STATES OF JERSEY

PARLIAMENTARY PRIVILEGE IN JERSEY

Presented to the States on 22nd July 2009
by the Privileges and Procedures Committee

STATES GREFFE

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REPORT

Foreword

On 30th April 2009 the Chairman of PPC undertook to present to the States a statement on the extent of parliamentary privilege in Jersey.

The Committee requested the Greffier of the States to research this matter and draft such a statement. The report that follows is a very comprehensive summary of the position and it has understandably taken the Greffier slightly longer to prepare than the 6 week period that was initially mentioned.

PPC is hopeful that the attached report will set out the position in Jersey in a definitive way and that this will be of use to members and others. PPC is grateful to the Greffier for the extensive work that he has undertaken on this important subject.

PARLIAMENTARY PRIVILEGE IN JERSEY

Greffier of the States

1. INTRODUCTION

1.1 Since the present Privileges and Procedures Committee was appointed in December 2008 it has been required to consider the application of parliamentary privilege in Jersey on a number of occasions and in a number of different contexts. In the States on 30th April 2009 the Chairman undertook to provide a comprehensive report on the position in Jersey and this report has therefore been prepared for the Committee to enable it to meet that undertaking.

1.2 This report is intended to provide a brief history of parliamentary privilege and summarise the main areas that it usually covers in parliaments which, as is the case for the States of Jersey, follow a 'Westminster' tradition. The report summarises, as far as is possible, how the position in Jersey follows the common law principles and statutory provisions that exist elsewhere although it is important to stress that the precise boundaries of privilege cannot always be defined in advance and there are very few cases in the courts in Jersey where the issue has been considered. The position in many continental European countries, which differs considerably from the United Kingdom and Jersey position in that much greater immunity is often available to individual members, is referred to briefly for information at the end of this report.

1.3 The information contained in this report has been drawn very extensively from a number of books on parliamentary practice and procedure in other jurisdictions and appropriate references are given in the text and in footnotes. In addition the report relies heavily on the 1999 Report of the Joint Committee on Parliamentary Privilege published by the UK House of Lords and House of Commons on 30th March 1999[1] ('the 1999 Joint Committee Report') which is still considered to be the most authoritative statement on the position in Westminster even though many of the report's recommendations have not yet been implemented in that jurisdiction.

1.4 I have approached the task of preparing this report by researching and setting out the position in Jersey as far as I am able to do so following that research. It is not my role to comment on the desirability or otherwise of amending the present position by statute as that is entirely a matter for political discussion and debate. This report merely tries to set out clearly the present position in Jersey on a purely factual basis.

[1] Joint Committee on Parliamentary Privilege (1998-99), HL Paper 43-I, HC 214-I
http://www.publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4302.htm

2. HISTORY OF PARLIAMENTARY PRIVILEGE

2.1 The term 'parliamentary privilege' is normally taken to refer to 2 separate matters: the immunities of a parliament and the powers of the parliament to protect its own processes. In a democratic society these powers and immunities are both essential to enable parliament to perform its functions of representing the people, determining policy matters, scrutinising the activities of the Executive, holding the Executive to account as well as its fundamental role of debating and passing legislation.

2.2 Although different forms of privilege apply in parliaments across the world the concept of privilege has its origins in the Westminster parliament. A useful historical summary of the position is set out in this extract from the New South Wales Legislative Council Practice –

> *"The privilege of freedom of speech in Parliament and other privileges arose to a large extent out of the historical struggle in England between the Monarch and the Parliament, especially during the Tudor and Stuart periods.*
>
> *The first reasoned plea for the right of members to speak freely to matters before them was delivered by Speaker Sir Thomas More in his address for privileges in 1523 in which he requested that King Henry VIII (1509-47) accept what members said in good part and in good faith for the prosperity of the realm. Later petitions, in addition to freedom of speech, also requested that members be granted freedom from arrest, freedom from molestation for members and their servants, and admittance to the royal presence. By 1541 the request for freedom of speech appeared routinely in the Speaker's petition to the King at the opening of Parliament.*
>
> *Throughout the reign of Queen Elizabeth I (1558-1603), the Parliament continued to claim the privilege of freedom of speech, and by 1563 it was claiming it as an ancient right which was simply to be confirmed by the Monarch. However, the freedom was seen by many at that time as limited to debate on legislation, rather than granting members freedom to say whatever they willed. In 1593 Lord Keeper Sir Edward Coke reminded the Speaker that the Queen had granted liberal but not licentious speech.*
>
> *Under King James I (1603-25) the struggle for freedom of speech for members of Parliament intensified. The Parliament insisted that its freedom of speech was an 'inheritance' of an ancient right, while the King viewed it as a royal prerogative, granted by his 'toleration' and 'derived from the grace and permission of our ancestors and us'. The Commons responded with the Protestation of 1621, in which it claimed:*
>
> > *'every Member of the House of Commons hath and of right ought to have freedom of speech ... and ... like freedom from all impeachment, imprisonment and molestation (other than by censure by the House itself) for or concerning any*

> *speaking, reasoning or declaring of any matter or matters touching the Parliament or parliamentary business.'*

James I dissolved the Parliament shortly thereafter. Reluctantly summoning the Parliament again in 1624, the parliamentary session was characterised by great division. James I died soon after the conclusion of the Parliament in 1625.

However, it was during the reign of James' son, King Charles I (1625-49), that the struggle between the Parliament and the Monarch reached its zenith. In 1629 Charles I ordered the arrest of three members of the Commons, Sir John Eliot, Denzil Holles and Benjamin Valentine, for speeches made in the House which the King considered dangerous, libellous and seditious. Following the dissolution of the Parliament the men were prosecuted in the Court of King's Bench, on charges of conspiring to resist the King's lawful command that the House adjourn, of calumniating his ministers, of creating discord between King and people, and of assaulting the Speaker. Although the men claimed privilege, arguing that as their alleged offences had been committed in Parliament they were not punishable in any other place, the royal court found against them, and they were subsequently imprisoned and fined.

The decision was extremely unpopular and contributed to the growing opposition to Charles I. In 1641 the Commons adopted resolutions declaring the entire proceedings against its members a breach of privilege.

The climax of this struggle was reached on 4 January 1642 when Charles I, attended by an armed escort, entered the Commons chamber and attempted to arrest five members who were most prominent in Parliament's attempt to transfer control of the armed forces away from the Crown. This dramatic moment in parliamentary history has been described in these words:

> *'No king of England had ever interrupted a session of the House of Commons, and at first the members sat stunned when Charles swept down the centre aisle. Then they remembered their duty and stood bareheaded as the King demanded that the Speaker, William Lenthall point out the five members he had come to arrest. Lenthall answered, 'I have neither eyes to see, nor tongue to speak but as this House is pleased to direct me'. Rebuffed, the King gazed along the serried rows of members. 'Well', he concluded, 'I see all the birds are flown. I cannot do what I came for'. With that Charles strode out of the House as the cry of 'privilege, privilege' rose up behind him.[2]'*

The relationship between Charles I and the Parliament was fatally undermined by his attempt to arrest the five members. Had he

[2] Kishlansky M.*A Monarchy Transformed: Britain 1603-1714, Allen Lane, London, 1996 pages 105-107*

succeeded he might have defused the political crisis by removing the opposition party leaders from the House. His failure ignited it, and both the King and the Parliament began to gather their forces. The following year, when Charles I raised the royal standard at Nottingham he was met by the Parliament's forces under the leadership of Sir Thomas Fairfax and Oliver Cromwell. The ensuing civil war was a devastating experience for the country. Although the Parliamentary forces were victorious, the war unleashed political and religious radicalism and a period of civil upheaval in which both monarchy and parliament were for a time overthrown and military rule imposed.

The monarchy was restored in 1660 under King Charles II (1661-85). However, it was not until the 'Glorious Revolution' of 1689 that the long struggle between the Stuart kings and the English people and Parliament was finally resolved with the effective 'election' of William III and Mary II as joint Monarchs on whom were imposed the terms of the Bill of Rights 1689, including the provisions of Article 9.

The Bill of Rights 1689 provided statutory recognition once and for all of the basic privilege of parliament – freedom of speech.

In the late 17th and early 18th centuries, some claims of privilege went beyond those in the Bill of Rights 1689, including claims that the freedom from arrest in civil matters applied not only to members but also to their servants. In addition, members sought to extend privilege to cover claims of trespassing and poaching on their lands. Such claims were ultimately curtailed as a serious obstruction to the ordinary course of justice, and privilege came to be recognised as only that which is absolutely necessary for Parliament to function effectively and for members to carry out their responsibilities.[3]

[3] New South Wales Legislative Council Practice, pages 48-50

3. THE POSITION IN THE STATES OF JERSEY

3.1 The States of Jersey first emerged from the Royal Court in the 16th century and the Assembly is therefore one of the oldest legislatures in the Commonwealth. The Royal Court was originally not only a law enforcing body but had also been a law making body since the break with Normandy in 1204. A change in the law in Jersey was achieved by an Order made by the Privy Council following a petition from the Royal Court.

3.2 In time the Royal Court developed the practice of consulting representatives of the 12 parishes, namely the Connétables and the Rectors, before petitioning the Privy Council. From this process of consultation emerged in due course a legislative assembly made up of the Jurats, Connétables and Rectors (the three estates) over which the Bailiff presided. The Assembly became known as "Les États de Jersey", paralleling the parliamentary assembly of Normandy, then known as "Les États de Normandie". The minutes of meetings of the States begin in 1524, but they were then intermingled with the records of the Royal Court and it was only in 1603 that the Minutes of the States began to be recorded separately. Notwithstanding the emergence of the States as a legislative body, the Royal Court continued to exercise legislative functions until 1771. In that year an Order in Council enacting a Code of Laws decreed that henceforth only the States Assembly should have legislative power and the residual power of the Royal Court to make regulations and ordinances was removed.

3.3 Unlike legislatures in many parts of the Commonwealth the States of Jersey did not therefore emerge from a colonial system where the original authority of the legislature stemmed from its initial creation by the Westminster parliament. A series of cases in the 19th century established that the traditional privileges enjoyed by the United Kingdom House of Commons were more limited in the legislatures of the then colonial territories particularly in relation to the inherent punitive powers of the House of Commons which arose from its ancient function as a court. In the case of *Kielley v Carson*[4] in 1842, which concerned the powers of the Newfoundland House of Assembly in Canada, the Privy Council made this distinction and stated that colonial legislatures possessed only, at common law, those powers of self-protection that were 'reasonably necessary for the proper exercise of their functions and duties'.

