</p> <p><i>(1) Subject to subsection (9) of section 44, any person to whom a notice under subsection (7) of that section has been given who—</i></p> <p><i>(a) refuses or fails to attend proceedings as required by the notice;</i></p> <p><i>(b) refuses or fails, when attending proceedings as required by the notice, to answer any question relating to the matters specified in the notice;</i></p> <p><i>(c) deliberately alters, suppresses, conceals or destroys any document which he is required to produce by the notice; or</i></p> <p><i>(d) refuses or fails to produce any such document,</i></p> <p><i>is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a period not exceeding three months.</i></p>

⁴² The Government of Wales Act 2006, Section 93, available online:

<http://www.legislation.gov.uk/ukpga/2006/32/part/3/crossheading/power>

⁴³ The Scotland Act 1998, Section 28 (5), available online: <http://www.legislation.gov.uk/ukpga/1998/46/section/28>

⁴⁴ The Northern Ireland Act 1998, Section 5, available online:

<http://www.legislation.gov.uk/ukpga/1998/47/part/II/crossheading/general>

		Section 46 refers to the administration of oaths
<p>Section 42 of The Government of Wales Act 2006 outlines guidelines referring to Defamation “<i>42. Defamation (1) For the purposes of the law of defamation—</i> <i>(a) any statement made in Assembly proceedings, and,</i> <i>(b) the publication under the authority of the Assembly of any statement,</i> <i>is absolutely privileged.</i> <i>(2) The Welsh Ministers may by regulations make provision for and in connection with establishing in any legal proceedings that any statement or publication is absolutely privileged by virtue of subsection (1).</i> <i>(3) No regulations are to be made under subsection (2) unless a draft of the statutory instrument containing them has been laid before, and approved by a resolution of, the Assembly.</i> <i>(4) In this section “statement” has the same meaning as in the Defamation Act 1996 (c. 31).”⁴⁵</i></p>	<p>Section 41 of the Scotland Act 1998 refers to “Defamatory Statements”</p> <p><i>“41 Defamatory statements.</i> <i>(1) For the purposes of the law of defamation—</i> <i>(a) any statement made in proceedings of the Parliament, and</i> <i>(b) the publication under the authority of the Parliament of any statement,</i> <i>shall be absolutely privileged.</i> <i>(2) In subsection (1), “statement” has the same meaning as in the M1 Defamation Act 1996.”⁴⁶</i></p>	<p>Section 50(1) of the Northern Ireland Act 1998 which refers to Privilege in respect of defamation.</p> <p><i>“(1) For the purposes of the law of defamation, absolute privilege shall attach to—</i> <i>(a) the making of a statement in proceedings of the Assembly;</i> <i>and</i> <i>(b) the publication of a statement under the Assembly’s authority.”⁴⁷</i></p>
<p>Section 43 of The Government of Wales Act 2006 refers to “Contempt of Court”</p> <p><i>“43 (1) The strict liability rule does not apply in relation to any publication—</i> <i>(a) made in, for the purposes of, or for purposes incidental to, Assembly proceedings, or</i> <i>(b) to the extent that it consists of a report of Assembly proceedings which either is made by or under the authority of the Assembly or is fair and accurate and made in</i></p>	<p>Section 42 of the Scotland Act refers to “Contempt of Court”</p> <p><i>“42 Contempt of court.</i> <i>(1) The strict liability rule shall not apply in relation to any publication—</i> <i>(a) made in proceedings of the Parliament in relation to a Bill or subordinate legislation, or</i> <i>(b) to the extent that it consists of a fair and accurate report of such proceedings made in good</i></p>	<p>Section 50(2) of the Northern Ireland Act 1998 which refers to Privilege in respect of “contempt of court under the strict liability rule”.</p> <p><i>“(2) A person is not guilty of contempt of court under the strict liability rule as the publisher of any matter—</i> <i>(a) in the course of proceedings of the Assembly which relate to a Bill or</i></p>

⁴⁵ The Government of Wales Act 2006, Section 42, Defamation, available online; <http://www.legislation.gov.uk/ukpga/2006/32/section/42>

⁴⁶ The Scotland Act, 1998, available online: <http://www.legislation.gov.uk/ukpga/1998/46/section/41>

⁴⁷ The Northern Ireland Act, 1998, available online: <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2045126>

<p><i>good faith.</i> (2) In subsection (1)— “the strict liability rule”, and “publication”, have the same meaning as in the Contempt of Court Act 1981 (c. 49).⁴⁸</p>	<p><i>faith.</i> (2) In subsection (1), “the strict liability rule” and “publication” have the same meanings as in the M1Contempt of Court Act 1981.⁴⁹</p>	<p><i>subordinate legislation; or (b) to the extent that it consists of a fair and accurate report of such proceedings which is made in good faith.</i>⁵⁰</p>
<p>Section 43 of the Government of Wales Act 2006 also refers to the “strict liability rule”</p> <p>“(1) The strict liability rule does not apply in relation to any publication— (a) made in, for the purposes of, or for purposes incidental to, Assembly proceedings, or (b) to the extent that it consists of a report of Assembly proceedings which either is made by or under the authority of the Assembly or is fair and accurate and made in good faith. (2) In subsection (1)— “the strict liability rule”, and “publication”, have the same meaning as in the Contempt of Court Act 1981 (c. 49).⁵¹</p>	<p>Section 42(2) of the Scotland Act refers to the “strict liability rule”</p> <p>“(2) In subsection (1), “the strict liability rule” and “publication” have the same meanings as in the M1Contempt of Court Act 1981.⁵²</p>	<p>Section 50(3) of the Northern Ireland Act 1998 refers to the “strict liability rule”</p> <p>“(3) In this section— “statement” has the same meaning as in the ^{M11}Defamation Act 1996; “the strict liability rule” has the same meaning as in the ^{M12}Contempt of Court Act 1981.⁵³</p>

⁴⁸ The Government of Wales Act 2006, Section 43, Contempt of Court, available online:
<http://www.legislation.gov.uk/ukpga/2006/32/part/1/crossheading/legal-issues>

⁴⁹ The Scotland Act, 1998, available online: <http://www.legislation.gov.uk/ukpga/1998/46/section/42>

⁵⁰ The Northern Ireland Act, 1998, available online: <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2045126>

⁵¹ The Government of Wales Act 2006, Section 43, Contempt of Court, available online:
<http://www.legislation.gov.uk/ukpga/2006/32/part/1/crossheading/legal-issues>

⁵² The Scotland Act, 1998, available online: <http://www.legislation.gov.uk/ukpga/1998/46/section/42>

⁵³ The Northern Ireland Act, 1998, available online: <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2045126>

