STATES OF JERSEY

PARLIAMENTARY PRIVILEGE: REPORT TO THE PRIVILEGES AND PROCEDURES COMMITTEE FROM SIR MALCOLM JACK

Presented to the States on 12th September 2017
by the Privileges and Procedures Committee

STATES GREFFE

REPORT

Parliamentary Privilege

'Parliamentary privilege' is a term which refers to the rules which uphold the special constitutional status of parliamentary bodies, reflecting their democratic accountability to the electorate. At the most basic level the key privileges are freedom of speech for parliamentarians and other people who contribute to parliamentary proceedings and a legislature's freedom to set its own internal rules and procedures.

PPC commissioned Sir Malcolm Jack to undertake a review of parliamentary privilege in Jersey in December 2016. Sir Malcolm is a former Clerk of the UK House of Commons and editor of the most recent edition of *Erskine May*, the definitive guide to parliamentary procedure and practice. His terms of reference were to:

- review Jersey legislation and case law relating to parliamentary privilege;
- prepare an options paper on codifying parliamentary privilege in a single draft Law, drawing on experience in other jurisdictions;
- visit the Island in order to discuss the options paper with key stakeholders, including the Committee; and
- finalise advice to the Committee, including drafting instructions for the new Law.

Sir Malcolm's paper is published as part of this report. The cost of the review was £24,000. PPC wishes to hear views on Sir Malcolm's paper and his recommendations before deciding on how to take matters forward. Comments should be sent to the Greffier of the States, Mark Egan, at StatesGreffe@gov.je or Morier House, St. Helier, JE1 1DD. Comments should be submitted by Friday, 20th October 2017.

Privilege and Codification: States Assembly Jersey

Report to Privileges and Procedures Committee
from Sir Malcolm Jack

Executive Summary

Purpose of inquiry:

The purpose of this inquiry is to 'review Jersey Legislation and Case Law relating to parliamentary privilege with a view to preparing a paper on codifying parliamentary privilege in a single, draft law, drawing on experience in other jurisdictions.'

1. Parliamentary Privilege: Background (UK, Devolved Assemblies and Crown Dependencies)

– Functionality principle
– Freedom of speech in debate and proceedings
– Freedom from arrest, favourable construction
– Publication of proceedings, 1840 Act
– Exclusive cognisance/ internal jurisdiction
– Devolved Assemblies
– Crown Dependencies (other than Jersey)

2. Codification of Parliamentary privilege: pros and cons

– Pros: clarification of terms, public accessibility, legal certainty
– Cons: judicial interference, litigation, inflexibility
– Joint Committees 1999: for codification 2013: against codification. Exclude: internal regulation under Standing Orders

3. Commonwealth Experience

Commonwealth experience: Australia, Canada and New Zealand
– Australia: Background to Codification
– Australian Parliamentary Privileges Act 1987 (Includes clarification of terms, penalties for contempt, protection of witnesses etc.)
– Canadian and New Zealand experience

4. States Assembly: Existing Codification

States of Jersey Law 2005 Parts 5 and 7
– Article 33: Entry to States
– Article 34: Immunity from legal proceedings
– Article 35: Minutes of States etc. to be evidence
– Article 36: Evidence of proceedings not to be given without leave
– Article 37: Offence of printing false documents
– Article 38: Protection of persons responsible for States and other publications
– Article 39 Protection in civil proceedings for publication without malice
– Article 40 Exercise of jurisdiction by courts

– Article 47 Offence of blackmail, menace or compulsion
– Article 48 Standing orders
– Article 49 Regulations: powers, privileges and immunities
Regulations 2006 – Panels
Regulations 2007 – Committees of Inquiry

5. States Assembly: Existing Case Law

– Freedom of speech/exclusive cognisance: Syvret 1993, Syvret 1998, Royal Court, 2011
– Members and criminal law: Syvret 2009, Pitman & Southern 2009
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– Panels: PPC Ruling 2015

6. Matters to consider for comprehensive Codification

1. Principle of absolute privilege
2. Definition of 'proceedings'
3. Use of proceedings in the courts
4. Publication with leave, certification and premature disclosure
5. Members of the Assembly and Officer
6. Suspension and Expulsion of Members
7. Conferment of privilege on non-Members
8. Principle of exclusive cognisance/internal jurisdiction
9. Contempts
10. Penal powers
11. Protection of officials
12. Qualified privilege
13. Jurisdiction of the Courts

7. Matters to be excluded from Codification

A number of matters should be *excluded* from a single law and instead set out in Standing Orders:

– Disciplinary powers of the Chair
– Conduct of Members in debate etc.
– Code of Conduct for Members
– Redress for individuals claiming to have been defamed

8. Conclusion: the Way Forward

Malcolm Jack
10th July 2017

Privilege and Codification: States Assembly Jersey

Report to Privileges and Procedures Committee
from Sir Malcolm Jack

Purpose of inquiry:

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7. Matters to be excluded from Codification

8. Conclusion: the Way Forward

1. Parliamentary Privilege: Background (UK, Devolved Assemblies and Crown Dependencies)

1. Parliamentary privilege – those rights and immunities enjoyed by Parliament collectively and by Members of each House individually – is a complex subject with a long history.

2. The House of Commons has asserted certain privileges since the Middle Ages. The broad context of the early history of privilege is the House's stand against executive interference in the person of the Crown; the later context is broadly that of Parliament's struggle with the courts over jurisdiction in this area. While some understanding of the long sweep of the history of parliamentary privilege is essential to any consideration of modern privilege issues, the focus of this paper is on the question of codification – whether or not it is desirable to enshrine the principles of privilege, wholly or at least in material part, in new

statutory provisions for the States Assembly which could be incorporated into a revision of the States of Jersey Law 2005.

3. Before considering briefly some of the significant pointers that arise from the history of privilege, two important observations need to be made. The first is to remind ourselves of the purpose of parliamentary privilege which, contrary to public perception, is not the preservation of exclusive rights no longer appropriate in the twenty-first century but is an essential element in the functioning of any modern, democratic Parliament. The Resolution of the House of Commons of 1675 stated that purpose in the clearest possible terms when it said that privilege exists so that Members might freely attend the public affairs of the House, without disturbance or interruption.[1] I will refer to this as the *functionality principle*.

4. The second important matter to understand is that the most widely acknowledged of the British Parliament's rights – free speech – is already codified in Article IX of the Bill of Rights, 1689. Throughout the modern period of the history of privilege, the Courts have not hesitated to interpret provisions of that statute. Parliament eventually accepted that the parameters of privilege are indeed defined by the courts while the courts accepted that the internal working of Parliament (exclusive cognisance) was an area into which they would not venture.[2] Codification is therefore not a departure in the evolution of parliamentary privilege – a statute is already its basis. In the case of Jersey, the existing States of Jersey Law 2005 is the statutory basis of privilege.

Meaning and origins of Parliamentary privilege

5. The word 'privilege' in our modern, democratic society has awkward connotations. A specific right or advantage; an exemption from a rule or a norm which puts its possessor in a different position from everyone else sounds elitist, exclusive and is therefore unwelcome to the majority of the public. For any parliamentary body to claim privilege in the twenty-first century it is necessary to convince the public that it is a vital element in the functioning of a democratically-elected body. That objective can only be achieved if there is clarity about what parliamentary privilege is and how it enables elected Members to fulfil their mandate.

6. Erskine May, the definitive guide to the UK Parliament's procedure and practice, defines privilege in the following terms:

> *Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament; and by Members of the House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Some privileges rest solely on*

[1] Commons Journals (CJ) (1667-87) 342

[2] The boundary line between what is a matter for Parliament and what is a matter for the Courts was set out in an authoritative pronouncement made by the then Attorney General in a memorandum laid in the House of Commons Library in 2009. DEP 2009/1081. The Attorney General's memorandum is also appended to the Report of Committee on the Issue of Privilege (Session 2009-10) HC 62 Appendix IV.

the law and custom of Parliament, while others have been defined in statute.[3]

7. Erskine May is thus making clear that these rights and privileges, the most important of which is freedom of speech, attach to individual Members of each House but they do so only *because the Houses cannot effectively perform their functions without the unimpeded service of their Members.* This underlying purpose of privilege is the 'functionality principle' I have referred to. (Paragraph 3 above). It is the principal modern justification for a certain setting aside of the law in respect of parliamentary proceedings. In the case of the House of Commons, what the principle suggests is that Members of Parliament derive their privilege only as a means to the effective discharge of the collective functions of the House – to scrutinise Government and approve public expenditure, to legislate and to air the grievances of their constituents. The rights and immunities enjoyed by Members arise so that they can carry out those functions; they are not free standing rights. By long standing resolutions both Houses have agreed not to assert any new privilege.[4]

8. The Houses also retain certain powers collectively. Among these is, at least in theory, the power to punish contempts (a subject treated more fully below[5]). These powers derive from the historic nature of Parliament as a High Court; in modern times they are exercised extremely sparingly and only so that Parliament can function effectively and so that those who serve it (including those who come as witnesses before parliamentary committees) can do so with impunity.

9. In the case of Jersey, the States Assembly emerged from the Royal Court of Jersey in the distant past. The legislature has not, therefore, been created by statute and is sovereign in the same way as the British Parliament, with competence to assert its own privilege.

10. The powers to assert privilege are an expression of the unique authority that Parliament, as a whole, exercises and they place Parliament in a special category. When the rights or immunities of Parliament are attacked, a breach of privilege has occurred: in the House of Commons there are various ways in which Members can raise alleged breaches of privilege, the most regular being a written submission to the Speaker who rules on whether a debate is in order on the question of referring the matter to the Committee of Privileges.

11. While the Speaker's role is crucial in deciding whether there appears to have been a *prima facie* breach, the substantive matter is settled by an inquiry by the Committee of Privileges. Each House retains the right to punish contempts – that is actions that thwart the Houses in their business which may go wider than a breach of one of the defined privileges. What these powers actually amount to in the modern context will be discussed subsequently in this paper.