3.4 There is little judicial authority in Jersey on the extent of the common law privileges that the States Assembly and its members attract but in 1998 the issue was considered by Commissioner Michael Beloff QC in the context of the case of *Syvret v Bailhache and Hamon*.[5] The background to the case was that the plaintiff, Senator Syvret, had been suspended by the States for failing to withdraw certain remarks when directed to do so by the Chair. The Senator brought proceedings in the Royal Court against the Bailiff and Deputy Bailiff of the day seeking an order that the decision to suspend him should be quashed. The defendants argued that this was a matter of the privileges of the States and that the Court had no jurisdiction to intervene. They argued that the legal position was so clear that the Senator's proceedings should not be allowed to proceed to trial but should be struck out at a preliminary stage as

[4] (1842) 12 ER 225
[5] 1998 JLR 128

disclosing no reasonable cause of action. After hearing detailed legal argument the Commissioner agreed and struck out the proceedings. In passing he said this –

> *"I accept that the privileges of the United Kingdom Parliament were influenced by its origin as a court. In New Brunswick Broadcasting Co. v. Speaker of House of Assembly, Nova Scotia, Lamer, C.J.C. said (100 DLR (4th) at 228):*
>
> > *"In that context, a further historical factor was highly relevant. The penal jurisdiction of the Houses of Parliament in the United Kingdom was in large part derived from the fact that at one time they had been part of the 'High Court of Parliament', the judicial function of which had been as important as its legislative function. The division between legislatures and courts has been much clearer in Canada throughout its constitutional history."*
>
> *That influenced the reach of the privilege. The kind of privilege in play in the instant proceedings, however, sprang from need, not history.*
>
> *Unlike the colonial legislative assemblies, the States of Jersey were not created by a statute of the United Kingdom Parliament. They emerged from the Royal Court of Jersey, as the Attorney General put it, from the mists of time. Their history is therefore similar in that respect to that of the United Kingdom Parliament. I accept that the power of the States to discipline their members as part of the necessary power to regulate their own proceedings cannot be any less than that of a colonial legislative assembly: it is unnecessary for present purposes to consider the interesting question whether they equate to that of the United Kingdom Parliament.*
>
> *Although there is no direct Jersey judicial authority on the matter, Ex p. Nicolle is persuasive in the defendants' favour. In that matter, His Majesty, on the advice of the Privy Council, dismissed the petition against a motion of censure passed by the States upon Mr. Nicolle, a member of the States, for intemperate and offensive language against another member. The Privy Council can be taken to have accepted the following claim by the States of Jersey (5 Ordres du Conseil, at 351):*
>
> > *'That the States therefore claimed the privilege which they had ever exercised of maintaining order in the Assembly and a decorous Deportment of the Members towards each other during the Debates a Privilege which appertained to every Representative Assembly in the World and without which no such Assembly of that kind could subsist.'*
>
> *While it is unclear whether the Privy Council was acting in a judicial or administrative capacity, in my judgment the ruling continues to represent the law of Jersey."*

3.5 The precise nature of any parliamentary privilege can, of course, be set out, amended, extended or restricted by statute and the principal privileges of the States of Jersey were declared in the States of Jersey Law 1966, the long-title of which was –

> *"A LAW to codify, with sundry amendments, the Law regarding the constitution, procedure and Committees of the States of Jersey, to declare and define the powers, privileges and immunities of the States, and to make provision in relation to certain ancillary matters".*

3.6 The provisions of the 1966 Law were restated, largely without amendment, in the States of Jersey Law 2005 which replaced the 1966 Law.

3.7 In the absence of further judicial authority in Jersey it is impossible to say with total certainty how the courts would define the precise boundaries of parliamentary privilege in the Island but in the light of the judgment of Commissioner Beloff QC in the case of *Syvret v Bailhache and Hamon* it is clear that the courts would almost certainly interpret the position in the light of well-established precedent set in judgements in the United Kingdom and across other parts of the Commonwealth and this report is therefore based on this assumption.

4. FEATURES OF PRIVILEGE IN A WESTMINSTER PARLIAMENTARY SYSTEM

4.1 Erskine May's 'Treatise on the Law, Privileges, Proceedings and Usage of Parliament' (23rd Edition), the definitive work on parliamentary practice in the United Kingdom Parliament, describes parliamentary privilege at Westminster in the following way –

> *"Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law. Certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual Members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its Members. Other such rights and immunities such as the power to punish for contempt and the power to regulate its own constitution belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity. Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members."*[6]

4.2 In summary privilege can be described as the immunities and powers which a parliament, its members and officers possess to enable them to carry out their functions effectively and without hindrance. Privilege essentially belongs to the parliament as a whole and individual members can only claim privilege insofar as any denial of their rights, or threat made to them, would impede the functioning of the parliament. As explained below, privilege is, in the 21st century, usually considered to be appropriate only to the extent that it covers that which is absolutely necessary for parliaments to function effectively and for members to carry out their responsibilities. When disputes arise in relation to the precise boundaries of parliamentary privilege the courts are likely to consider whether any particular power or immunity is reasonably necessary for the effective functioning of the parliament in question.

4.3 The 2 most significant privileges usually available to a parliament in a Westminster system are –

- Freedom of speech;
- The exercise by Parliament of control over its own affairs, known technically as 'exclusive cognisance' (or 'exclusive jurisdiction').

A third privilege, which is also referred to later, is Freedom from Arrest, although this is now limited to certain very narrow circumstances in relation to civil matters as described below and of limited relevance in Jersey. Each of the above privileges is now considered in greater detail.

[6] Erskine May's Treatise on the Law, Privileges and Usage of Parliament, 23rd edition, 2004, Lexis Nexis UK, page 75.

5. FREEDOM OF SPEECH

5.1 The freedom of members of a parliament to have the right to say what they wish in the parliament (freedom of speech) and to discuss what they wish (freedom of debate) is rightly considered to be the most significant privilege available to members.

5.2 In the United Kingdom Parliament this right is enshrined in Article 9 of the Bill of Rights 1689 which, using modern spelling, provided *"That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament"*. (The meaning of the word 'impeach' in this context is not entirely clear but possible meanings include 'hinder', 'challenge' or 'censure').

5.3 Article 9 has been the subject of many legal decisions both in the United Kingdom and in many Commonwealth countries which follow a 'Westminster' parliamentary tradition. Argument often centres on what is covered by 'proceedings in Parliament' and what precisely is meant by 'impeached or questioned in any court or place out of Parliament'. The fundamental underlying principle is nevertheless clear and well established; namely that members of parliament are protected from being subjected to any penalty, whether civil or criminal, for what they have said in the course of proceedings in parliament (including in parliamentary committees). The privilege *"provides an altogether exceptional degree of protection"*.[7]

5.4 In Jersey the provisions of Article 9 of the Bill of Rights 1689 are mirrored in Article 34 of the States of Jersey Law 2005 –

> ***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.*

5.5 The immunity is extended to witnesses invited or summoned to appear before scrutiny panels or the PAC in Jersey by the provisions of the States of Jersey (Powers, Privileges and Immunities) (Scrutiny panels, PAC and PPC) (Jersey) Regulations 2006 although it should be noted that the immunity has been restricted in the case of witnesses if they give evidence that they know to be untrue. Regulation 8 provides that –

[7] 1999 Joint Committee Report – paragraph 110

8 Privileges and immunity of person appearing before or producing documents to a scrutiny panel or the PAC

(1) A person asked or required to give evidence or produce documents before a scrutiny panel or the PAC shall be entitled, in respect of such evidence and documents, to legal professional privilege and privilege against self-incrimination.

(2) An answer given by a person to a question put to that person, an oral or written statement made by a person, or a document produced by a person, in the course of his or her appearance before a scrutiny panel or the PAC shall not, except in the case of proceedings for an offence under these Regulations, be admissible in evidence against that person in any civil or criminal proceedings.

(3) Paragraph (2) shall not apply to evidence given or documents produced by that person which he or she knows to be untrue.

5.6 Similar protection is granted in Jersey to non-States members who are appointed as members of PAC or as members of a sub-committee of PPC established to investigate an alleged breach of the code of conduct.

5.7 The scope of the privilege given to members of parliament in relation to freedom of speech is extremely wide and absolute. The 1999 Joint Committee Report refers at paragraphs 38 and 39 to its scope at Westminster as follows –

"38. This immunity is wide. Statements made in Parliament may not even be used to support a cause of action arising out of Parliament, as where a plaintiff suing a member for an alleged libel on television was not permitted to rely on statements made by the member in the House of Commons as proof of malice. The immunity is also absolute: it is not excluded by the presence of malice or fraudulent purpose. Article 9 protects the member who knows what he is saying is untrue as much as the member who acts honestly and responsibly. Nor is the protection confined to members. Article 9 applies to officers of Parliament and non-members who participate in proceedings in Parliament, such as witnesses giving evidence to a committee of one of the Houses. In more precise legal language, it protects a person from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament.

39. A comparable principle exists in court proceedings. Statements made by a judge or advocate or witness in the course of court proceedings enjoy absolute privilege at common law against claims for defamation. The rationale in the two cases is the same. The public interest in the freedom of speech in the proceedings, whether parliamentary or judicial, is of a high order. It is not to be imperilled by the prospect of subsequent inquiry into the state of mind of those who participate in the proceedings even though the price is that a person may be defamed unjustly and left without a remedy."

5.8 Erskine May (23rd Edition) refers to the scope of the privilege in the following way –

> *"Subject to the rules of order in debate, a Member may state whatever he thinks fit in debate, however offensive it may be to the feelings, or injurious to the character, of individuals; and he is protected by his privilege from any action for libel, as well as from any other question or molestation".*[8]

5.9 The privilege exists because, unlike, for example, United Kingdom local or county councils where it does not, members in a legislature must have the freedom to speak freely during proceedings in the Chamber or in a parliamentary committee and raise whatever matters they wish without fear of subsequent legal action. The privilege empowers members, for example, to criticise those with power or wealth who might otherwise not hesitate to pursue matters through the courts. In the New South Wales case of *Gipps v McElhone* in 1881, Manning J stated –

> *"... the public interests require that what is said in the Legislature should be absolutely privileged. Doubtless there may be members of strong energy, easy credulity, and impulsive temperament, who, in discussing a question of public interest, may injure an individual by reckless and injudicious statements. But it is of greater importance to the community that its legislators should not speak in fear of actions for defamation. It is most important that there should be perfect liberty of speech in Parliament, even though sometimes it may degenerate into license"*[9]

5.10 The privilege should not, of course, be treated as a licence for members to make totally outrageous and unfounded statements to deliberately injure the reputation of individuals under the cloak of parliamentary privilege. In the Canadian House of Commons on 5th May 1987, in a ruling following a question of privilege, Speaker Fraser stated –

> *'There are only two kinds of institutions in this land to which this awesome and far-reaching privilege* [of freedom of speech] *extends – Parliament and the legislatures on the one hand and the courts on the other. These institutions enjoy the protection of absolute privilege because of the overriding need to ensure that the truth can be told, that any questions can be asked, and that debate can be free and uninhibited. Absolute privilege ensures that those performing their legitimate functions in these vital institutions of Government shall not be exposed to the possibility of legal action. This is necessary in the national interest and has been considered necessary under our democratic system for hundreds of years. It allows our judicial system and our parliamentary system to operate free of any hindrance.*
>
> *Such a privilege confers grave responsibilities on those who are protected by it. By that I mean specifically the Hon. Members of this place. The consequences of its abuse can be terrible. Innocent people*

[8] Erskine May (23rd Edition) page 96
[9] (1881) 2 LR (NSW) 18 at 24

> *could be slandered with no redress available to them. Reputations could be destroyed on the basis of false rumour. All Hon. Members are conscious of the care they must exercise in availing themselves of their absolute privilege of freedom of speech. That is why there are long-standing practices and traditions observed in this House to counter the potential for abuse.'* [10]

5.11 The compatibility of members' privilege of freedom of speech with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms was tested in the European Court of Human Rights in the 2002 case of *A v United Kingdom*.[11] The case arose out of comments made by Mr. Michael Stern MP in an adjournment debate in the House of Commons on 17th July 1996. In his introductory remarks he referred to the behaviour of a named family in a housing association in his constituency, describing them as 'neighbours from hell'. He went on to accuse the named family of anti-social behaviour which included keeping their children away from school, allowing members of the family to lead gangs of local vandals and creating disturbance and litter in the neighbourhood. The person named by Mr. Stern, supported by the civil liberties organisation Liberty, subsequently claimed, *inter alia*, that she had become the subject of racial discrimination and that she had been forced to move residence and change her children's school after the publicity which followed the MP's remarks in the House. She claimed that she was denied the right to a fair hearing because of parliamentary privilege, and that such a denial was a contravention of Article 6(1) of the Convention which provides that *"everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

5.12 In its judgement the European Court concluded, by a majority, that *"the Parliamentary immunity enjoyed by the MP in the present case pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary."*

5.13 The Court went on to assess the proportionality of the immunity. It noted that most, if not all, Council of Europe states had an immunity of a similar kind, and that, therefore, in principle, such an immunity was proportionate. The Court also noted that the immunity afforded in the United Kingdom was in certain respects less extensive than in other member states because it only applied to statements made in the Houses. This showed that the immunity was of benefit to Parliament as a whole rather than to individual MPs. Although the Court was critical of the nature of the comments made by Mr. Stern, the Court nevertheless concluded that *"the creation of exceptions to immunity, the application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued."* The Court therefore found no breach of Article 6 of the Convention.

5.14 The fact that members have such wide-ranging freedom of speech does not mean that no control is possible. The fundamental underlying principle is nevertheless that any control exercised on members must come from the parliament itself and cannot be imposed from outside. Parliaments are free to

[10] Canadian House of Commons, Debates, May 5th 1987, pp 5765-6
[11] A v United Kingdom (2003) 36 EHHR 51

deal with anything that members collectively regard as an abuse by taking action against the member concerned and they are also able to put in place Standing Orders or other procedural rules that limit the manner in which members exercise their freedom of speech. For example, on 25th February 1988 the Australian Senate adopted a resolution which set out the specific manner in which Senators are expected to exercise their freedom of speech –

> ***9. Exercise of Freedom of Speech***
>
> *(1) That the Senate considers that, in speaking in the Senate or in a committee, Senators should take the following matters into account:*
>
> *(a) the need to exercise their valuable right of freedom of speech in a responsible manner;*
>
> *(b) the damage that may be done by allegations made in Parliament to those who are the subject of such allegations and to the standing of Parliament;*
>
> *(c) the limited opportunities for persons other than members of Parliament to respond to allegations made in Parliament;*
>
> *(d) the need for Senators, while fearlessly performing their duties, to have regard to the rights of others; and*
>
> *(e) the desirability of ensuring that statements reflecting adversely on persons are soundly based.*
>
> *(2) That the President, whenever the President considers that it is desirable to do so, may draw the attention of the Senate to the spirit and the letter of this resolution.*

5.15 Other legislatures have put in place Citizens' Right of Reply schemes where, in certain circumstances, persons who feel aggrieved by statements made about them in parliament can apply, usually through a specified parliamentary committee, to have a response published in the official parliamentary record.

5.16 In Jersey, Standing Order 104(2) imposes certain restrictions on the contents of speeches as follows –

> *(2) A member of the States must not –*
>
> *(a) unduly repeat his or her own arguments or the arguments of others;*
>
> *(b) use offensive or insulting language about any member of the States;*
>
> *(c) impute improper motives, directly or by innuendo, to any member of the States;*
>
> *(d) refer to the private affairs of any member of the States, unless they are of direct relevance to the business being discussed;*
>
> *(e) use the name of Her Majesty the Queen or the Lieutenant-Governor in order to seek to influence the States;*
>
> *(f) refer to the conduct of Her Majesty the Queen, any other member of the Royal Family, any member of the States or any*

Jurat or other person performing judicial functions, unless the debate is upon a proposition the purpose of which is to discuss such conduct;

(g) refer to a case pending in a court of law in such a way as might prejudice the case;

(h) seek, within a debate, to re-open discussion of, a decision of the States made within the preceding 3 months, unless the debate is upon a proposition to rescind the decision; or

(i) refer to any individual who is not a member of the States by name, unless use of the individual's name is unavoidable and of direct relevance to the business being discussed.

5.17 In addition the States recently adopted an amendment to Standing Orders which allows the Presiding Officer to direct, in certain circumstances, that a name spoken in breach of Standing Order 104(2)(i) above should be omitted from the Hansard transcript of proceedings.

5.18 If a member is considered by others to have misused the privilege of freedom of speech the matter can be raised as a 'matter of privilege' and considered by the Assembly. It is nevertheless important to stress that, notwithstanding any measures that the States may take to reprimand a member who is considered to have abused his or her freedom of speech, it is not possible for the fundamental protection from legal action given by the States of Jersey Law 2005 to be waived by the Assembly. To be able to do so would seriously undermine the effectiveness of the protection offered, as a member or witness would never be sure when speaking in the Chamber or at a committee/panel meeting whether the protection would continue to apply at a later date.

Definition of 'proceedings in parliament'

5.19 In the United Kingdom the protection given by Article 9 extends to 'proceedings in Parliament' but, as the 1999 Joint Committee Report explains there is no comprehensive definition available setting out what is covered by this expression in that jurisdiction. Article 34 of the States of Jersey Law 2005 gives protection not only for words spoken in the States or before a committee/panel but also *"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"*.

5.20 In considering the scope of the privilege available to members of a parliament it is important to gain an understanding of the circumstances in which it might apply and those when it might not.

5.21 The absolute immunity against civil and criminal liability granted to members of the Westminster Parliament by Article 9 of the Bill of Rights refers to 'proceedings in Parliament' and, although the wording of the States of Jersey Law 2005 is not identical, it is useful to understand the principles that have been established across the Commonwealth in defining the scope of privilege as these would undoubtedly guide any court in Jersey if it was called on to adjudicate on whether or not a particular matter was covered by this privilege.

5.22 As the 1999 Joint Committee Report points out *"no comprehensive definition has been determined* [of the term 'proceedings in Parliament'] *either by Parliament itself or by judicial decision."*[12]

5.23 To illustrate the importance of understanding the scope of privilege it is perhaps useful to set out the various processes that might eventually lead to a debate in the States where, obviously, the absolute immunity from civil and criminal liability will apply to the proceedings.

5.24 A member of the States might receive a letter or e-mail from a member of the public making allegations about the activities of a particular States department, perhaps even raising concerns about the work of a Minister or named individual officers. The member concerned might start his or her enquiries by writing back to the member of the public concerned to seek further details of the allegations. He or she might also, at this stage, correspond with the relevant Minister, with other States members or with officers to find further information, share the allegations and ascertain whether or not the initial allegations have any substance. A next stage might be to submit a draft oral question to the Greffier of the States who may then correspond with the member over the wording before submitting it to the Bailiff for approval. At that stage further correspondence might take place involving the Bailiff, the Greffier and the member before the question is approved, forwarded to the Minister concerned and listed on the Order Paper. The question is then answered in the Assembly by the Minister with the question and answer transcribed in Hansard and published on the States Assembly website. If the member remains concerned about the matter after the question has been answered the member might decide to bring a proposition for debate on the issue requesting the Minister concerned to take certain action. The member may repeat some of the processes above, namely corresponding with members of the public, Ministers, other members or officers before submitting a draft proposition to the Greffier of the States. As with the draft question above there will be exchanges involving the Greffier, the Bailiff and the member concerned before the proposition is finally prepared for publication, lodged and then debated. Once again the full transcript of the debate is recorded in Hansard and published.

5.25 Although there are certain stages in the series of events set out above that are clearly and unambiguously covered by the absolute immunity given in Jersey by the States of Jersey Law 2005, for example the publication of the oral question in the Order Paper, the answering of the question in the Assembly, the lodging of the printed proposition, speeches made during the debate on that proposition and the Hansard transcript, the point at which privilege 'starts' in the remaining processes is less clear.

5.26 It is important firstly to stress that the protection given to members is unrelated to physical location. The States Chamber, its precincts and the rooms reserved for committee/panel rooms do not in themselves have any special significance and it is simply the activities that take place in them that give rise to the operation of privilege. Remarks made by a member in the States Chamber when the Assembly was not meeting would attract no privilege and similarly an informal meeting of members in one of the

[12] Paragraph 97

committee rooms would not either. An event such as the annual Youth Assembly, even though it takes place in the States Chamber according to certain relatively formal procedural rules, clearly falls outside the scope of privileged activities. Conversely privilege would apply if the Assembly met in another location for whatever reason or, as often happens, a scrutiny panel held a properly constituted meeting in a location away from the normal committee rooms.

5.27 Erskine May (23rd Edition) gives the following broad description of the term 'proceedings in parliament' –

> *"The term 'proceedings in Parliament' has received judicial attention (not all of it in the United Kingdom) but comprehensive lines of decision have not emerged and indeed it has been concluded that an exhaustive definition could not be achieved. Nevertheless, a broad description is not difficult to arrive at. The primary meaning of proceedings, as a technical parliamentary term, which it had at least as early as the seventeenth century, is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual Member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking. Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers also may take part in the proceedings of a House, for example by giving evidence before it or one of its committees, or by securing the presentation of a petition."*[13]

5.28 In Australia, following concern in parliament at the outcome of certain court proceedings in the mid-1980s, the Parliamentary Privileges Act 1987 (Cth) was enacted at Australian Commonwealth level, primarily to codify the scope of freedom of speech. Section 16(2) of that Act defines *'proceedings in Parliament'* in the following way –

> *"(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688*[14] *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;*

[13] Erskine May (23rd Edition) Pages 110-111
[14] Old style date

(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."

5.29 The 1999 Joint Committee report refers to the position at Westminster in the following way –

"100. The position regarding certain activities is reasonably clear. In this category are debates (expressly mentioned in article 9), motions, proceedings on bills, votes, parliamentary questions, proceedings within committees formally appointed by either House, proceedings within sub-committees of such committees, and public petitions, once presented. These are all proceedings in Parliament. Statements made and documents produced in the course of these proceedings, and notices of these proceedings, all appear to be. So are internal House or committee papers of an official nature directly related to the proceedings, and communications arising directly out of such proceedings, as where a member seeks further information in the course of proceedings and another member agrees to provide it. So too are the steps taken in carrying out an order of either House.

101. On the other hand, certain activities of members are not protected, even though they may take place within the House or a committee. A casual conversation between members in either House even during a debate is not protected, nor an assault by one member on another. In 1947 a member of the House of Commons sued a newspaper for defamation because it claimed she had 'danced a jig on the floor of the House of Commons' during a division on a bill. Motions were agreed permitting members to attend the trial and give evidence both for and against the member on what had occurred in the Chamber.

102. Repetition, even verbatim repetition, by a member of what he said during proceedings has no protection elsewhere under article 9. Nor does article 9 cover proceedings of committees not appointed or nominated by either House, such as backbench and party committees, or the Ecclesiastical Committee which is a statutory committee."

5.30 The above extracts indicate that, although some matters, such as a debate in the Chamber or the giving of evidence before a parliamentary committee, are very clearly covered by privilege other matters only connected with, or ancillary to, 'proceedings in parliament' are less clear-cut. In order to ascertain whether or not a particular document or activity is covered by privilege it may be necessary to examine the particular circumstances of the individual case.