The core privilege – free speech in Parliament

[3] Erskine May *Parliamentary Practice* Twenty-fourth edition, (London, 2011) p. 203.
[4] Commons Journals (1702-04) 555, 560.
[5] See below paragraphs 32 & 33.

12. As we have noted, Parliament, and in particular the House of Commons had been asserting its right to debate and proceed free from royal interference from the Middle Ages. That right to freedom of speech had already grown up by the latter part of the fifteenth century as a matter of tradition rather than by virtue of a privilege sought and obtained. By the early sixteenth century the ancient tradition was being articulated in pleas by Speakers and by the House itself.

13. Nevertheless, while free speech became regarded as a right hallowed by tradition, it was also understood that respect and obedience to the Sovereign's wishes should temper the debates and decisions of Parliament. Where the borderline lay between parliamentary freedom and sovereign control and on what basis privilege was claimed, remained matters of controversy. Parliament's privileges were increasingly challenged by the Stuart monarchs from James I onwards. At a most simplistic level one can view the civil war of the mid-seventeenth century as an assertion of Commons' privilege against encroachment by the Crown.

14. Eventually statutory expression was given to freedom of speech in the Bill of Rights of 1689.[6] The Preamble to the Bill of Rights tells us that it was introduced –

> *Because King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him did endeavour to subvert and extirpate the laws and liberties of this kingdom.*[7]

15. The language of the Preamble reminds us that the Bill of Rights was an assertive, politically-motivated declaration. It is (like its predecessor Magna Carta) a jumble of contemporary complaints rather than being a comprehensive, constitutional instrument. Nonetheless, free speech in Parliament was at the centre of the political demands being asserted by Parliament.

16. Freedom of speech is famously asserted in Article IX of the Bill itself, which provides that –

> *The freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.*[8]

17. Considerable attention has been paid to the exact meaning of the words in Article IX. The phrases *'proceedings in Parliament' 'impeached or questioned'* and *'court or place out of Parliament'* have been the subject of learned and judicial pondering and ruling over the ages. It will be necessary to return to consider definitional issues later in this paper but it is, in the context of codification, important to note that the courts have never hesitated to consider the meaning of what are statutory provisions whatever view Parliament itself has taken of its privileges.

[6] In Scotland it was by the Claim of Right Act, 1689.
[7] Bill of Rights 1689, Preamble paragraph 2
[8] Ibid. Article IX.

18. The struggle between Parliament and the courts reached its apogee in the mid-nineteenth century when the Commons gave up its right to determine the nature of privilege: that task was ceded to the courts. But the ambits of privilege and the area in which the Houses maintained exclusive cognisance remained to be delineated and this came about in a series of cases, not always with complete clarity. Paradoxically most of these cases were settled on first principles, with only a glance at Article IX.

19. As time went on the courts were drawn into broader areas of public life so that they became less attached to a self-imposed rule which excluded interpretation of statutes and parliamentary material, including debates relevant to the legislative history of a statute. A number of cases decided by the House of Lords in its former judicial capacity significantly varied the earlier self-denying ordinance. In 1992 as a result of decisions in the case of *Pepper v. Hart,*[9] the courts now feel freer to refer to parliamentary material where legislation is considered to be ambiguous, or obscure, or leads to absurdity. In such cases, parliamentary material can be used to elucidate the meaning of statute.

20. Although it is true that the ruling in *Pepper v. Hart* has been applied with some caution in subsequent case-law, that decision and the examination which the courts now give to Parliamentary materials to determine the proportionality of a measure in terms of its compliance with fundamental rights imperatives mean that the courts are becoming increasingly familiar with looking at statements made in Parliament and with the parliamentary process more generally.

21. Whatever the nuances of the words of Article IX, the principle of freedom of speech underpins it. That core principle enables a Member of either House to say whatever he or she thinks fit in debate. However offensive or injurious those remarks might be to a named individual, that individual will have, as matters currently stand, no obvious recourse to the courts – at least to the British courts – since they will, amongst other things, not be able to take out any action for defamation. Within the House of Commons itself certain rules and conventions about decorum and the proper way of addressing Members of both Houses are enforced by the Chair. Nevertheless, as Enoch Powell reminded the House, the absolute nature of privilege protects an individual Member even when he or she is expressing opinions abhorrent to all his colleagues.[10]

22. Free speech in Parliament is of obvious importance. But in more modern times the power of the Crown has diminished[11] so that the considerations that drive the need for free speech as an imperative of parliamentary effectiveness have changed. Without wishing to overstate the position, the reality in modern day Britain is that Parliament's position is sometimes perceived to be threatened (if it is threatened at all) not by an over-zealous Crown, but by an increasingly powerful senior judiciary.

23. The judiciary has been greatly empowered as a result (in particular) of two significant pieces of legislation (the European Communities Act 1972 and the

[9] [1992] UKHL 3
[10] See HC Deb. 2nd May 1978 Vol. 949 col. 43-44.
[11] Although playing a symbolic role, the Crown remains as part of Bagehot's 'dignified' constitution and in that role is still significant.

Human Rights Act 1998); so significant that they have sometimes been termed 'constitutional statutes.' Modern legislation of this kind can appear to threaten parliamentary sovereignty, because modern judges at the highest level have the power (in EU law) to dis-apply legislation enacted by Parliament, or (under the Human Rights Act 1998) to declare Parliament's laws to be incompatible with the European Convention on Human Rights (ECHR). However, it should be noted that the powers were granted to the courts by Parliament. In other EU Member States, parliamentary privilege is embedded in written constitutions as has been made clear in a recent case in Eire where an individual sought redress from the courts over proceedings in the Oireachtas. The court decided it had no jurisdiction over the matter.[12]

24. These new powers, the practical effects of which were almost certainly unforeseen when these statutes were given legal effect, have caused incipient and increasing tension between the courts and Parliament as to which organ of state prevails in the event of conflict. This latest tension between Parliament and the courts had not been articulated clearly when the question of codification of Parliamentary privilege arose. But it is the principal reason why codification of Parliamentary privilege is controversial. There would seem to be many who would oppose codification, not because of principled objection but because of what they perceive as 'judicial activism.'

Other privileges – freedom from arrest, favourable construction

25. Other earlier privileges were also historically important. Freedom from arrest was another part of the protection the Commons sought from action by the Crown against those who displeased it. As with other privileges, it is based upon the absolute priority of Members to attend and to participate in the business of Parliament. But it is important to note that it has never been extended to protect Members from arrest on criminal charges (except in the Chamber when the House is actually sitting,)[13] a principle clearly upheld by the courts in the recent case of *R. v. Chaytor* in which, significantly, the Speaker did not intervene on behalf of the House.[14]

26. The privilege of freedom from arrest, in modern times, is very limited and there are a number of statutory provisions of detention which apply to Members notwithstanding any privilege;[15] other ancient privileges, such as asking the Sovereign to place a 'favourable construction' on the House of Commons' proceedings, have fallen into desuetude.

[12] See Kerins judgement, 2014 No 431 JR. Also a landmark ruling from the European Court was given in the case of A v. United Kingdom EHRR 917 (2002) upholding the principle of free speech in national parliaments.
[13] For an account of the arrest of Lord Cochrane (a Member of the House) in the chamber when the House was *not* sitting see Parl. Deb (1814-15). 30 cc 309, 336.
[14] *R. v. Chaytor* [2010] UK SC 52. A similar policy of non-intervention was followed by the Clerk of the Parliaments in a similar case involving a peer.
[15] For example under the Mental Health Act, 1983 where special provision is set out for Members detained under s. 141. Also see Erskine May, 24th edition, p. 245ff.

The Commonwealth context

27. The British concept of Parliamentary privilege is shared throughout the Commonwealth by those institutions which – in various ways – have developed from the Westminster model. For the purpose of privilege, the Commonwealth in a community, sharing and exchanging practice and precedent. For that reason, Commonwealth precedents and practice in respect of privilege are cited in Erskine May.[16] However, unlike the UK itself, Commonwealth countries have codified constitutions and the protection of parliamentary privilege is invariably cited in those constitutions. Thus, codification in Commonwealth jurisdictions is entirely normal. I will return to Commonwealth experience in Section 3 below.

Publication and reporting of Parliamentary proceedings

28. The publication of Parliamentary proceedings in the Official Report (Hansard), the Votes and Proceedings (the official minutes of the House of Commons) and any other document ordered to be printed by Parliament is also protected; any reporting of proceedings by other bodies (principally the media) attracts qualified privilege as a matter of common law rather than parliamentary law and which also applies to the reporting of court proceedings.

29. The principle behind this qualified protection is that there is an advantage to the public interest in the publication of facts which outweighs any private injury that it might cause with the proviso (which is an important one) that publication does not involve malice. So far as the reporting of parliamentary proceedings is concerned, the protection is encoded in the Parliamentary Papers Act, 1840 which followed a considerable trial of strength between Parliament and the courts in the cases around *Stockdale v. Hansard* in the late 1830s. There has been some concern expressed recently about the obscurity of the wording of the Act and a call for its rewriting by the Joint Committee on Parliamentary Privilege (1999).[17]

Exclusive cognisance

30. Another area of parliamentary privilege closely related to freedom of speech is that of 'exclusive cognisance' or exclusive jurisdiction over their internal affairs that both Houses claim. The most important of these is the regulation of business by rules (Standing Orders) and practices which, in the House of Commons, are interpreted and ruled on by the Speaker. These rules and practices are the property of the Houses, they can be changed by resolution but, while extant, they are binding on Members as they debate and take part in the proceedings of their respective Chambers and Committees.