5.31 Having considered the position in the United Kingdom and other Commonwealth jurisdictions, it is clear that members are not protected by privilege in respect of all their parliamentary duties when these are performed outside parliamentary proceedings. However, *"the closer the relevant activity*

is connected to the proceedings of parliament, the easier it is to argue that it should be protected by privilege".[15]

5.32 The 1999 Joint Committee considered the issue of members' drafts and notes in relation to parliamentary proceedings and concluded that these were likely to be so closely related to 'proceedings in parliament' that they would attract immunity. It commented as follows –

> *113. Drafts and notes frequently precede speeches and questions, and members often need assistance and advice in preparing them. By necessary extension, immunity accorded to a speech or question must also be available for preparatory drafts and notes, provided these do not circulate more widely than is reasonable for the member to obtain assistance and advice, for instance from a research assistant. It would be absurd to protect a speech but not the necessary preparatory material. The same principle must apply to drafts of evidence given by witnesses. This principle must also apply to drafts of speeches, questions and the like which in the event are not used. A member cannot always catch the Speaker's eye, or he may change his mind.*
>
> *114. This approach accords with the view expressed by the select committee of the House of Commons on the Official Secrets Acts (1939). The appointment of this committee arose out of the action taken by a member, Mr Duncan Sandys, in threatening to table a question regarding the inadequacy of London's anti-aircraft defences. The draft question included information, classified as secret, about the number of available guns and their state of readiness. Mr Sandys sent the draft to the minister. In its report the committee said there were some:*
>
> > *'communications between one member and another, or between a member and a minister, so closely related to some matter pending in, or expected to be brought before the House, that though they do not take place in the chamber or a committee room they form part of the business of the House, as, for example, where a member sends to a minister the draft of a question he is thinking of putting down or shows it to another member with a view to obtaining advice as to the propriety of putting it down or as to the manner in which it should be framed'*[16]
>
> *The House agreed with this conclusion.*

5.33 One activity that is clearly not covered by privilege, as indicated in the extract from the 1999 Joint Committee Report above, is repetition outside the Chamber by a member of something said under privilege during proceedings. Indeed the challenge to a member in Jersey that has occasionally been heard

[15] Carney, G *Members of Parliament: Law and Ethics* ,Prospect Media, Sydney, 2000, page 210

[16] Report of the House of Commons Select Committee on the Official Secrets Act (1939): HC (1938-1939) 101, paragraph 4

during a debate inviting a colleague to *'repeat that statement in the Royal Square'* indicates that members of the States are no doubt already aware of this distinction. It follows that members must take care in responding to questions outside the States, including from the media, about comments they have made in the Assembly. If a member publishes a speech that he or she has made separately from the officially published Hansard transcript of debate this becomes a separate publication and is unlikely to be covered by privilege. The Canadian House of Commons Procedure and Practice comments on this matter as follows –

> *"Parliamentary privilege may not protect a Member publishing his or her own speech separate from the official record.*
>
> *Members are therefore cautioned that utterances which are absolutely privileged when made within a parliamentary proceeding may not be when repeated in another context, such as in a press release, a householder mailing, a telegram, on an Internet site, a television or radio interview, at a public meeting or in the constituency office. Members also act at their peril when they transmit otherwise libellous material for purposes unconnected with a parliamentary proceeding. Thus, comments made by a Member at a function as an elected representative – but outside the forum of Parliament – would not be covered by this special privilege, even if the Member were quoting from his or her own speech in the Debates of the House of Commons. Telecommunications, including new technology such as electronic mail, facsimile machines and the Internet, should therefore not be used to transmit otherwise libellous material.*
>
> *The publication of libellous material has been considered by most courts to be beyond the privileges of Parliament when such publication was not part of the parliamentary process to begin with. Courts take a distinctly "functional" approach to the interpretation of parliamentary privilege by relating any novel situation in which a Member may become involved back to the function and purpose that parliamentary privilege was originally intended to serve: the need for Members of Parliament to be able to fearlessly debate issues of public policy in Parliament. Thus even correspondence between one Member and another on a matter of public policy may not be considered to be privileged."*[17]

5.34 It is of note that the position of members who repeat allegations outside the Chamber is less favourable than the media and others who report the proceedings. The publication of a fair and accurate account of a debate will normally be protected by qualified privilege by the same common law principle that protects fair reports of court proceedings. Qualified privilege may not apply in these circumstances if it can be shown that the publication was done with malice and not in good faith. In Jersey this common law principle has been codified in Article 39 of the States of Jersey Law 2005 which states –

[17] Marleau and Montpetit, [Canadian] *House of Commons Procedure and Practice*, Chenelière McGraw-Hill, Montreal, 2000, page 76

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.*

Members' correspondence

5.35 An issue that is undoubtedly of interest to members is the one raised in the extract above, namely the status of correspondence sent to or from members.

5.36 In the course of their work members send and receive a vast amount of correspondence, much of it by e-mail, and the work of a member of any parliament in the 21st century bears no relation to the duties of parliamentarians when the Bill of Rights was enacted in the 17th century. States Members, in common with parliamentarians across the world, receive vast amounts of correspondence from the public and from colleagues and they frequently write to Ministers and departmental officials and outside bodies. They take up a wide range of matters on behalf of their constituents and voters often expect members to take action on their behalf. Many of these activities, even though they fall within the duties and responsibilities of being a member, do not relate directly to 'proceedings in parliament'.

5.37 In accordance with the principles set out above the protection afforded by parliamentary privilege only applies to members' correspondence if it can be clearly shown that the correspondence is for the purposes of, or clearly incidental to, proceedings in parliament. Parliamentary Practice in New Zealand (3rd Edition) summarises the position in the following way –

> *"A person sending information to an individual member is not engaging in a parliamentary proceeding. Such a communication is not a proceeding in Parliament, unless the communication is directly connected with some specific business to be transacted in the House, such as the delivery of a petition to the member for presentation to the House, or was solicited by the member for the express purpose of using it in a parliamentary proceeding.*
>
> *Other than in these circumstances, no parliamentary privilege applies to a communication to a member of Parliament.*
>
> *A communication's status after it has been received by the member depends upon the use made of it by the member, If the member takes some action in respect of it for the purpose of transacting parliamentary business, it may, at that point, become part of a proceeding (whether it is referable to a particular debate or not). But, even so, that will not have any retrospective effect so as to afford protection in respect of the original communication to the member.*

Where a member communicates with another member, such as a Minister, regarding parliamentary business (for example, forwarding an amendment to a bill before the House or a question that the member is contemplating lodging) this will be regarded as a proceeding in Parliament."[18]

5.38 The issue arose in 1958 in the case of Mr. George Strauss MP. Mr Strauss wrote a letter to a minister making allegedly defamatory statements regarding the London Electricity Board. The Board's solicitors demanded a withdrawal and apology, failing which a writ of libel would be issued. Mr Strauss brought this letter to the attention of the House of Commons and the Speaker ruled that the threat constituted a prima facie case of breach of privilege. The committee of privileges agreed that, in writing his letter to the minister, Mr Strauss was engaged in proceedings in Parliament and by threatening libel proceedings in respect of statements made in the course of proceedings in Parliament the Board and their solicitors had acted in breach of the privilege of Parliament. The matter nevertheless came before the House and on 8th July 1958 the House resolved by a narrow majority (218 votes to 213) that *"this House does not consider that Mr. Strauss' letter of the 8th day of February 1957 was a proceeding in Parliament and is of opinion therefore that the letters from the London Electricity Board and the Board's Solicitors constituted no breach of privilege"*[19], the House's reasoning being that the original letter did not relate to any matter that was before the House at the time.

5.39 The 1999 Joint Committee considered whether legislation should be introduced in the United Kingdom to extend absolute privilege to members' correspondence with Ministers. The Committee noted that both the 1967 House of Commons committee on parliamentary privilege, the 1977 Committee of Privileges and the 1970 Joint Committee on publication of proceedings had accepted that the House of Commons' decision in the relation to the Strauss case had been right in law but all agreed that the arguments in favour of members' correspondence with Ministers having the benefit of absolute privilege were so compelling that the law should be changed. The 1999 Joint Committee did not share this view and set out its reasoning as follows –

107. An extension of absolute privilege to members' correspondence with ministers would therefore seem logical. But on closer examination it would create problems of principle. Why distinguish between a member's letter to a minister and a member's letter to a public official or a local authority? Should a constituent's correspondence accompanying a member's letter be considered part of a 'proceeding'? Should a member's reply to the constituent have the same privilege? When a matter is raised in debate in the House a member may be subject to challenge from other members. Parliamentary questions should be short and to the point, and are subject to rules of order. Letters can be extensive, and if absolutely privileged under article 9 might be used as a means of publishing with

[18] McGee, D, *Parliamentary Practice in New Zealand*, 3rd Edn, Dunmore Publishing, Wellington, 2005, page 622.
[19] HC Deb 591 cc 207-346

impunity defamatory statements or trade secrets. With modern photocopying facilities and e-mail, many people can easily see copies of letters, sometimes inadvertently. One reason why letters to ministers have increased appreciably is the rise in the number of constituency cases ill-suited to proceed by way of written questions, because they are too detailed or for some other reason. If parliamentary privilege were extended to members' correspondence, Parliament would probably become involved in attempting to make rules for correspondence, both constituency correspondence and generally, as it has for questions and other proceedings. The comparison drawn by the 1977 committee is not convincing. Correspondence with the parliamentary commissioner for administration consists mainly of complaints of maladministration by constituents, forwarded by members for investigation by the commissioner under statutory powers. By their nature these complaints may be defamatory, and exposure to defamation actions would unduly obstruct the commissioner's investigations.

108. It remains the case that the distinction between a member's letter and a member's speech or parliamentary question can be somewhat arbitrary. A letter may relate to the same subject matter as an existing proceeding, and may simply be for the member a more convenient or sensible way of pursuing the same objective. It is anomalous that a member who, for example, received information that children were being abused in a named institution, would have the benefit of article 9 if he tabled a question but not if he wrote to the responsible minister first. But the boundary of privilege has to be drawn somewhere, and the present boundary is clear and defensible. Moreover, although members taking up difficult constituency cases often receive threatening letters from solicitors, cases in court are rare. Professor Bradley summed up the position in evidence:

> *`There was a strong case for [absolute privilege] in 1957 at the time of the Strauss case. . . . That strong case is still there. However, we have had the last 40 years in which the qualified privilege of common law seems to have enabled members of both Houses to carry out their functions satisfactorily'.*

109. This practical consideration has weighed heavily with the Joint Committee, coupled with the absence of any defensible line between constituency correspondence with a minister and constituency correspondence with others.

110. There is another consideration. Article 9 provides an altogether exceptional degree of protection, as discussed above. In principle this exceptional protection should remain confined to the core activities of Parliament, unless a pressing need is shown for an extension. There is insufficient evidence of difficulty, at least at present, to justify so substantial an increase in the amount of parliamentary material protected by absolute privilege. Members are not in the position that, lacking the absolute immunity given by article 9, they are bereft of all legal protection. In the ordinary course a member enjoys qualified

privilege at law in respect of his constituency correspondence. In evidence the Lord Chief Justice of England, Lord Bingham of Cornhill, and the Lord President of the Court of Session, Lord Rodger of Earlsferry, both stressed the development of qualified privilege at law and the degree of protection it provides nowadays to those acting in an official capacity and without malice. So long as the member handles a complaint in an appropriate way, he is not at risk of being held liable for any defamatory statements in the correspondence. Qualified privilege means a member has a good defence to defamation proceedings so long as he acted without malice, that is, without some dishonest or improper motive.

111. Admittedly, qualified privilege is less effective than the sweeping, absolute protection afforded by article 9, in two respects. Article 9 provides a defence not only to defamation claims but also to any claim that by sending the constituent's letter to the minister the member committed an offence under the Official Secrets Acts or a breach of a court order. Secondly, defamation proceedings brought contrary to article 9 will generally be dismissed peremptorily, without any need for a trial, as it will be obvious from the outset that they are bound to fail. With a defence of qualified privilege, if there is sufficient prima facie evidence of malice the case will ordinarily proceed to trial for a verdict by the jury. So a member may be put to the inconvenience and expense of defending an action before he is vindicated.

112. Constituency correspondence has burgeoned over the last 30 years, but since Strauss there have been remarkably few, if any, instances of defamation actions against members who were acting on behalf of their constituents. We ***recommend*** *that the absolute privilege accorded by article 9 to proceedings in Parliament should not be extended to include communications between members and ministers.*

5.40 It is important to distinguish between the absolute privilege granted to members of a parliament when the parliamentary privilege of freedom of speech applies and the qualified privilege that may, on certain occasions, be available to them.

5.41 Qualified privilege is a common law concept available to all and was recognised as part of the law of Jersey in the case of *Johnson v Lucas.*[20] As a common law concept it is not strictly within the narrow scope of this report on parliamentary privilege but, as the status of correspondence is a matter that is clearly of interest to members some, consideration of the circumstances in which it may apply could be useful.

5.42 As explained above, where the absolute privilege provided by parliamentary privilege applies to statements or documents, no action may lie for the matter even, for example, if it is made or published with malice. The protection covers not only civil actions for defamation but extends to matters such as infringement of copyright or other matters which could otherwise be punished

[20] 1982 JJ 67

as criminal offences (for example, breach of secrecy or data protection legislation or contempt of court).

5.43 Qualified privilege exists where a person making a statement is not liable for a successful action in defamation if certain conditions are fulfilled and the statement is made without malice. It can never give any wider protection in relation, for example, to alleged breaches of the criminal law. A Standard Note issued by the House of Commons Library on 2nd December 2008[21] gives some guidance to MPs on the application of qualified privilege in the following terms –

> *"Qualified privilege is a legal concept extending well beyond the scope of parliamentary privilege." (...)*
>
> *"According to Words and Phrases Legally Defined, qualified privilege means:*
>
> > *'On grounds of public policy the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person which is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege. As a general rule, there must be a common and corresponding duty or interest between the person who makes the communication and the person who receives it.'*[22]
>
> *The standard judicial definition of a privileged occasion is that made by Lord Atkinson in Adam v Ward –*
>
> *'A privileged occasion is an occasion where the person who makes a communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.'*[23]
>
> *Malice on the part of a person who communicated information always disapplies the privilege.*
>
> *The rule was tested in 1930 in a case (Watt v Longsdon) where one director of a company passed allegations about the sexual misconduct of another director to the Chairman, and also to that person's wife. The court held on appeal that communication with the chairman was privileged, as both the maker and the receiver had a common interest in the probity of the company, but that no such reciprocity existed with the wife, and hence that that communication was not privileged.*[24]

[21] SN/PC/2024
[22] Words and Phrases Legally Defined, 3rd edition (Butterworths) 1989
[23] 1917 AC 309, at p 334
[24] 1930 1KB, pp 130-159

5.44 The issue of qualified privilege for members' correspondence was addressed by Professor Anthony Bradley, Emeritus Professor of Constitutional Law at the University of Edinburgh when he gave evidence to the 1999 Joint Committee –

> *"There is no doubt that matters that are contained in speech in the House or in a Committee are subject to absolute privilege under Article 9 and so, for that matter, are matters contained in House of Commons papers. We have the supporting authority of the Parliamentary Papers Act in that context. To enable the House and Members to perform their function, documents that are ancillary to those matters must surely also be protected, whether drafts of questions or Members' notes he or she may use in a speech, and other ancillary matters. At the borderline is the question of an MP's letter to the minister which, in my view, raises the difficult issue of where you draw the line. If the argument is that this may be preliminary to or instead of a question in Parliament, why should not such a letter by a Member to a minister be a proceeding in Parliament? If we stop short of that and we have, for example, constituents' letters to MPs or MPs' letters to constituents, or what is said in a surgery or what is said at a protest meeting that a Member attends in his constituency, those do not seem to me to be parliamentary proceedings. They relate to the Member's presence and functions in the constituency. Therefore, I would at the moment not wish to argue that proceedings in Parliament should be widened to include everything that is done by a Member in his or her capacity as a Member. I believe there is a good deal of support for that proposition to be found both in this country and abroad. Of course, what is said in correspondence between a constituent and a Member of Parliament will almost certainly be covered by qualified privilege at common law. As I have indicated earlier today, it seems as if Members of Parliament since the 1950s have been able to carry out their duties on that basis. While I accept that there may be an argument for putting letters to ministers within the definition of proceedings in Parliament, it may not be that there is a real need shown at the present time for that to be done."*[25]

5.45 The established position in the United Kingdom is that the reporting by a Member of a complaint by made by a constituent to a person who has an interest in, or may be in a position to act on, the complaint would be likely to attract qualified privilege. In 1969 the Labour MP Mr. Reg Freeson communicated certain complaints about a firm of solicitors, which he knew were defamatory, to the Law Society and to the Lord Chancellor. It was held by the Court that an MP had *"both an interest and a duty to communicate to the appropriate body at the request of a constituent any substantial complaint from the constituent concerning a professional man in practice at the service of the public."*[26] The Court ruled that Mr Freeson's letter was subject to qualified privilege.

[25] HC 214-III, page 137
[26] Beach and anor. v Freeson 1QB (1972) p 14

5.46 In the United Kingdom members have, in practice, had an effective defence in any proceedings for defamation for their constituency correspondence since the confirmation in the Freeson case, always provided the channel of communication was a proper one for the transmission of a complaint or other defamatory comment, to a responsible authority, and that no malice was involved. But it must be stressed that this is a common law right based on case law, that every case is therefore different and that the qualified privilege is a defence available in defamation proceedings only and, unlike parliamentary privilege, not an absolute privilege that would cause any potential proceedings to be stayed. It is also important to stress that the correspondence must be made in good faith and without malice. In a memorandum to the 1999 Joint Committee the Right Hon. Lord Bingham of Cornhill, the then Lord Chief Justice wrote that the qualified privilege *"would be lost if the member were shown to have made the statement in question without believing it to be true or from some ulterior or wrongful motive"*.[27]

5.47 Following difficulties that arose for MPs in the United Kingdom in dealing with constituency matters following the introduction of the Data Protection Act 1998 a statutory instrument, the Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002[28] was passed. The Order has two main functions, which apply where a constituent has contacted a member of Parliament or another category of elected representative as specified in the Order. The first is to give the member (or someone acting with their authority) the authorisation necessary under the Data Protection Act 1998 to process sensitive personal information about the constituent in the course of the member's 'functions as a representative' (for example constituency casework) without having to establish 'explicit consent'. Second, the Order allows, but does not require, others (for example agencies or organisations) who are contacted by elected representatives to disclose sensitive personal information to them where this is necessary to help with their functions, without having to obtain the explicit consent of the individual concerned. Current guidance from the Information Commissioner makes clear that it is only in exceptional circumstances that insisting on written consent would likely be justified.[29]. It should, however, be stressed that no similar subordinate legislation has been enacted in Jersey under the Data Protection (Jersey) Law 2005.

5.48 In conclusion it can be seen that the absolute immunity provided under the parliamentary privilege of freedom of speech applies to statements and documents directly related to 'proceedings in parliament' or that can be shown to be so closely related to, or ancillary to, those proceedings that the privilege will also apply. Qualified privilege as a defence against a defamation action may apply in other circumstances.

[27] HC 214-III, p 109
[28] SI 2002/2095
[29] For further details see the Standard Note SN/HA/1936 issued by the House of Commons Library which gives further information http://www.parliament.uk/documents/upload/snha-01936.pdf

5.49 Useful examples of circumstances in which parliamentary privilege may apply in the United Kingdom are found in a note issued by the Ministry of Justice in relation to Section 34 of the Freedom of Information Act 2000[30] which relates to an absolute exemption under the Act where disclosure would be an infringement of the privileges of either House of Parliament[31]. The Guidance Note gives the following examples –

> *The Parliamentary privilege exemption is most likely to be relevant to information contained in documents in the following categories, when they are unpublished -*
>
> - *memoranda submitted to committees;*[32]
>
> - *internal papers prepared by the officials of either House directly related to the proceedings of the House or committees (including advice of all kinds to the Speaker or other occupants of the Chair in either House, briefs for the chairmen and other members of committees, and informal notes of deliberative meetings of committees);*
>
> - *papers prepared by the Libraries of either House, or by other House agencies, either for general dissemination to Members or to assist individual Members, which relate to, or anticipate, debates and other proceedings of the relevant House or its committees, and are intended to assist Members in preparation for such proceedings;*
>
> - *correspondence between Members, officials of either House, Ministers and government officials directly related to House proceedings, including exchanges between Counsel to the Chairman of Committees and those drafting bills and statutory instruments;*
>
> - *papers relating to investigations by the Parliamentary Commissioner for Standards;*
>
> - *papers relating to the Registers of Members' Interests;*
>
> - *bills, amendments and motions, including those in draft, where they originate from Parliament or a Member rather than from Parliamentary counsel or another government department.*

[30] Freedom on Information Guidance – Exemptions guidance, Section 34 – Parliamentary privilege. Ministry of Justice, 14th May 2008

[31] A similar exemption has been inserted in the consultation drafts of the Freedom of Information (Jersey) Law 200- circulated by the Privileges and Procedures Committee.

[32] In this context 'committees' refers only to parliamentary committees and would be interpreted in the Jersey context as PPC, PAC and scrutiny panels. The proceedings of the Council of Ministers are not covered by Article 34 of the States of Jersey Law 2005.

Privileged information which is likely to be in departments' hands

Information which may be covered by parliamentary privilege may also fall under other exemptions, depending on the subject matter. It is important, however, that privilege is asserted wherever it is applicable. Particular care will therefore need to be taken in relation to requests for information about, or contained in:

- *any of the unpublished working papers of a select committee of either House, including factual briefs or briefs of suggested questions prepared by the committee staff for the use of committee chairmen and/or other members, and draft reports: these should only be in the possession of a department as a result of a Minister being, or having been, a member of such a committee;*

- *any legal advice submitted in confidence by the Law Officers or by the legal branch of any other department to the Speaker, a committee chairman or a committee, or any official of either House (even if section 42 (legal professional privilege) would be likely to apply);*

- *drafts of motions, bills or amendments, which have not otherwise been published or laid on the Table of either House;*

- *any unpublished correspondence between Ministers (or departmental officials) and any Member or official of either House, relating specifically to proceedings on any Question, draft bill or instrument, motion or amendment, either in the relevant House, or in a committee;*

- *any correspondence with or relating to the Registrar of Lords' Interests, the proceedings of the Parliamentary Commissioner for Standards or the Registrar of Members' Interests in the House of Commons.*

Information relating to matters not regarded as 'proceedings in Parliament'

Other information arising from or related to a wide range of activities within Parliament is not regarded as privileged, although other exemptions may be relevant. The most significant categories are:

- *Papers prepared by the Libraries of either House, or other House agencies, intended to provide general or specific background information on matters not currently under examination, or expected or planned to be considered, in formal proceedings of either House or their committees.*

- *Members' correspondence and other communications not specifically related to proceedings of either House or of one*

of its formally constituted committees. For example, correspondence between a Member and a Minister about a constituency issue that is not the subject of proceedings is not privileged, but correspondence about a draft motion, amendment or Question is privileged.