31. In addition, the internal jurisdiction of Parliament extends to control of the parliamentary precincts (shared by the Houses) and the responsibility for

[16] For example for the ruling of a breach of privilege by the Canadian Speaker in a case involving the refusal by the Executive to hand over confidential papers to a parliamentary committee. See Erskine May, 24th edition, p. 819.
[17] Joint Committee on Parliamentary Privilege, (1999) HL Paper 43-I, HC 214 I: paragraphs 379-385 (hereafter referred to as the '1999 Joint Committee.')

security and access. In the Commons the Speaker's Protocol regulates the conditions upon which the police may enter the precincts in pursuit of criminal investigations.[18]

Contempts

32. When any of the rights or immunities of Parliament are attacked or disregarded, the offence committed is known as a breach of privilege which the Houses have, and continue to assert, a right to punish. Each House also claims the right to punish contempts which, while not breaches of any specific privilege, in some way obstruct or impede Parliament in its proceedings. For a long time Parliament has adhered to the principle that its penal powers should be exercised sparingly; in the modern context that has become expedient since it is doubtful how in practice the Houses could exercise those powers.

33. An important aspect of the notion of contempt is that an action may be treated as a contempt for which there has been no precedent. An example was the referral of phone hacking to the then Committee on Standards and Privileges, following a complaint by a Member of the House that hacking was inhibiting him in his parliamentary work. While the novelty of the alleged contempt was not a barrier to the Committee's investigation, it was necessary for the Committee to establish in what way the hacking interfered with the Member's work so far as it related to the Chamber or Committees since correspondence with constituents and matters pursued locally, unless related to proceedings of the House, are not covered by parliamentary privilege. The Committee's conclusion left the matter unresolved, suggesting that while the hacking might have amounted to a contempt, hacking was a criminal matter best dealt with by enforcement of the law.[19]

34. Two matters which have arisen since the report of the Joint Committee in 1999, (namely select committee powers and the use of parliamentary material in evidence) are contained in provisions of the Australian Parliamentary Privileges Act, 1987, while the Australian Parliament has provided, by internal regulation (in the form of Standing Orders), for citizens who consider they have been victimised by the use of Parliamentary privilege, to present their views to a parliamentary committee (the presiding officers acting as an initial filter).

The devolved assemblies

35. The principal difference between the UK Parliament and the devolved assemblies is that the latter are statutory rather than sovereign bodies. The privileges protected in these legislatures are set out in statute which, unlike privilege in the UK Parliament, is subject to process in the courts.

36. In the case of Scotland the privileges of the Scottish Parliament – including the key protection of SMPs from actions for defamation – are contained in various sections of the Scotland Act, 1998. In addition to the protection afforded for

[18] See HC Deb (2008-09) 485, c1ff. Similar arrangements have been adopted in the House of Lords.

[19] Committee on Standards and Privileges, Fourteenth Report, HC 268 (2008-09).

freedom of speech, other provisions include offences for contempt and the publication of parliamentary papers and records.[20]

37. Similar statutory provisions exist for the Welsh Assembly and the Northern Ireland Assembly. In the latter case, offences are defined as those interfering with the functioning of the Assembly.[21]

The Other Crown Dependencies: Guernsey

38. The position on privilege in Guernsey derives from the Reform (Guernsey) Law 1948, as amended in 2006. (Article 20A). The Law confers absolute privilege on Members in respect of any words spoken in the States – no civil or criminal proceedings can be instituted against a Member in that respect, or in respect of matters (proceedings) conducted in the Assembly, or contained in its publications. The protection afforded applies even when the words complained of are spoken or published maliciously. In the 'Red Book' of guidance to Members it states that 'Members are afforded this immunity to enable them to air any matter, regardless of the power, wealth, or status of those criticised.'[22] Qualified privilege is accorded to reporting of debates and proceedings made without malice.

39. In respect of allegations of abuse of privilege, a Panel comprising five of the ten most senior Members is appointed by the Presiding Officer. The Privileges Panel considers complaints, including those of one Member against another on agreement to a Motion that must set out the full details of the complaint showing a *prima facie* breach. The Panel itself decides whether a *prima facie* contempt has been committed and it has the power to call for papers. After its consideration a report is made to the States – recommendations may include reprimand, suspension or expulsion of a Member. Suspension may include cessation of allowances due to a Member. This last occurred in 1945; the Member was reinstated after a short period.

40. A consolidation of existing statutes and practice is set out in the 'Red Book' but no definitive privileges act of the type in Australia has been promulgated.

Isle of Man

41. Although the Bill of Rights has never applied to Tynwald, the courts do not interfere with the Manx Parliament, based on a traditional understanding of its inherent privilege.

42. Certain provisions on the privilege of Tynwald are contained in the Tynwald Proceedings Act 1876 and the Tynwald Proceedings Act 1984.

43. The 1876 Act contains detailed provisions about witnesses before the Houses or Committees which put such witnesses on a similar footing to witnesses or persons summoned to appear personally, or to produce documents, before a Court of Justice. Witnesses who refuses to co-operate would be committing a

[20] See Scotland Act 1998, s. 41 etc.
[21] See Government of Wales Act 2006 & Northern Ireland Act, 1998.
[22] Red Book Paragraph 36.

contempt but such witnesses are entitled to legal professional privilege as in the High Court. The method of enforcement involves the issue of a 'precept' (or 'order') for a witness to appear or to produce specified papers. Failure to comply with the precept would be a contempt punishable as if it were a contempt of the High Court. The High Court would have to decide whether a contempt had been committed. The Act gives the Tynwald powers to fine, or even imprison, a person who commits a contempt. There is also a provision for a fine for any person libelling the Houses, or their Members, in the course of their duties. There have been no cases of a contempt being referred to the High Court since the enactment of 1876.

2. Codification of Parliamentary privilege: pros and cons

44. The definitions and background considered so far bring us to the key issue of codification, that is, whether or not a new and potentially comprehensive statute is needed for the States Assembly. The principal arguments in favour of codification were set out in the report of the Joint Committee on Parliamentary Privilege (1999).

45. The 1999 Joint Committee made the following principal points in recommending codification:

> * An Act of Parliament would make it easier for the electorate to understand the importance of parliamentary privilege by presenting a clear, accessible code in modern language, comprehensible to Members and the public;
>
> * Such a Code would clarify what are ambiguous terms in the Bill of Rights 1689 and for contempts, include penalties;
>
> * Such a Code would maintain flexibility by stating principles;
>
> * Such a Code would not increase the power of the courts, which already determine the ambits of privilege and at the same time would create legal certainty.

46. By contrast, those who have argued against codification have made the following points –

> * Codification would lead to renewed judicial interference (or 'inventiveness') in the affairs of Parliament, upsetting the constitutional balance between Parliament and the judiciary;
>
> * Codification would lead to a raft of cases in the courts arguing over provisions of a statute;
>
> * The Bill of Rights is a statement of fundamental, constitutional significance which has stood the test of time: flexibility would be lost by the straightjacket of a modern statute.

47. In recommending codification, the 1999 Joint Committee emphasised that a restatement of Article IX would not entail putting aside the historic principles

on which it is was based. The Joint Committee envisaged a statute which would be composed of two broad sections – the first would be a clarification of key terms such as 'proceedings in Parliament'; 'place out of parliament', 'questioning' etc. The second part would deal with exclusive cognisance – Parliament's control of its internal affairs – and contain a definition of contempt.

48. Criminal offences – punishable by fines and imprisonment – would be written into the provisions of the statute. Other 'tidying up' measures – such as abolishing the privilege of freedom from arrest – would also be contained in the statute. To maintain flexibility, principles would be stated with examples, thereby not precluding future developments from being covered by the provisions of the Act.

49. It should be noted that there are certain areas of action that Parliament could take itself by internal regulation, which would not require codification. These would include such matters as discipline in the Chamber and a Code of Conduct for Members.

50. Another example, a right of reply by citizens who consider they have been defamed in Parliament could take the form of a Standing Order, as is the case in the Australian jurisdiction. Such a provision would mitigate some of the reservations which the European Court of Human Rights has expressed about the exercise of parliamentary privilege in an age of human rights.[23]

51. The 1999 Joint Committee also recommended the replacement of the 1840 Parliamentary Papers Act with a modern statute making clear the ambits of qualified privilege in cases of publication.

52. A number of problems have arisen in respect of privilege matters in the British Parliament. They include select committees being unable to deal with recalcitrant witnesses and their reports being cited in the courts. There has also been the problem of Members flouting court injunctions on naming individuals by doing so under the protection of privilege in the House.

53. The matter of codification was considered again in 2013 by the Joint Committee on Parliamentary Privilege of that session. The Committee decided that comprehensive codification was *not* needed, relying on convention. It added that this did not mean that legislation was ruled out but should only be resorted to 'in the unlikely event of Parliament's exclusive cognisance being materially diminished by the courts.'[24] While arguing against piecemeal legislation on privilege, the Committee left the door open to comprehensive legislation in future.

[23] See A. v. United Kingdom EHRR 917 (2002).
[24] Joint Committee on Parliamentary Privilege Report of Session 2013-14 HL Paper 30 HC 100 paragraph 275.

3. Commonwealth Experience

Commonwealth experience: Australia, Canada and New Zealand

Australia: Background to Parliamentary Privileges Act 1987

54. Section 49 of Australia's Constitution gave the two Houses, and their committees and members, the 'powers, privileges and immunities' of the United Kingdom House of Commons, and its committees and members, at the time of Federation (1901) until the Australian Parliament otherwise provided.

55. In a well-known case in 1955, the Australian House of Representatives sentenced a publisher and a journalist to three months imprisonment after it had agreed with a report from the Committee of Privileges which had found that they were each guilty of a serious breach (they had admitted to attempting to intimidate a Member in order to prevent him from raising matters in the House). The High Court rejected applications for writs of *habeas corpus*, saying that the House had inherited the power to imprison for breach of privilege from the House of Commons, that as the resolution of the House and the warrants were expressed in general terms, they were not subject to review, and that the imposition of the penalty was not contrary to the constitutional provisions which had provided for the judiciary.