- *The deliberations of parliamentary bodies established by statute (although if they are discussing matters relating to the preparation of formal proceedings in Parliament, those deliberations may be privileged).*

- *Meetings of political parties and their committees.*

- *Meetings of all-party groups.*

6. PARLIAMENT'S CONTROL OVER ITS OWN AFFAIRS ('EXCLUSIVE COGNISANCE')

6.1 The technical term 'Exclusive cognisance', sometimes referred to as 'exclusive jurisdiction' refers to the fact that Parliaments must have control over all aspects of their own affairs, the ability to determine their own internal procedures and to discipline their own members for misconduct.

6.2 The justification for the privilege is that Parliaments must be free to conduct their proceedings without interference by outside bodies if they are to perform their constitutional duties to legislate, investigate and debate properly.

6.3 Perhaps the most important aspect of this privilege is that ability of a parliament to regulate its own internal proceedings without interference from outside. As a result he manner in which the States Assembly exercises its own internal rules in relation, for example, to disciplinary matters is entirely a matter for the Assembly and not for the courts or other outside bodies such as the States of Jersey Complaints Board.

6.4 This long-standing principle of parliamentary autonomy was clearly reiterated in the Jersey context in the case of *Syvret v Bailhache and Hamon*[33] referred to earlier. In his judgement Commissioner Beloff QC, in allowing the application by the defendants for the application for judicial review to be struck out, held that it was clear that the States Assembly, as a legislative assembly, possessed such privileges as were reasonably necessary for its proper functioning, including the power to regulate its own internal proceedings, the exercise of which could not be questioned by the court. Therefore, although the court was entitled to establish whether the sanctions which had been imposed by the States on the plaintiff were ones which it was entitled to use, it could enquire no further and it was not for the court to consider whether the Standing Orders had been properly interpreted or applied, whether the plaintiff had in fact been guilty of misconduct, or whether the action taken against him had been in accordance with the rules of natural justice or in good faith. That the States were the sole judge of their own privileges in this way was a power common to all legislative assemblies, which needed to be independent of outside control the better to fulfil their democratic functions. This inherent power clearly included the power to suspend a member for disorderly conduct. In his judgement the Commissioner stated –

> *"In my view, the sole question for me is whether the sanctions imposed were ones available to the defendants (including the States). I have no doubt that they were. Apart from express powers and prerogative powers, where relevant, they are both embraced by the general principle of necessity and the particular example canvassed in Barton v. Taylor.*
>
> *I conclude that all of what was being done and is complained of by the plaintiff relates to the internal proceedings of the States; that the privilege contended for exists; that the States and officers enjoyed the inherent powers claimed; and that, accordingly, I should abstain from further inquiry into the matter. My judicial function is exhausted.*

[33] 1998 JLR 128

> *It was argued by the plaintiff that I should consider whether the condition precedent for the exercise of such powers, i.e., that the plaintiff was guilty of disorderly conduct, was established. I decline the invitation which seems to me destructive of the privilege. Although, I repeat, it is not for the court to determine whether the plaintiff's conduct was "grossly disorderly," support for the second defendant's decision can be derived from Erskine May, Parliamentary Practice, 21st ed., at 393–395 (1989). For example, a failure to withdraw a disorderly or unparliamentary expression on the direction of the Speaker may lead the Speaker to take action pursuant to Standing Order 42 of the United Kingdom Parliament, which is in almost identical terms to Standing Order 30(3) and empowers the Speaker to deal with "grossly disorderly conduct."*
>
> *It is further argued that the breach of the rules of natural justice (i.e., absence of notice to the plaintiff) prima facie vitiate the exercise of such powers. Again, I reject the argument. Procedural fairness is an obvious example of the manner in which powers are exercised and the question is thus excluded from judicial scrutiny.*
>
> *It is further argued that the allegation that the defendants acted in bad faith can be investigated. I reject that argument too. Once the mantle of Parliamentary privilege cloaks an action, its motivation is not a matter for the courts"*

6.5 The 1999 Joint Committee stated at paragraph 275 of its Report that *"As far as members are concerned, there can be no doubt that each House should remain responsible for disciplining its own members. The Joint Committee has taken this as axiomatic. It is inconceivable that the power to suspend or expel a member of either House should be exercisable by the courts or some other body"*. Although it is not a departure from this principle it is nevertheless worth pointing out that in adopting the States of Jersey Law 2005 the States have agreed that there are certain circumstances when a Senator or Deputy would be automatically disqualified from membership of the Assembly without the need for a debate. These include being convicted of an offence and sentenced to an term of imprisonment of not less than 3 months with no option of a fine, being compulsorily detained under the mental health legislation or becoming bankrupt.

6.6 The disciplinary sanctions referred to in the Standing Orders of the States of Jersey against individual members are censure, no confidence (in relation to an officeholder), suspension and expulsion.[34] The duration of any period of suspension is set out in Standing Order 164(4). There is currently no provision to fine members or withhold their remuneration during any period of suspension.

6.7 The ability of a parliament to be master of its own membership is an important privilege although it is now common, as in Jersey, for disputes about contested elections to be dealt with by the courts. The power of expulsion from the States is therefore one that is referred to in Standing Orders as

[34] See for example Standing Order 26(3)(c) to (e)

mentioned above. At the time of the debate on the new Standing Orders in 2005 this matter was referred to in the accompanying report of the then PPC –

> *"The Committee has received legal advice that the States have a prerogative power to expel a member in common with powers found in parliaments around the world. The power has never been used in Jersey to the Committee's knowledge and has not been used, for example, in the UK House of Commons for many decades. Many of the situations that might lead to expulsion are now dealt with in other ways such as the voluntary resignation of the member concerned or statutory disqualification from office as found in the States of Jersey Law 2005 for matters such as serious criminal conduct. Although PPC hopes and expects that the powers will never be used in Jersey it seems important to include in these Standing Orders the safeguards for the member who might be affected."*

6.8 The 'safeguards' referred to include matters such as the ability of the member concerned to speak twice during any debate on his or her expulsion.

6.9 Another important aspect of the privilege of parliament to control its own affairs is its right to judge the lawfulness of its own proceedings. The Courts will not look, for example, at the procedures that were followed to enact legislation to ascertain whether they were defective. The 1999 Joint Committee refers to this in the following way –

> *232. Both Houses have long claimed, and succeeded in maintaining, the right to be the sole judges of the lawfulness of their own proceedings and to determine, or depart from, their own codes of procedure. Courts of law accept Parliament's claim that they have no right to inquire into the propriety of orders or resolutions of either House relating to their internal procedure or management. Except for purposes of statutory interpretation, the courts do not 'look behind the Act' or consider themselves competent to consider the processes within Parliament preparatory to enactment. With minor statutory exceptions the two Houses have a substantial measure of independence in the way in which they organise their business and regulate their internal organisation. Speaking in his judicial capacity in 1974 Lord Morris of Borth-y-Gest stated –*
>
> > *'...the question of fundamental importance which arises is whether the court should entertain the proposition that an Act of Parliament can so be assailed in the courts that matters should proceed as though the Act or some part of it had never been passed... such doctrine would be dangerous and impermissible. It is the function of the courts to administer the laws which Parliament has enacted. In the processes of Parliament there will be much consideration whether a bill should or should not in one form or another become an enactment. When an enactment is passed there is finality, unless and until it is amended or repealed by Parliament. . . it must surely be for Parliament to lay down the procedures which are to be followed before a bill can become an Act. It*

> *must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its standing orders and further to decide whether they have been obeyed: it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders."*[35]

> *233. This ancient right remains of fundamental constitutional importance. The exclusive right of the two Houses to make and to vary their own rules of procedure protects the legislative supremacy of Parliament and the exclusive right of the Commons to grant aids and supplies.*

6.10 This doctrine was more recently reaffirmed in the case brought by the Chairman of the Countryside Alliance, Mr. John Jackson, to challenge the Hunting Act 2004 which had made it illegal to hunt foxes with hounds.[36] In its judgement the House of Lords, in its judicial capacity, reaffirmed a long line of judicial authority to the effect that the courts of the United Kingdom had no power to declare enacted law to be invalid.

6.11 Until 1993 the protection given by Article 9 of the Bill of Rights 1689 was held to prevent the courts from even using statements made in Parliament concerning the purpose of Bills as a guide to the interpretation of ambiguous statutory provisions. This principle was overturned in the landmark judgment of *Pepper v Hart*[37] which led to the lifting of the restriction.

6.12 The case is described in the following way in the 1999 Joint Committee Report –

> *43. (...) The case concerned the proper meaning of a taxation provision. Mr Hart was a schoolmaster at a fee-paying school which operated a concessionary fee scheme enabling members of staff to have their sons educated at the school at reduced fees if surplus places were available. Tax was payable by Mr Hart on 'the cash equivalent of the benefit', but the statutory definition of that expression was ambiguous. During the committee stage of the Finance Bill in the House of Commons the financial secretary to the Treasury indicated that the basis of taxation for certain benefits in kind would remain the cost to the employer of providing the service. When pressed he interpreted this as being, in effect, the extra cost caused by the provision of the benefit in question. In Mr Hart's case the actual additional cost to the employer was negligible, because boys educated through the scheme were filling places which otherwise would have been empty. However, relying on the wording in the Act, the Inland Revenue had taxed a proportion of the total cost of providing the services.*

> *44. The House of Lords in its judicial capacity decided that clear statements made in Parliament concerning the purpose of legislation in course of enactment may be used by the court as a guide to the interpretation of ambiguous statutory provisions. The Lords held such*

[35] Pickin v British Railways Board [1974] AC 765 at 788 - 790
[36] Jackson and Others v Attorney General [2005]UKHL 56, (2006) 1AC 262
[37] Pepper (Inspector of Taxes) v Hart [1993] AC 593

use of statements did not infringe article 9 because it did not amount to questioning a proceeding in Parliament. Far from questioning the independence of Parliament and its debates, the courts would be giving effect to what was said and done there. Lord Browne-Wilkinson said -

> *'I trust when the House of Commons comes to consider the decision in this case, it will be appreciated that there is no desire to impeach its privileges in any way. Your Lordships are motivated by a desire to carry out the intentions of Parliament in enacting legislation and have no intention or desire to question the processes by which such legislation was enacted or of criticising anything said by anyone in Parliament in the course of enacting it. The purpose is to give effect to, not thwart, the intentions of Parliament.'*

6.13 Courts will now, if necessary, consider statements made by Ministers and others in parliament during the passage of legislation, as well as Explanatory Notes accompanying the draft legislation, in order to assist with statutory interpretation in the case of any ambiguity.

6.14 Certain other traditional aspects of privilege under the heading of 'exclusive cognisance' are increasingly now being dealt with in other ways as parliaments and the courts recognise that the exceptional protection and power given by privilege should be reserved for matters that are reasonably necessary for parliaments to carry out their functions. In addition, in the United Kingdom context, the traditional penal powers of Parliament as the former 'High Court of Parliament' in relation to matters such as the ability to imprison non-members in cases of contempt are increasingly seen as difficult to maintain in the 21st century. The 1999 Joint Committee Report recommended that Parliament's power of imprisonment should be abolished and its penal powers over non-members should, in general, be transferred to the High Court.[38]

6.15 The existence or otherwise of penal powers against non-members has not been tested in living memory in relation to the States of Jersey and it would seem unwise to suggest that any such theoretical powers could, or should, be exercised by the Assembly. Through legislation such as the States of Jersey Law 2005 the Assembly has already transferred much of the power of enforcement for matters that in the past might have been covered by the common law of privilege to the courts. These include –

Admission to the Assembly

6.16 The right of strangers to attend the meetings of the States is governed by Article 33 of the States of Jersey Law 2005. No stranger is entitled, as of right, to enter or remain in the precincts of the States and the Bailiff may at any time order any stranger to withdraw from the precincts of the States. The rules on admission during States meetings are set out in Standing Order 173. Failure to comply with the rules or failure to withdraw when required to do so is an offence and renders the stranger liable to a term of imprisonment of 3 months and a fine of level 2 on the standard scale (currently £500).