56. A comprehensive review of the law and practice of parliamentary privilege was commenced in 1982 and carried out by a joint select committee between 1982 and 1984. Evidence was taken from members and staff, academics and media personnel. A good deal of information was obtained about the law and practice of privilege in other jurisdictions, both in Australia and internationally. The committee concluded that the Houses should retain their penal jurisdiction but that there should be a number of safeguards, including the adoption of a policy of restraint, the adoption of detailed provisions for the protection of witnesses before the Privileges Committee, special provisions before a penalty was imposed by a House, provisions for the imposition of fines, and provision for a limited review where a penalty of imprisonment was imposed.

57. Some of the Committee's recommendations could be implemented only by a statute —for example, the ability to impose fines, the provision for a limited review of penalties of imprisonment, the narrowing of the traditional immunities from imprisonment in civil matters and from compulsory attendance in court as a witness. The Committee also recommended that the House adopt a detailed definition of proceedings in Parliament and this also could be achieved only by a statutory provision.

58. In the mid-1980s, the courts in New South Wales allowed witnesses in a certain case to be cross-examined about evidence they had given to Senate inquiries. The courts rejected submissions made on behalf of the President of the Senate that the law of parliamentary privilege prevented the use of committee evidence in this way: it was considered that the consequences of these court decisions could be reversed effectively only by legislation. The Parliamentary Privileges Act dealt with the recommendations of the Joint Select Committee which

required implementation by statute, as well as the problem that had arisen in New South Wales, but it was the latter which was the spur to action.

Australian Parliamentary Privileges Act 1987

59. The Australian Parliamentary Privileges Act 1987, is the principal comparative model for codification since it is in place in a Commonwealth country with a similar common law tradition to the United Kingdom and to Jersey.[25] The Australian Act begins with definitions (as envisaged by the Joint Committee on Parliamentary privilege in their recommendation) but it does so in a broad way to maintain maximum flexibility. Thus contempt or offences against the Houses are not defined in terms but rather the principle is stated and a threshold set. The Act states that conduct does not constitute an offence against the Houses *'unless it amounts, or is intended to amount to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance of a member of a member's duties as a member'*.[26]

60. The Act sets out penalties for committing contempts in the presence of the Houses or their committees. Fines range from $5,000 for individuals to $25,000 for corporations. There is also provision for imprisonment (and the release of anyone so imprisoned) by order or resolution of either House.

61. Other provisions of the Act deal with the reporting of proceedings with the defence of 'fair and accurate' reporting in actions for defamation against those reporting;[27] protection of witnesses from 'fraud, intimidation, force or threat';[28]unauthorised disclosure of evidence;[29] and certain immunities from arrest and court attendance by Members.[30] However, the application of Federal Law in the precincts is re-asserted in case of doubt: Members are not protected from criminal prosecution by parliamentary privilege.[31]

62. One of the most important sections of the Act deals with parliamentary privilege in the context of court proceedings.[32] The section begins with a declaration that the provisions of Article IX of the Bill of Rights apply to Parliament. The next subsection defines *'proceedings in Parliament'* as *'all words spoken or acts done in the course of, or for the purposes of or incidental to, the transacting of the business of the House or of a committee'*, and, *'without limiting the generality of the foregoing'* includes:

    (a) the giving of evidence before a House or a committee, and evidence so given;

[25] Other commonwealth countries considered as 'constitutional democracies' such as South Africa have discrete privileges statutes.
[26] Australian Parliamentary Privileges Act 1987 (as amended) s.4. The full text of the legislation as currently in force is annexed to this report.
[27] Ibid. s. 10.
[28] Ibid. s. 12.
[29] Ibid. s. 13.
[30] Ibid. s.14
[31] Ibid. s. 15
[32] Ibid. s. 16

(b) the presentation or submission of a document to the House or a committee;

(c) the preparation of a document for purposes of, or incidental to, the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of the House or a committee and the document so formulated, made or published.[33]

63. Further subsections prohibit the production of evidence, questions, statements, submissions or comments made in Parliament to be used in court or tribunal proceedings which either question proceedings or attempt to draw conclusions from them. Exceptions are provided for the use of such evidence so far as they relate to section 57 of the Constitution (Disagreement between the Houses) as well as to the interpretation of an Act, following the principles established in *Pepper v. Hart*.[34]

64. The opportunity was also taken to give the proposed policy of restraint in the exercise of the penal jurisdiction a statutory basis, in section 4 of the Act. In addition, statutory provisions for the protection of witnesses were included (section 12), and for the unauthorised disclosure of *in camera* evidence (section 13) and the Houses were prevented from expelling members (section 8). Both sections 5 and 16 (concerning the general principle of privilege and the protection of parliamentary proceedings) retained links with the law inherited from the United Kingdom by virtue of section 49 of the Constitution, except to the extent that the Parliamentary Privileges Act provides otherwise.

65. The only provisions of the Act that have received any significant attention in courts have been those in section 16. They have been relied on in a number of cases. With one exception there has been no problem from a parliamentary perspective. In *Laurance v Katter* decisions of judges of the Queensland Court of Appeal questioning the validity of section 16(3) led to an appeal to the High Court, but the case was settled. This would have been of great interest because the validity of section 16(3) on the use of evidence of proceedings in the courts would have been tested.

66. There have been no cases in which either House has imposed a fine or a penalty of imprisonment under the Act. Matters such as offences against witnesses or in respect of the disclosure of *in camera* evidence have continued to be dealt with under the traditional in-house processes, albeit with the newer procedures for the protection of witnesses.

67. Section 4 has been found to be particularly helpful in setting a threshold definition of contempt. The provision in section 6, that words or acts cannot be held to constitute a contempt by reason only that they are defamatory, has been criticised as a restriction on the possible response to an unwarranted attack on a Member. A second criticism is that the Houses were unwise in providing that

[33] Ibid. s. 16 (2)
[34] See paragraphs 19 & 20 above.

neither House could expel a member. At the time the Act was passed, its proponents wanted to guard against capricious or vindictive action by a majority. Opponents of the provision would see the section as depriving the Houses of an important historical power.

68. While it has been said that, in law reform, codification often means the achievement of a degree of certainty at the expense of flexibility, on the evidence to date, the Parliamentary Privileges Act has not caused the Houses to regret any loss of flexibility. It has achieved a greater level of certainty in relation to the privilege of freedom of speech and the use of parliamentary records in courts. Were it not for the provisions of s. 16, these matters would have evolved in a more unpredictable (although not necessarily unsatisfactory) way. The Act has enabled some ancient provisions to be updated, although some of these were of little importance, and it has given the Houses the option of imposing fines. There is no evidence that the existence of the Act has led to a greater likelihood of appeals to the courts in respect of parliamentary matters, although it was intended that a limited appeal be available where a sentence of imprisonment was imposed (section 9).

69. Parliaments of the states of Australia, including New South Wales, have considered the need for codification of parliamentary privilege along the lines of the federal provisions but so far have not enacted it. In New South Wales former Speaker Richard Torbay MP (an Independent member) tabled an Exposure Draft of a Parliamentary Privilege Bill in December 2010, at the end of the 54th Parliament. Speaker Torbay expressed the wish that the new Parliament might refer the draft bill to a committee for consideration. In the wake of concern about the action of the Independent Commission against Corruption in executing a search warrant on the Parliament House office of a member of the Legislative Council, committees of both Houses reported on the need to strengthen awareness of the role and function of parliamentary privilege. The Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics noted in a number of reports that legislation, along the lines of the Commonwealth of Australia's Parliamentary Privilege Act, would confirm the protection of privilege.

Canada

70. Canada does not have a parliamentary privileges act. References to parliamentary privilege do, however, appear in both the Constitution Act 1867 and the Parliament of Canada Act, so parliamentary privilege is part of the constitutional law of Canada. McLachlan J, in the Supreme Court of Canada, expressed the principle in 1993 that both Parliament and the courts respect 'the legitimate sphere of activity of the other: it is fundamental to the working of government as a whole that all these parts [of government] play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.' (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly))*

71. In recent decades, there have been a number of court cases dealing with aspects of privilege, which in turn have spawned a small number of articles and theses

about privilege in Canada. Some academic authors have recommended the legislating of the privileges of Parliament.

New Zealand

72. The New Zealand approach is to effect changes through Standing Orders rather than by legislation. There is no single legal instrument or statute that sets out the privileges, powers and immunities of the New Zealand legislature. In order to ascertain the privileges of the New Zealand House, it is necessary to establish the nature of the privileges enjoyed by the House of Commons so far as these have not been altered by British statutes passed since 1 January 1865 and any changes to New Zealand legislation since that date. No legislative proposals to reform the whole parliamentary privilege regime have been attempted since 1994, but statutory reform is now required particularly to address two issues:

    (i) to overcome the effect of *Buchanan v Jennings* (2004) (recommended by the New Zealand Privileges Committee in 2005 and 2009); and

    (ii) to address potential liability issues arising from broadcasts and other publication of parliamentary proceedings.

73. In *Buchanan v Jennings* (2004) the Judicial Committee of the Privy Council held a Member liable for the 'effective repetition' of a defamatory statement made in the House, under the protection of privilege, because when challenged outside the House he said no more than 'I do not resile' from the remarks.[35]

74. One of the problems identified in proceeding with a general legislative reform in 1994 was the suggestion from the New Zealand Department of Justice that aspects of the law of parliamentary privilege were incompatible with the New Zealand Bill of Rights Act 1990, the principles of which bind the House under section 3(a) of the Act. Reforms to the New Zealand Standing Orders have now addressed many of the issues about incompatibility between the law of privilege and the New Zealand Bill of Rights Act 1990. This issue was purposely addressed by changes to Standing Orders in 1996, particularly through the inclusion of natural justice requirements in select committee procedures and a procedure for allowing outsiders to have the Speaker incorporate their responses to Members' adverse references to them into the parliamentary record.

75. Changes to the Standing Orders in respect of natural justice procedures, an inclusive definition of contempts and the operations of the Privileges Committee meant that there was only a limited area which could be covered by legislation, including a more detailed statutory restatement of privileges generally. No attempt has been made since 1994 to address these issues by any legislative change. New Zealand has always been very reluctant to legislate for parliamentary procedure on grounds of encouraging 'judicial activism.'

76. Any proposal for statutory changes to the privileges enjoyed by the House of Commons in the UK will be closely examined by the New Zealand Parliament as this may impact on the legal basis of the New Zealand law of privilege. There are also several issues, particularly around effective repetition (the *Buchanan v.*

[35] See Erskine May, 24th edition. p. 224 n. 17.

Jennings case) and protections for broadcasting that can be effected only by legislative change.

4. States Assembly: Existing Codification

77. The principal codified provisions in law relating to privilege are contained in Part 5 of the States of Jersey Law 2005 as follows –

"PART 5

POWERS, PRIVILEGES AND IMMUNITIES

33 Entry to States

(1) Subject to paragraph (3), no stranger shall be entitled, as of right, to enter or to remain in the precincts of the States.

(2) Subject to paragraph (3), the Bailiff may at any time order any stranger to withdraw from the precincts of the States.

(3) Paragraphs (1) and (2) shall not apply to a Jurat or an officer of the Bailiff's Department or Judicial Greffe passing through those parts of the building giving direct access to the States' chamber.

(4) A person who –

(a) fails to withdraw from the precincts of the States when ordered to do so by the Bailiff; or

(b) contravenes any provision of standing orders regulating the entry of strangers to or requiring the withdrawal of strangers from the precincts of the States,

shall be guilty of an offence and liable to imprisonment for a term of 3 months and a fine of level 2 on the standard scale.

34 Immunity from legal proceedings

No civil or criminal proceedings may be instituted against any member of the States –

(a) for any words spoken before or written in a report to the States or a committee or panel established under standing orders; or

(b) by reason of any other matter or thing brought by the member before or within the States or any such committee or panel by petition, proposition or otherwise.

35 Minutes of States etc. to be evidence

A copy of any minutes of the States or of any committee or panel established under standing orders signed by the Greffier of the States or as otherwise provided by standing orders, shall be received in evidence without further proof.

36 Evidence of proceedings not to be given without leave

(1) Subject to this Part and standing orders, no member of the States or officer of the States and no person employed to take minutes before the States or any committee or panel established under standing orders shall give evidence elsewhere –

(a) in respect of the contents of such minutes or the contents of any document laid before any of those bodies; or

(b) in respect of any proceedings or examinations held before any of those bodies,

without the prior consent of the body concerned.

(2) During any period of the year when the States are not in session, the consent of the States may be given by the Greffier of the States.

37 Offence of printing false documents

(1) It shall be an offence for a person –

(a) to print or cause to be printed a copy of any enactment or other document as purporting to have been printed by order or under the authority of the States or of a committee or panel established under standing orders and the same is not so printed;

(b) to tender in evidence any such copy as purporting to be so printed, knowing that the same was not so printed.

(2) A person guilty of an offence under paragraph (1) shall be liable to imprisonment for a term of 3 years and to a fine.

38 Protection of persons responsible for States and other publications

(1) This Article applies to civil or criminal proceedings instituted for or on account or in respect of the publication by the defendant or the defendant's servant of any enactment or other document by order or under the authority of the States or of a committee or panel established under standing orders.

(2) The defendant may, on giving to the plaintiff or the person presenting the case or prosecutor, as the case may be, not less than 24 hours written notice of his or her intention, bring before the court in which such proceedings are taken a certificate conforming to paragraph (3) and an affidavit conforming to paragraph (4).

(3) The certificate shall be signed by the Greffier of the States and shall state that the enactment or document to which the proceedings relate was published by the defendant or the defendant's servant by order or under the authority of the States or the committee or panel, as the case may be.

(4) The affidavit shall verify the certificate.

(5) Upon the defendant bringing the certificate and affidavit before the court –

(a) the court shall stay the proceedings; and

(b) the proceedings shall be deemed to be finally determined.

39 Protection in civil proceedings for publication without malice

(1) This Article applies to civil proceedings instituted for publishing any account or summary of or any extract from or abstract of any document published by order or under the authority of the States or of a committee or panel established under standing orders or any proceedings of any such body.

(2) The court shall enter judgment for the defendant if satisfied that such account, summary, extract or abstract was published *bona fide* and without malice.

40 Exercise of jurisdiction by courts

No person shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in that person by or under this Part.".

In addition from Part 7 –

"47 Offence of blackmail, menace or compulsion

A person who blackmails or attempts to blackmail or who offers any threat, assault, obstruction or molestation or attempt to compel by force or menace any member of the States, member of a committee of inquiry established under standing orders or officer of the States in order to influence him or her in his or her conduct as such member or officer, or for, or in respect of the promotion of or of opposition to any matter, proposition, question, bill, petition or other thing submitted or intended to be submitted to the States, the Council of Ministers, the Chief Minister, any other Minister, an Assistant Minister or any committee or panel established under standing orders, or who is a party to such an offence, shall be guilty of an offence and liable to imprisonment for a term of 5 years and a fine.

48 Standing orders

(1) The States shall make standing orders to give effect to this Law and to regulate their proceedings and business and the conduct of elected members.

(2) Standing orders made under paragraph (1) shall –

(a) establish a Privileges and Procedures Committee;

(b) require the States to appoint an elected member, who is neither a Minister or Assistant Minister, to be its chairman;

(c) require the States to appoint to be members of such Committee –

(i) 4 elected members who are not Ministers or Assistant Ministers, and

(ii) 2 elected members who are Ministers or Assistant Ministers;

(d) state the terms of reference of such Committee.

(3) Standing orders made under paragraph (1) shall –

(a) establish a Public Accounts Committee;

(b) require the States to appoint an elected member who is not a Minister or an Assistant Minister to be chairman of such committee;

(c) require the States to appoint at least 4 persons to be members of such Committee of whom –

(i) 50% shall be elected members, who are not Ministers or Assistant Ministers, and

(ii) 50% shall be persons who are not members of the States;

(d) state the terms of reference of such Committee.

(3A) Standing orders made under paragraph (1) shall –

(a) establish a Planning Committee;

(b) require the States to appoint an elected member, who is not a Minister, to be its chairman; and

(c) require the States to appoint to be members of that Panel at least 3 and no more than 9 elected members who are not Ministers.

(4) Standing orders made under paragraph (1) shall make provision for scrutiny, which shall include provision for the agreement of a code of practice for engagement, for the purposes of scrutiny, between elected members conducting scrutiny and Ministers and Assistant Ministers.

(5) Standing orders made under paragraph (1) –

(a) shall include provision requiring minutes of decisions of the States to be taken and kept; and

(b) shall include provision requiring written transcripts of proceedings of the States to be prepared and kept.

(6) Standing orders made under paragraph (1) may establish committees of inquiry, whose members may or may not be members of the States.

(7) Standing orders made under paragraph (1) may, but not by way of limitation –

(a) prescribe anything that shall or may be prescribed under this Law;

(b) establish committees in addition to the committees described in the foregoing paragraphs;

(c) establish the procedure for any appointment or dismissal under this Law or standing orders;

(d) restrict the eligibility of an elected member for any appointment under this Law or standing orders;

(e) regulate the entry of strangers to and require the withdrawal of strangers from the precincts of the States.

(8) Notwithstanding Article 3(1) of the Official Publications (Jersey) Law 1960, the Greffier of the States shall not be required to publish in the Jersey Gazette a notice relating to the passing of standing orders.

(9) In this Article "Minister" includes the Chief Minister.

49 Regulations: powers, privileges and immunities

The States may by Regulations –

(a) confer on members of committees established by or in accordance with standing orders who are not members of the States immunity from civil and criminal proceedings in their capacity as members of such committees;

(b) disapply Article 36(1) to evidence given before a committee or panel established by or in accordance with standing orders;

(c) confer powers on any committee or panel established by or in accordance with standing orders to require any person to –

(i) appear before it, and

(ii) give evidence and produce documents to it;

(d) make it an offence liable to imprisonment for a term of up to 2 years and to a fine of up to level 3 on the standard scale for any person to –

(i) disobey any lawful order made by a committee or established by or in accordance with standing orders for attendance or for production of documents, or

(ii) refuse to be examined before, or to answer any lawful and relevant question put by a committee or panel established by or in accordance with standing orders;

(e) confer on persons appearing before any committee or panel established by or in accordance with standing orders immunity from civil and criminal proceedings for words spoken before or in a written report to the committee or panel;

(f) confer on persons appointed by any committee or panel established by or in accordance with standing orders to advise the committee or panel on any technical matter, immunity from civil and criminal proceedings when questioning persons appearing before the committee or panel.".

In addition, the **States of Jersey (Powers, Privileges and Immunities) (Scrutiny Panels, PAC and PPC) (Jersey) Regulations 2006** deal with privileges connected with activities of scrutiny panels and PAC and the **States of Jersey (Powers, Privileges and**

Immunities) (Committees of Inquiry) (Jersey) Regulations 2007 with those of Committees of Inquiry.

5. States Assembly: Existing Case Law

78. Three are a number of precedents in Jersey case law relevant to parliamentary privilege which are best considered in subject order.

Freedom of speech: Complaints against Senator Syvret, 1993

79. A significant matter arose on the basis of complaints made by certain Senators who claimed they had been defamed by Senator Syvret in the States Assembly in a speech in which he implied that they had subsidised the election expenses of candidates to gain their political allegiance. The remarks were later reported in the *Jersey Evening Post* and repeated on radio and television.

80. Senator Syvret signed a statement denying that his intention had been to imply corruption but continued to air his views publicly.

81. The matter was referred to the Solicitor General who offered the view that had the remarks been made in the House of Commons, they 'would be capable of amounting to a contempt.'

82. In the House of Commons disciplinary powers are invested in the Chair and Erskine May says expressions regarded as unparliamentary which will call for 'prompt interference' include 'the imputation of false or unavowed motives.'[36]

83. In the case of Jersey the Solicitor General said that while the States Assembly has no power to punish a Member, it could censure him. But in any event the matter was one of the internal jurisdiction of the Assembly itself.