[38] 1999 Joint Committee Report, paragraph 324

Attendance at committee/panel meetings

6.17 The ability of a parliament to require the attendance of witnesses to give evidence is a further traditional privilege. The powers in Jersey are found in the States of Jersey (Powers, Privileges and Immunities) (Scrutiny panels, PAC and PPC) (Jersey) Regulations 2006. These Regulations, subject to certain conditions and rights of appeal, allow committees/panels to issue a summons to require the attendance of a witness and the production of documentary evidence. In addition they contain powers to require witnesses who have been summoned to answer specific questions put to them by the committee/panel. Any person who fails to comply with a summons or, when summoned, fails to answer a question as required is guilty of an offence and liable to a fine of level 4 on the standard scale (currently £5,000). These Regulations do not, however, apply to States members who are required to comply with requests to attend committees and panels by the provisions of their own Code of Conduct. This ensures that any failure to comply falls to be dealt with by members themselves as a breach of the Code and not by the criminal courts. Similar Regulations, the States of Jersey (Powers, Privileges and Immunities) (Committees of Inquiry) (Jersey) Regulations 2007 are in place in relation to the work of any Committees of Inquiry established by the States to inquire into any particular matter.

Blackmailing, menacing or compelling a member to act

6.18 It is clearly a fundamental principle that members of a parliament should be able to undertake their duties without threat or hindrance. In addition to normal common law legal remedies that may be available, Article 47 of the States of Jersey Law is in the following terms –

> ***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.*

7. FREEDOM FROM ARREST

7.1 Freedom from arrest in civil actions is the oldest privilege of the House of Commons and even pre-dates the privilege of freedom of speech. Members have never been exempt from arrest in relation to criminal matters. The immunity flows from the paramount right of parliament to the attendance and service of its members, free from restraint or intimidation by means of arrest in relation to a civil matter. For similar reasons members of parliament are often exempt from jury service and, although only Connétables are automatically exempt by law in Jersey, the Viscount's practice is, in principle, to grant an exemption to States members, upon application, in recognition that such service would detrimentally clash with their duties as States members.

7.2 The privilege of freedom from arrest has never extended in the United Kingdom and most parliaments that follow the British model to arrest in criminal matters (for the position in parts of continental Europe see Section 9 below).

7.3 The historic privilege of freedom from arrest in civil matters was considered by the 1999 Joint Committee that recommended its abolition as follows –

> *326. The principle that both Houses impose upon their members an absolute priority of attendance is the origin of other privileges that remain. One such privilege is 'freedom from arrest'. The immunity is confined to arrest in civil matters, such as orders for payment of amounts of money. The privilege, as set out in Lords standing orders, is that 'no Lord . . . is to be imprisoned or restrained without sentence or order of the House unless upon a criminal charge or for refusing to give security for the peace'. The privilege appears never to have applied to members of either House in respect of criminal charges, or to any matter which includes an element of criminality, such as criminal contempt of court. The privilege is enjoyed 'within the usual times of privilege of Parliament' which is customarily interpreted to mean during the session of Parliament and for 40 days before and after. It thus covers long adjournments such as the summer recess.*
>
> *327. The immunity lost most of its importance in 1870 when, with a few exceptions, imprisonment for debt was abolished. It now seems to have little, if any, scope beyond providing immunity from arrest for disobedience of a court order in civil proceedings, such as an order to hand over property. The Attorney General told us the privilege was of extremely limited application, and Sir Donald Limon thought it was no longer relevant and was confusing to the public. Such justification as exists for its continuance resides in the principle that Parliament should have first claim on the service of its members, even to the detriment of the civil rights of others. The 1967 committee took the view it was wrong for the claims of individuals to be obstructed by use of members' immunity from arrest, and considered the privilege anomalous and of little value. The 1967 committee recommended that legislation should be introduced to abolish the privilege. We agree, and **so recommend**.*

7.4 The position in relation to this privilege is similar in other Commonwealth jurisdictions. The position in the Canadian House of Commons has been summarised as follows –

> [Freedom from arrest] *"has only applied to arrest and imprisonment under civil process and does not interfere with the administration of criminal justice. It is not claimable for any incident having a criminal character or a criminal nature, for treason, felony, breach of the peace, matters including criminal offences under federal statutes, breaches of provincial statutes (considered quasi-criminal) which involve the summary jurisdiction of the Criminal Code, or any indictable offence.*
>
> *It goes without saying that if Members are charged with infractions of the law, then they must abide by the due process of law just like any other citizen. To do otherwise would be contemptful of the justice system. While a Member is protected from arrest for civil contempt of court, there is no protection from arrest for criminal contempt of court. If a Member is arrested on a criminal charge or is committed for a contempt of court, the House should be notified by the authorities if it is in session. If a Member is committed for high treason or any criminal offence, the House is informed by way of a letter addressed to the Speaker by the judge or magistrate."*[39]

7.5 In Australia the protection from arrest in civil matters on days when a member is required to attend either House has been set out in the Parliamentary Privileges Act 1987 (Cth) where Section 14 states –

> ***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)*

7.6 The immunity is nevertheless considered to be of little significance in Australia –

[39] Marleau and Montpetit, [Canadian] *House of Commons Procedure and Practice*, Chenelière McGraw-Hill, Montreal, 2000, pages 79-80

> *"The immunity from arrest in a civil cause is now of little significance. The potential for a person to be arrested and imprisoned by a civil, as distinct from a criminal, process is now extremely small, due to changes in the law and the narrow compass which the courts have given to purely civil causes by interpretation. The immunity extends to witnesses required to attend on parliamentary committees and to officers required to attend on the Houses or their committees.*
>
> *In some countries the immunity extends to criminal matters, and a member may not be arrested or prosecuted without the consent of the relevant house. This may be regarded as a security against the obstruction of members by abuse of the processes of law, but in view of the general integrity of the criminal process in Australia, it would not seem to be appropriate here."*[40]

7.7 There is no specific provision in Jersey in relation to freedom from arrest in civil matters but as set out above the issue is of extremely limited relevance in the modern context.

7.8 In common with the position described above in relation to the United Kingdom, Canada and Australia it is clear that there is no immunity from arrest or detention for members of the States of Jersey in relation to criminal matters. Members are subject to the criminal law in exactly the same way as all other members of the community with exactly the same rights and obligations. There are no special provisions or immunities for States members in relation to search, arrest or detention other than the protection described earlier which exists in relation to documents that are covered by parliamentary privilege which could not be used in any criminal proceedings against the member.

7.9 The arrest and detention of members of the States in relation to allegations of criminal conduct is fortunately a rare occurrence and there is no formal requirement in Jersey of notification to the States of the arrest and detention of a member, a matter that may be worthy of further consideration particularly in cases where a member will be absent from a States meeting or the meeting of a committee/panel because of the detention. On 26th February 1980 the Australian Senate agreed to a resolution relating to the right of the Senate to receive notification of the detention of its members. A further resolution reaffirming this resolution was passed in 1987. The resolution was communicated to the Presiding Officers of the Parliaments of the Australian States, the Attorneys-General of the States and the Speaker of the House of Representatives. In the United Kingdom the relevant House must be informed in all cases when a member is arrested on criminal charges and it has been usual to communicate the cause of committal of the member after the arrest. Similar communications to Parliament are made whenever members are in custody in order to be tried by military courts-martial or have been sentenced to a term of imprisonment for a criminal offence. Notification is given to the Speaker by the judge or magistrate and the normal practice has been for the Speaker to make a statement to the House in relation to the arrest or imprisonment.

[40] Odgers' Australian Senate Practice, Eleventh Edition, 2004, Department of the Senate, Canberra

7.10 The arrest of the Conservative MP and Shadow Immigration spokesman Damien Green in November 2008 and the search of his office at the House of Commons raised a number of issues. Concerns have more recently been expressed by some States members in Jersey following the arrest and detention of Senator Syvret.

7.11 A press release issued by the UK campaign group Liberty on 28th November 2008 summarised some of the concerns raised by the arrest of Damien Green and the search of his office at the House of Commons in the following way –

"Liberty believes this incident raises the following questions –

- *In the absence of any national security or official secrets implication, why is the criminal law (as opposed to internal discipline or dismissal) even in play as a means of dealing with employee discipline within the public service?*
- *Why was a serving Member of Parliament who posed no flight risk or risk to the public arrested rather than being invited to attend for interview (as was the case with the former Prime Minister)?*
- *Who decided that it was in the public interest to employ criminal justice tools to investigate an elected representative suspected of presenting information to the public?*
- *Why such a heavy-handed operation with so many officers searching Mr Green's London flat?*
- *Why was it decided that he should be arrested and his home and House of Commons office whilst Parliament was not sitting so that questions could not be raised there?*
- *Who informed the media of Mr Green's arrest?*
- *Given that this whole matter relates to an alleged Home Office whistleblower, who in that department knew of the operation against Mr Green?"*[41]

7.12 The majority of the issues referred to above in the Liberty press release in relation to matters such as the appropriateness of the police action and the involvement of the Home Office are clearly outside the scope of this report on parliamentary privilege with the exception of the fifth bullet point relating to the search of Mr. Green's office in the House of Commons.

7.13 On 8th December 2008 the House of Commons approved a Government motion put forward by Leader of the House in the following terms –

[41] http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2008/damien-green-s-arrest.shtml

"That, following the search of a Member's office in the Parliamentary Estate by the police and the seizure of material therein, a committee be appointed to review the internal processes of the House administration for granting permission for such action, and to make recommendations for the future;

That the committee must not in any way prejudice any police inquiry or potential criminal proceedings and that therefore it will be adjourned immediately after choosing a chairman until the completion of any relevant inquiry or proceedings that may follow;

That the committee have power to send for persons, papers and records; to report from time to time; to sit notwithstanding any adjournment of the House; and

That the committee consist of seven members appointed by the Speaker reflecting the composition of the House."

7.14 During the debate on the motion many members expressed concern about the privacy of members' correspondence and significantly different views were expressed about the relevance or otherwise of parliamentary privilege in this case as these extracts from different parts of the debate show -

Mrs. Theresa May (Con) –
"There will be some people who will ask why we should bother with this - surely no MP is above the law. Of course, that is the case - no Member of Parliament is above the law, and parliamentary privilege has never protected MPs against criminal proceedings.

There are, however, two key issues at stake. First, MPs must be able to do their job, both in representing their constituents and in holding the Government to account. What we are talking about today is the search of an MP's office and the seizure of material that was fundamental to the ability of my hon. Friend to do his job. Crucially, material held by an MP which is going to be used or is capable of being used in parliamentary proceedings is indeed subject to parliamentary privilege, which we hold not for ourselves on our behalf but for our constituents."