Exclusive cognisance or exclusive jurisdiction

84. The most significant case in the category of exclusive jurisdiction was *Syvret v. Bailhache & Hamon (1998 JLR 128)* in which the plaintiff, Senator Syvret, applied for judicial review of the disciplinary action taken against him by the Chair for refusing to withdraw disorderly remarks when asked to do so.

85. On Syvret's repeated refusal to withdraw the remarks, he was suspended. At a subsequent sitting of the Assembly the suspension was lifted but the Senator was censured. He claimed that this action had been done in bad faith and infringed his natural rights.

86. The defendants in the case – the Bailiff and Deputy Bailiff – put in an application that the action be struck out on the grounds that the States Assembly had the 'power to regulate its internal proceedings, the exercise of which could not be questioned by the court.'

[36] Erskine May 24th edition p.445.

87. Various precedents from English law were cited including Stephen J in the case of *Bradlaugh v. Gosset* (1884) quoting the principle enunciated by Blackstone vis.:

> *The whole law and custom of Parliament has its origin from one maxim, that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.*

88. In the Canadian precedent cited, *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly),* the matter was stated simply that there exist 'privileges inherent in all legislative bodies [whereby] the provincial Houses of Assembly are able to control their own proceedings.'[37] At the root of the all the precedents and judgments is what I have called the 'functionality principle' (see paragraph 3 above) which, in Hatsell's words are 'absolutely necessary for the due execution of its [the House's] power.'

89. In 2011 the Commissioner heard a case in which Senator Syvret alleged a conspiracy of Ministers, the Attorney General and officials to remove him from ministerial office causing emotional and psychological stress and thwarting the due investigation of child abuse in Jersey which he had had to carry out single-handed without proper support. *(Royal Court [2011] JRC 116)* Syvret relied on Article 47 of the States of Jersey Law 2005 alleging that criminal offences had been committed against him.

90. Although the case was concerned primarily with the holding of ministerial office, the Commissioner observed that a person could not claim damages arising out of any conduct outside the legislature which caused the legislature to act as it did. He observed that 'the reason for the rule is that such a claim attacks the process by which legislation is made, and goes beyond the proper function of the Courts in their dealings with the legislature' (citing *Wilson v. First County Trust Ltd. (No 2) [2004] AC 816.)*

91. Accordingly, the defendants' application that the Order of Justice be struck out was upheld.

Members not immune from criminal prosecution

92. While absolute privilege for words spoken in the States Assembly has been asserted in the above cases, it has also been made clear by court decisions that Senators and Deputies are not immune from prosecution for criminal offences as is the case with British MPs and Members of the House of Lords.

93. In 2009 Senator Syvret's home was raided, without a warrant and he was arrested on the grounds that he had breached data protection law by putting confidential information about individuals on his blog. A debate took place in the Assembly on 30th April. Senator Syvret argued that his right to free speech was being denied and that the police action had been disproportionate. However, the Assembly accepted the law officers' advice that the police had to

[37] See paragraph 70 above.

retain the power to arrest any person suspected of a criminal offence including Members of the Assembly.

94. A case was heard in the Royal Court on 20th May 2009 involving two deputies – Shona Pitman and Geoffrey Southern – who had interfered with application for registration of postal and pre-poll voters, contrary to the law. Speeches made by Members in the States were read out in the course of the trial. Both were found guilty. The Court regarded the offences as very serious, making the point that by their actions, elected States Members had flouted their oaths to uphold the rule of law. Heavy fines on both Members were imposed.

Use of Hansard in Court

95. A number of precedents have been established in respect of the use of States' publications in the Courts broadly in line with the decision in the case of *Pepper v. Hart (1993)* in which the House of Lords set aside the long-standing rule preventing the courts from admitting parliamentary debates as an aid in interpretation of statute. The House of Lords' decision was based on the principle that such documents could be adduced as evidence to clarify ambiguities in the law but parties would not be able to impeach or question parliamentary proceedings as provided in the Bill of Rights.

96. In the case of *B.F. Burt & H.I. Burt v. States of Jersey (JLR 245)* (1994) it was established that a transcript of Assembly proceedings could be used to establish facts but not to draw implications from those facts.

97. In 2009 the Attorney General gave his opinion that Hansard could be used in criminal proceedings allowing the courts to use it where it was of direct relevance and where, without it, sentence could be reached which was inconsistent with the facts. Such proceedings relied on a wide interpretation of Article 34 of the States of Jersey Law 2005. This is what happened in the cases mentioned against Members in paragraph 94 above.

98. In the case of *Larsen v. Comptroller of Taxes of State of Jersey (2015 (1)JRL 430)* Assembly papers were allowed to be cited as background material, but the words of ministers could not be interpreted as indicative of the objective of the Assembly in legislating.

99. In the most recent precedent, in *Bellozane Waste Treatment Plant* (2016) the absolute protection afforded to Assembly debates and proceedings was re-asserted with the proviso that the Assembly could grant permission for use of material in the courts if it so wished.

Cases involving Panels and Committees

100. A recent precedent exists in respect of Panels (2015/2016). It involved a private company (albeit one wholly-owned by the States) claiming that responding to a summons of evidence from the Corporate Services Panel would result in disclosure of commercially sensitive information. The matter was referred to the Privileges and Procedures Committee (PPC). PPC recognised the sensitivity of the information being sought but with further safeguards protecting confidentiality, upheld the summons for evidence by the Panel.

6. Matters to be considered for comprehensive Codification

101. As set out in section 4 above, the principal features of parliamentary privilege in Jersey are provided in the States of Jersey Law 2005 and, as shown in section 5 of this paper, a number of important precedents have been set in case law over recent decades. Nevertheless, the view may be taken that the provisions of Parts 5 and 7 of the existing statute of 2005 and the regulations covering Scrutiny Panels and Committees of Inquiry need definitional clarification and that together with the principles established in common law, amalgamated into a new, comprehensive code.

102. The pros and cons of codification in general have been considered in section 2 of this paper. The most important benefit of codification would be to clarify in modern language the protection that privilege confers on the States, as well as providing a clearer statement about its powers of internal jurisdiction, contempt, the position of Members, its committees, witnesses etc., thereby also increasing transparency about the States' role for the public. Arguments against further codification include the possibility of increased litigation over the meaning of statutory provisions and a loss of flexibility in putting aside existing conventions.

103. In accordance with the terms set by the Committee, I now turn to what matters need to be included in a comprehensive statute. Features of the existing provisions of the States of Jersey Law 2005 and the Regulations covering Scrutiny Panels and Committees of Inquiry are incorporated in these proposals but clearer principles and definitions are also provided.

In this section, recommendations for inclusion in a draft Bill – the actual wording of which will need to be drafted by official draftsmen – are in bold italics under 13 sections. A brief explanation follows each section in square brackets.

1. Principle of absolute privilege
2. Definition of 'proceedings'
3. Use of proceedings in the courts
4. Evidence of Proceedings not to be given without leave, certification and premature disclosure
5. Members and Officers
6. Suspension and Expulsion of Members
7. Conferring privilege on non-Members
8. Exclusive cognisance or exclusive jurisdiction
9. Contempts
10. Penal Powers
11. Protection of persons responsible for States Assembly and other publications
12. Protection in civil proceedings for publication without malice (qualified privilege)
13. Exercise of jurisdiction by the Courts

1. Principle of absolute privilege

104. The 'functionality principle' – both guaranteeing free speech and the ability of the legislature to conduct its business without interference – underlies the practices of all parliamentary systems within the Commonwealth and indeed outside it where a parliamentary system exists. In the States of Jersey Law 2005 the emphasis in Article 34 is on persons covered by privilege whereas a clearer statement would focus on proceedings (which would then need to be defined). A statement of principle, on the following lines, may be provided in statutory form:

Proceedings of the States Assembly shall not be the subject of civil or criminal proceedings

[Debates and documents of the States cannot be the basis of litigation in the courts: A Member could not be sued for remarks made in the Assembly nor States' documents used in court actions; witnesses giving evidence would be similarly protected]

2. Definition of 'proceedings'

105. A modern, inclusive definition of proceedings is provided in the Australian Parliamentary Privileges Act, 1987. This puts the emphasis on the words spoken or action taken rather than on Members and others. It may be given statutory form, with clarification on Members' correspondence as follows:

'Proceedings of the States Assembly' means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the States Assembly or of a committee, panel or committee of inquiry and without limiting the generality of the foregoing, includes:

(a) the giving of evidence before the Assembly or a committee or panel or committee of inquiry, and evidence so given;

(b) the presentation or submission of a document to the Assembly, a Committee or panel or committee of inquiry;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of the Assembly or a committee or panel or committee of inquiry and the document so formulated, made or published;

(e) for the avoidance of doubt, Members' correspondence and communications with constituents are not proceedings of the Assembly.

[The immunity from action in the courts covers debate and documents and their preparation, including those of committees and panels, both of the States and submitted to it or to committees or panels. In the case of the subordinate bodies, this provision would supersede the provisions of sections 8, 8a and 9 of the States of Jersey (Powers, Privileges and Immunities) (Scrutiny Panels, PAC and

PPC) (Jersey) Regulations 2006 (2009) and sections 8 and 9 of the States of Jersey (Powers, Privileges and Immunities) (Committees of Inquiry) (Jersey) Regulations 2007 (2008). Immunity does not extend to Members' correspondence and communications with constituents]

3. Use of proceedings in the courts

106. In respect of citing proceedings, the current position in Jersey, established in the case law we have considered, broadly follows the decision of the House of Lords in *Pepper v. Hart (1993)* whereby the long-standing court practice which prevented the admission of parliamentary debates in the interpretation of statute, was set aside.[38] However, in that judgement, limits were placed upon the circumstances in which parliamentary matter could be admitted so as not to involve a breach of Article IX. A provision may be given statutory form as follows:

The admission of States Assembly debates and proceedings, including those of committees and panels, in the courts shall be restricted to purposes of clarifying the meaning of statute but shall not be used to examine or question the intention of the States Assembly in its formulation of the law.

[Debates and documents of the States may be cited in the courts only for the purpose of elucidation and not to question the intentions –for example policy objectives – behind them]

4. Evidence of Proceedings not to be given without leave, certification and premature disclosure

107. A related matter is preserving the right of the States Assembly to allow publication of its debates and proceedings as provided for in Article 36 of the States of Jersey Law 2005 while prohibiting their use in court without leave. It may be needed to allow for the publication of confidential documents of the States. This may be given statutory form as follows:

(1) No Member of the States Assembly or Officer of the States and no person employed to take minutes before the States or any committee or panel established under standing orders shall give evidence elsewhere –

(a) in respect of the contents of such minutes or the contents of any document laid before any of those bodies; or

(b) in respect of any proceedings or examinations held before any of those bodies,

Without the prior consent of the body concerned.

(2) During any period of the year when the States are not in session, the consent of the States may be given by the Greffier of the States.

[38] See paragraphs 95 to 99 above.

(3) For purposes of this section, a certificate signed by the Bailiff, Deputy Bailiff or Greffier is evidence that any document is a proceeding of the States Assembly.

(4) A person shall not, without the authority of the States Assembly or a Committee, publish or disclose documents and other evidence given to the Assembly or a Committee.

[Sets out conditions for leave to be given for publication of States documents]

5. Members and Officers

108. Certain provisions regarding Members and Officers may be given statutory form as follows:

(1) On any sitting day of the States Assembly, a Member may not be arrested or otherwise detained from attendance or an Officer prevented from duty in the Assembly or a Committee.

(2) Members and Officers of the States Assembly shall be exempt from service in the courts as jurors.

(3) For the avoidance of doubt, a Member of the Assembly is not exempt from criminal prosecution, including for the giving of false evidence under oath, for example to Committees of Inquiry.

[Members not to be arrested on sitting days in the States; they and officers exempt from service as jurors; but Members are not immune from prosecution for criminal offences as established by case law cited above in paragraphs 92 to 94]

6. Suspension and Expulsion of Members

The power to suspend or to expel a Member may be given statutory form as follows:

(1) The States Assembly may, upon Resolution, suspend or expel a Member from the Assembly.

(2) During suspension any allowance due to a Member for States service shall be forfeited

[Suspension and loss of allowance; expulsion would be an extreme measure taken only after debate and vote by the States following unacceptable behaviour by a Member]

7. Conferring privilege on non-Members

109. Under Article 49 of The States of Jersey Law 2005, privilege may be conferred on non-Members in their capacity as Members of Committees.

A provision on the lines of Article 49 may be given statutory form.

[Confers immunity from legal action on non-Members in their capacity as members of committees]

8. Exclusive cognisance or exclusive jurisdiction

110. A statement of principle about the States Assembly's exclusive jurisdiction of its internal affairs may be given statutory form as follows:

The States Assembly has exclusive jurisdiction in settling its own rules and practices, controlling its own precincts and exercising disciplinary power over Members and Strangers.

[Enunciates an important principle that makes the States the sole authority in determining its rules and practices, its control of precincts and its power over disciplinary matters affecting Members and strangers]

9. Contempts

111. We have noted in paragraphs 32–34 above that it is difficult to provide a comprehensive view of contempt or breaches of privilege but all such action in some way or other impedes the operation of Parliament. In the Australian Privileges Act (1987) the matter is tackled by defining only the 'essential' element of a contempt, leaving it open for the Houses to decide on whether a particular action amounts to a contempt. A provision may be given statutory form as follows:

(1) Conduct (including the use of words) does not constitute an offence against the States Assembly unless it amounts, or is intended or likely to amount, to improper interference with the free exercise by the Assembly or a committee or panel of its authority or functions, or with the free performance by a member of the Member's duties as a Member.

(2) The States Assembly shall determine, upon Resolution, that an offence has been committed.

[Contempts are offences – primarily of obstructing the business of the States or its subordinate bodies. The States retains the right to determine when such an offence has been committed]

10. Penal Powers

112. Under the States of Jersey Law 2005 a number of penalties are imposed on persons committing offences including violation of the precincts, falsification of documents, and separately, but relating to parliamentary privilege, offences such as blackmail etc. under Article 47. The penalties include terms of imprisonment and fines. Both categories of punishment are also provided for in the Australian Parliamentary Privileges Act, 1987.

113. It may be necessary to review these penalties and incorporate them in statutory form, with an addition on protecting witnesses. A Resolution of the States

Assembly, that an offence has been committed, **as set out in paragraph 111 section 9(2) above**, will trigger the penalty provisions as follows:

(1) The States Assembly may determine that an offence has been committed in addition to the specific offences for which penalties are listed in subsections (2) to (6) of this section.

(2) Interference with or obstruction of proceedings of the Assembly or a Committee or Panel, in the case of the latter by refusal to attend or obstruction of the Committee or Panel's functioning.

[what penalty for interference or obstruction of States proceedings: as in Article 47 of States of Jersey Law 2005(see above part 4): liable to imprisonment of up to 5 years and a fine?]

[what penalty for obstructing committees and panels: as in Article 49 of States of Jersey Law 2005(see above part 4): liable to imprisonment for 2 years or fine on level 4 of standard scale?]

(3) Failure of strangers to withdraw

[what penalty: as in Article 33 of States of Jersey Law 2005(see above part 4): liable to imprisonment for a term of three months and a fine on level 2 of the standard scale?]

(4) Offence of printing false documents

[what penalty: as in Article 37 of the States of Jersey Law 2005(see above part 4): liable to imprisonment for a term of 3 years and a fine?]

(5) Interference with witnesses and protection of witnesses

A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given before the Assembly or a Committee or Panel, or induce another person to refrain from giving such evidence.

[what penalty? Australian Act provides for fine or imprisonment for 6 months]

(6) Offence of disclosing documents or evidence without authority

[what penalty? Australian Act provides for fine or imprisonment for 6 months]

[Sets out various penalties with options to choose]

114. Further provisions at present set out in the States of Jersey Act 2005 sections 38–40 (see above part 4) may be given statutory form on the following matters:

11. Protection of persons responsible for States Assembly and other publications.

12. Protection in civil proceedings for publication without malice (qualified privilege).

13. Exercise of jurisdiction by the Courts

[Confers immunity on those involved in publication of States documents; affords common law protection for those publishing records of debates etc. if done without malice which is an important protection for the reporting of States proceedings. Enunciates the principle of the limitation of the jurisdiction of the courts]

7. Matters to be excluded from Codification

116. A number of matters should be ***excluded*** from a single law and instead set out in Standing Orders:

– Disciplinary powers of the Chair

– Conduct of Members in debate etc.

– Code of Conduct for Members

– Redress for individuals claiming to have been defamed.

[The basic principle of exclusive cognisance, ***as set out in paragraph 110 section 8 above,*** *provides statutory backing for the States to reserve such matters to its own, internal jurisdiction]*

8. Conclusion: the Way Forward

117. This report has been prepared for the Privileges and Procedures Committee on the basis of the remit I was given to review Jersey statute and case law with a view to codifying parliamentary privilege in a single, draft law, drawing on experience in other jurisdictions.

118. I began by reviewing the history and principal features of privilege in the English and subsequently British, Parliament and considering practice in other Commonwealth jurisdictions as well as considering, in general terms, the arguments for and against codification. I then set out the existing statutory provisions (principally in the States of Jersey Law 2005) and reviewed the important judgments in Jersey case law. In Section 6 of my report I suggested the necessary features of a comprehensive code, with certain options to be taken in respect of penalties and other provisions, as well as noting important exclusions. If it was thought advantageous to keep privilege matters within a comprehensive statute about the States, as in the 2005 Act, these proposals could be made as a replacement of Parts 5 and Articles 47 and 49 of that Act together with the regulations governing the privilege afforded to subordinate

bodies. At the same time, the opportunity could then be taken to examine other provisions of the Act, including Standing Orders, for revising and updating.

Malcolm Jack
10th July 2017

Parliamentary Privileges Act 1987

No. 21, 1987

Compilation No. 4

Compilation date:	21 October 2016
Includes amendments up to:	Act No. 61, 2016
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Prepared by the Office of Parliamentary Counsel, Canberra

About this compilation

This compilation

This is a compilation of the *Parliamentary Privileges Act 1987* that shows the text of the law as amended and in force on 21 October 2016 (the ***compilation date***).

The notes at the end of this compilation (the ***endnotes***) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register (www.legislation.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Editorial changes

For more information about any editorial changes made in this compilation, see the endnotes.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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An Act to declare the powers, privileges and immunities of each House of the Parliament and of the members and committees of each House, and for related purposes

1 Short title

This Act may be cited as the *Parliamentary Privileges Act 1987*.

2 Commencement

This Act shall come into operation on the day on which it receives the Royal Assent.

3 Interpretation

(1) In this Act, unless the contrary intention appears:

committee means:

(a) a committee of a House or of both Houses, including a committee of a whole House and a committee established by an Act; or

(b) a sub-committee of a committee referred to in paragraph (a).

court means a federal court or a court of a State or Territory.

document includes a part of a document.

House means a House of the Parliament.

member means a member of a House.

tribunal means any person or body (other than a House, a committee or a court) having power to examine witnesses on oath, including a Royal Commission or other commission of inquiry of the Commonwealth or of a State or Territory having that power.

(2) For the purposes of this Act, the submission of a written statement by a person to a House or a committee shall, if so ordered by the House or the committee, be deemed to be the giving of evidence in accordance with that statement by that person before that House or committee.

(3) In this Act, a reference to an offence against a House is a reference to a breach of the privileges or immunities, or a contempt, of a House or of the members or committees.

3A Application of the *Criminal Code*

(1) Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2) To avoid doubt, subsection (1) does not apply the *Criminal Code* to an offence against a House.

4 Essential element of offences

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

5 Powers, privileges and immunities

Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of this Act, continue in force.

6 Contempts by defamation abolished

(1) Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member.

(2) Subsection (1) does not apply to words spoken or acts done in the presence of a House or a committee.

7 Penalties imposed by Houses

(1) A House may impose on a person a penalty of imprisonment for a period not exceeding 6 months for an offence against that House determined by that House to have been committed by that person.

(2) A penalty of imprisonment imposed in accordance with this section is not affected by a prorogation of the Parliament or the dissolution or expiration of a House.

(3) A House does not have power to order the imprisonment of a person for an offence against the House otherwise than in accordance with this section.

(4) A resolution of a House ordering the imprisonment of a person in accordance with this section may provide that the President of the Senate or the Speaker of the House of Representatives, as the case requires, is to have power, either generally or in specified circumstances, to order the discharge of the person from imprisonment and, where a resolution so provides, the President or the Speaker has, by force of this Act, power to discharge the person accordingly.

(5) A House may impose on a person a fine:

(a) not exceeding $5,000, in the case of a natural person; or

(b) not exceeding $25,000, in the case of a corporation;

for an offence against that House determined by that House to have been committed by that person.

(6) A fine imposed under subsection (5) is a debt due to the Commonwealth and may be recovered on behalf of the Commonwealth in a court of competent jurisdiction by any person appointed by a House for that purpose.

(7) A fine shall not be imposed on a person under subsection (5) for an offence for which a penalty of imprisonment is imposed on that person.

(8) A House may give such directions and authorise the issue of such warrants as are necessary or convenient for carrying this section into effect.

8 Houses not to expel members

A House does not have power to expel a member from membership of a House.

9 Resolutions and warrants for committal

Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence.

10 Reports of proceedings

(1) It is a defence to an action for defamation that the defamatory matter was published by the defendant without any adoption by the defendant of the substance of the matter, and the defamatory matter was contained in a fair and accurate report of proceedings at a meeting of a House or a committee.

(2) Subsection (1) does not apply in respect of matter published in contravention of section 13.

(3) This section does not deprive a person of any defence that would have been available to that person if this section had not been enacted.

11 Publication of tabled papers

(1) No action, civil or criminal, lies against an officer of a House in respect of a publication to a member of a document that has been laid before a House.

(2) This section does not deprive a person of any defence that would have been available to that person if this section had not been enacted.

12 Protection of witnesses

(1) A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given

before a House or a committee, or induce another person to refrain from giving any such evidence.

Penalty:

(a) in the case of a natural person, imprisonment for 6 months or 50 penalty units; or

(b) in the case of a corporation, 250 penalty units.

(2) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of:

(a) the giving or proposed giving of any evidence; or

(b) any evidence given or to be given;

before a House or a committee.

Penalty:

(a) in the case of a natural person, imprisonment for 6 months or 50 penalty units; or

(b) in the case of a corporation, 250 penalty units.

(3) This section does not prevent the imposition of a penalty by a House in respect of an offence against a House or by a court in respect of an offence against an Act establishing a committee.

13 Unauthorised disclosure of evidence

A person shall not, without the authority of a House or a committee, publish or disclose:

(a) a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera; or

(b) any oral evidence taken by a House or a committee in camera, or a report of any such oral evidence;

unless a House or a committee has published, or authorised the publication of, that document or that oral evidence.

Penalty:

(a) in the case of a natural person, imprisonment for 6 months or 50 penalty units; or

(b) in the case of a corporation, 250 penalty units.

14 Immunities from arrest and attendance before courts

(1) A member:

(a) shall not be required to attend before a court or a tribunal; and

(b) shall not be arrested or detained in a civil cause;

on any day:

(c) on which the House of which that member is a member meets;

(d) on which a committee of which that member is a member meets; or

(e) which is within 5 days before or 5 days after a day referred to in paragraph (c) or (d).

(2) An officer of a House:

(a) shall not be required to attend before a court or a tribunal; and

(b) shall not be arrested or detained in a civil cause;

on any day:

(c) on which a House or a committee upon which that officer is required to attend meets; or

(d) which is within 5 days before or 5 days after a day referred to in paragraph (c).

(3) A person who is required to attend before a House or a committee on a day:

(a) shall not be required to attend before a court or a tribunal; and

(b) shall not be arrested or detained in a civil cause;

on that day.

(4) Except as provided by this section, a member, an officer of a House and a person required to attend before a House or a committee has no immunity from compulsory attendance before a court or a tribunal or from arrest or detention in a civil cause by reason of being a member or such an officer or person.

15 Application of laws to Parliament House

It is hereby declared, for the avoidance of doubt, that, subject to section 49 of the Constitution and this Act, a law in force in the Australian Capital Territory applies according to its tenor (except as otherwise provided by that or any other law) in relation to:

(a) any building in the Territory in which a House meets; and

(b) any part of the precincts as defined by subsection 3(1) of the *Parliamentary Precincts Act 1988*.

16 Parliamentary privilege in court proceedings

(1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, ***proceedings in Parliament*** means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

(4) A court or tribunal shall not:

(a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or

(b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence;

unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

(5) In relation to proceedings in a court or tribunal so far as they relate to:

(a) a question arising under section 57 of the Constitution; or

(b) the interpretation of an Act;

neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

(6) In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.

(7) Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act.

17 Certificates relating to proceedings

For the purposes of this Act, a certificate signed by or on behalf of the President of the Senate, the Speaker of the House of Representatives or a chairman of a committee stating that:

(a) a particular document was prepared for the purpose of submission, and submitted, to a House or a committee;

(b) a particular document was directed by a House or a committee to be treated as evidence taken in camera;

(c) certain oral evidence was taken by a committee in camera;

(d) a document was not published or authorised to be published by a House or a committee;

(e) a person is or was an officer of a House;

(f) an officer is or was required to attend upon a House or a committee;

(g) a person is or was required to attend before a House or a committee on a day;

(h) a day is a day on which a House or a committee met or will meet; or

(i) a specified fine was imposed on a specified person by a House;

is evidence of the matters contained in the certificate.

Endnotes

Endnote 1—About the endnotes

The endnotes provide information about this compilation and the compiled law.

The following endnotes are included in every compilation:

Endnote 1—About the endnotes
Endnote 2—Abbreviation key
Endnote 3—Legislation history
Endnote 4—Amendment history

Abbreviation key—Endnote 2

The abbreviation key sets out abbreviations that may be used in the endnotes.

Legislation history and amendment history—Endnotes 3 and 4

Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended (or will amend) the compiled law. The information includes commencement details for amending laws and details of any application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision (generally section or equivalent) level. It also includes information about any provision of the compiled law that has been repealed in accordance with a provision of the law.

Editorial changes

The *Legislation Act 2003* authorises First Parliamentary Counsel to make editorial and presentational changes to a compiled law in preparing a compilation of the law for

registration. The changes must not change the effect of the law. Editorial changes take effect from the compilation registration date.

If the compilation includes editorial changes, the endnotes include a brief outline of the changes in general terms. Full details of any changes can be obtained from the Office of Parliamentary Counsel.

Misdescribed amendments

A misdescribed amendment is an amendment that does not accurately describe the amendment to be made. If, despite the misdescription, the amendment can be given effect as intended, the amendment is incorporated into the compiled law and the abbreviation "(md)" added to the details of the amendment included in the amendment history.

If a misdescribed amendment cannot be given effect as intended, the abbreviation "(md not incorp)" is added to the details of the amendment included in the amendment history.

Endnote 2—Abbreviation key

ad = added or inserted
am = amended
amdt = amendment
c = clause(s)
C[x] = Compilation No. x
Ch = Chapter(s)
def = definition(s)
Dict = Dictionary
disallowed = disallowed by Parliament
Div = Division(s)
ed = editorial change
exp = expires/expired or ceases/ceased to have effect
F = Federal Register of Legislation
gaz = gazette
LA = *Legislation Act 2003*
LIA = *Legislative Instruments Act 2003*
(md) = misdescribed amendment can be given effect
(md not incorp) = misdescribed amendment cannot be given effect
mod = modified/modification
No. = Number(s)
o = order(s)
Ord = Ordinance
orig = original
par = paragraph(s)/subparagraph(s) /sub-subparagraph(s)
pres = present
prev = previous
(prev…) = previously
Pt = Part(s)
r = regulation(s)/rule(s)
reloc = relocated
renum = renumbered
rep = repealed
rs = repealed and substituted
s = section(s)/subsection(s)
Sch = Schedule(s)
Sdiv = Subdivision(s)
SLI = Select Legislative Instrument
SR = Statutory Rules
Sub-Ch = Sub-Chapter(s)
SubPt = Subpart(s)
underlining = whole or part not commenced or to be commenced

Endnote 3—Legislation history

Act	Number and year	Assent	Commencement	Application, saving and transitional provisions
Parliamentary Privileges Act 1987	21, 1987	20 May 1987	20 May 1987 (s 2)	
Parliamentary Precincts Act 1988	9, 1988	5 Apr 1988	s 12 and Sch 2: 1 Aug 1988 (s 2(2) and gaz 1988, No S229)	s 12
Law and Justice Legislation Amendment Act (No. 3) 1992	165, 1992	11 Dec 1992	Note about section heading: 11 Dec 1992 (s 2(1))	—
Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001	24, 2001	6 Apr 2001	s 4(1), (2) and Sch 38: 24 May 2001 (s 2(1)(a))	s 4(1) and (2)
Statute Update Act 2016	61, 2016	23 Sept 2016	Sch 1 (items 355–360): 21 Oct 2016 (s 2(1) item 1)	—

Endnote 4—Amendment history

Provision affected	How affected
s 3A	ad No 24, 2001
s 12	am No 61, 2016
s 13	am No 61, 2016
s 14	am No 165, 1992
s 15	am No 9, 1988