(...)
"I said that we held parliamentary privilege not on our own behalf, but on behalf of our constituents. The second issue at stake is the relationship of trust between an MP and their constituents - trust that means that constituents feel able to share information with a Member on the basis of confidentiality. Constituents do not give information to their Member of Parliament on the basis that one day it might be pored over by police officers. Parliamentary privilege is not our privilege; it is the people's privilege.

That is because we need to clarify the meaning of parliamentary privilege, who can and cannot grant access to an MP's office and effects and – crucially - where constituents stand on the information

given to their Member of Parliament in the expectation of confidentiality. Those questions need to be resolved; they cannot be left hanging in the air until the Government deem it convenient to have a debate."

Mr. Frank Dobson (Labour)
"We all agree that there is something called parliamentary privilege, but hardly anybody agrees exactly what it amounts to. It is apparent from reading articles by apparently learned academics in the news media that they do not agree either on the boundaries of our parliamentary privilege.

If we are serious about parliamentary privilege, we need to clarify what we mean by it."

Sir Gerald Kaufman (Labour)
"The hon. Gentleman's party [the Conservative party] *and sections of the press seem to be seeking to create a new privilege for Members of Parliament, which has never existed before and ought not to exist now - namely that it is in some way a breach of parliamentary privilege for the police to search the office of a Member of Parliament without a warrant, and that a Member of Parliament's correspondence with his or her constituents has some special privilege which the police have violated. All that is nonsense."*

(...)
"All the parliamentary documents that I have been able to examine, including "Erskine May" and Standing Orders, contain nothing relevant to this controversy, and confirm no privilege of any kind in such circumstances. The nearest we can come to anything relevant to this huge unwarranted fuss is contained in the excellent briefing for this debate prepared by the House of Commons Library[42]*. A statement by one Professor Bradley* [interruption] *professor of constitutional law at Edinburgh University, says that there is, effectively, protection for MPs' correspondence in certain circumstances, but this is no more than a common-law right based on case law. In fact, the police had a perfect right to search the hon. Gentleman's correspondence without a warrant, and indeed without anyone's permission."*

Mr. Frank Field (Labour)
"As my right hon. Friend the Member for Holborn and St. Pancras (Frank Dobson) pointed out, one of the problems is that many of our constituents, and at least some of us, are confused about what our privileges are and why we have them. It would not only be useful for them to be set out again but, as the shadow Leader of the House said, it might be good to see whether we should move to a statutory basis for those privileges. Their purpose is not to boost us and our egos but - we hope - to allow us to carry out our duties in a way that furthers the interests of our constituents."

[42] http://www.parliament.uk/commons/lib/research/briefings/snpc-04905.pdf

Mr David Davis (Conservative)
"I cannot find an example in the past century of a Member of Parliament who has escaped the law, or proper prosecution, as a result of privilege, and I do not expect that to change as a result of what we do today."

(…)
"Let us remind ourselves of what happens elsewhere in Europe. I am the last person to draw European analogies in the House of Commons, but the simple truth is that those countries that have had totalitarian Governments in the past invariably have absolute privilege, including protection from arrest. A German MP cannot be arrested without a motion from the Bundestag, and that arises from previous abuse and intimidation of German Members of Parliament. I am not recommending such privilege here, as that can in turn be abused. But what we have is one of the weakest sets of protections of democracy, as they should be called, in Europe."

Dr Tony Wright (Labour)
"Members in the past few days have thought, that the immunities granted to Members under the name of privilege are larger than they really are. Those immunities are not general; they are very precious, but also very defined. However, there is clearly a general misunderstanding about what they are, as my right hon. Friend the Member for Holborn and St. Pancras (Frank Dobson) said. Whatever else comes out of this debate, we ought to try to be a bit clearer about what this thing called privilege is, which would be a good thing."[43]

7.15 Even though the House voted to establish the Speaker's Committee the Conservative and Liberal Democrat parties announced that they would refuse to serve on it and at the time of writing it has still not been established. The Speaker of the House of Commons nevertheless issued a Protocol on 8th December 2008 setting out the procedures that he would expect to see followed in the future in respect of police requests for searches in the parliamentary estate –

1. *Responsibility for controlling access to the precincts of the House has been vested by the House in me. It is no part of my duties as Speaker to impede the proper administration of justice, but it is of equal concern that the work of the House and of its Members is not necessarily hindered.*

2. *The precincts of Parliament are not a haven from the law. A criminal offence committed within the precincts is no different from an offence committed outside and is a matter for the courts. It is long established that a Member may be arrested within the precincts.*

3. *In cases where the police wish to search within Parliament, a warrant must be obtained and any decision relating to the execution of that warrant must be referred to me. In all cases where any Officer or*

[43] For the full Hansard transcript of the 8th December 2008 debate see www.parliament.uk

other member of the staff of the House is made aware that a warrant is to be sought the Clerk of the House, Speaker's Counsel, the Speaker's Secretary and the Serjeant at Arms must be informed. No Officer or other member of the staff of the House may undertake any duty of confidentiality which has the purpose or effect of preventing or impeding communication with these Officers.

4. *I will consider any warrant and will take advice on it from senior officials. As well as satisfying myself as to the formal validity of the warrant, I will consider the precision with which it specifies the material being sought, its relevance to the charge brought and the possibility that the material might be found elsewhere. I reserve the right to seek the advice of the Attorney General and Solicitor General.*

5. *I will require a record to be provided of what has been seized, and I may wish to attach conditions to the police handling of any parliamentary material discovered in a search until such time as any issue of privilege has been resolved.*

6. *Any search of a Member's office or belongings will only proceed in the presence of the Serjeant at Arms, Speaker's Counsel or their deputies. The Speaker may attach conditions to such a search which require the police to describe to a senior parliamentary official the nature of any material being seized which may relate to a Member's parliamentary work and may therefore be covered by parliamentary privilege. In the latter case, the police shall be required to sign an undertaking to maintain the confidentiality of that material removed, until such time as any issue of privilege has been resolved.*

7. *If the police remove any document or equipment from a Member's office, they will be required to treat any data relating to individual constituents with the same degree of care as would apply in similar circumstances to removal of information about a client from a lawyer's office.*

8. *The execution of a warrant shall not constitute a waiver of privilege with respect to any parliamentary material which may be removed by the police.*

7.16 A similar protocol was issued in respect of the House of Lords.

7.17 The fact that members of the States do not have individual offices within the precincts of the States and that they do not normally keep large amounts of documentation in the States Building makes comparisons with the United Kingdom difficult. H.M. Attorney General was asked a question in relation to this issue on 20th January 2009 and replied as follows –

> ***"3.10 The Deputy of St. John of the Attorney General regarding the investigation of members by the police within the States Building:***
> *Following the recent events at Westminster, would the Attorney General advise whether Members have any protection from*

investigation by the police within the States Building, while carrying out their business as Ministers, Scrutiny Panel members or Back-Benchers, and if so, outline what protection exists and whether a warrant to search Members' possessions, lockers, desks and computers within the States building could be issued, by whom and on what grounds?

The Attorney General:
I would like to congratulate the Deputy of St. John on a question which is far too difficult to answer at 3 days' notice also. There is no special protection ... and I would ask Members to take my response in light of that opening statement. There is no special protection for any Member from investigation by the police, whether within or without the States building, other than through the ordinary parliamentary privileges which might be claimed. A warrant to search Members' possessions, lockers, desks and computers could be issued under relevant provisions in the Police Procedures and Criminal Evidence (Jersey) Law 2003. Such warrants can only be obtained where there are reasonable grounds for believing a serious offence has been committed, of which there is evidence on the premises, and where the evidence is relevant, not legally privileged, and does not consist of excluded or special procedure material. Under the Police Procedures and Criminal Evidence law, warrants can be issued by the Bailiff, the Deputy Bailiff, or in the case of many statutory provisions, by Jurat. It may well be that the Privileges and Procedures Committee, in consultation with the Bailiff will want to consider what guidance ought to be given to Members in relation to parliamentary privilege."

7.18 It is probable that the House of Commons will look further into the issues raised in the Damien Green affair now that the police have announced that no criminal charges are to be brought against him and it would undoubtedly be worthwhile for the Privileges and Procedures Committee to review the position in Jersey in due course in the light of any recommendations made in the United Kingdom.

8. THE RELATIONSHIP BETWEEN PARLIAMENT AND THE COURTS IN RELATION TO PARLIAMENTARY PRIVILEGE

8.1 The relationship between parliament and the courts in relation to privilege is an extremely important one. The relationship was described in the following way in the 1999 Joint Committee Report –

> *23. The legislature and the judiciary are, in their respective spheres, estates of the realm of equal status. A recurring theme throughout this report is the relationship between these two estates. Parliamentary privilege is founded on the principle that the proper conduct of parliamentary business without fear or favour, let or hindrance, requires that Parliament shall be answerable for the conduct of its affairs to the public as a whole (and specifically in the case of the Commons to the electorate). It must be free from, and protected from, outside intervention. Parliament is sovereign over its own business. The courts have a legal and constitutional duty to protect freedom of speech and Parliament's recognised rights and immunities, but they do not have power to regulate and control how Parliament shall conduct its business. Parliament in turn is careful not to interfere with the way the judges discharge their judicial responsibilities. Parliament enacts the law, but the courts are then left to interpret and administer it without interference by Parliament.*
>
> *24. This important constitutional principle of the separation of powers inevitably gives rise to a question of boundaries: identifying the areas where the ordinary law of the land prevails, enforceable by the courts, and the no-go areas where the courts must step back and the special rights and immunities of parliamentary privilege prevail. In the past there were disputes between the courts and Parliament. There was confrontation and tension. This is no longer so. Currently there is a large measure of agreement between Parliament and the courts about the areas where Parliament reigns supreme. For more than a century the courts have carefully avoided the dangers inherent in disagreements with Parliament. In 1974 the courts refused to entertain a claim that a private Act of Parliament had been procured by fraud on the part of the promoter of the bill. This was held to be a matter for investigation by Parliament alone. Lord Simon of Glaisdale said –*
>
> > *'It is well known that in the past there have been dangerous strains between the law courts and Parliament—dangerous because each institution has its own particular role to play in our constitution, and because collision between the two institutions is likely to impair their power to vouchsafe those constitutional rights for which citizens depend on them. So for many years Parliament and the courts have each been astute to respect the sphere of action and the privileges of the other.'*

8.2 It is now accepted that the role of the courts in relation to matters of parliamentary privilege is to inquire into the existence and extent of privilege but not the exercise of the privilege. In the case of *Stockdale v Hansard*[44] Lord Denman, C.J. said *"Where the subject matter falls within their jurisdiction, no doubt we cannot question their judgment; but we are now enquiring whether the subject matter does fall within the jurisdiction of the House of Commons."* If the court finds that a matter is one for parliament alone it will not then enquire further into the exercise of the privilege. Commissioner Beloff QC referred to this in his judgement in the case of *Syvret v Bailhache and Hamon*[45] in the following way –

> ***"Jurisdiction of the court***
> *I must at the outset determine the limits of the court's powers in this peculiar context. In my judgment, if I am satisfied that the matters complained of do relate to the regulation of the internal proceedings of the States, I cannot interfere with any of them and must decline jurisdiction. Existence of a privilege, the nature of which may vary between legislative assemblies, may be for the courts. Exercise of an acknowledged privilege manifestly is not. I remind myself that it "behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament" (R. v. H.M. Treasury, ex p. Smedley ([1985] Q.B. at 666, per Donaldson, M.R.). In Burdett v. Abbot, Lord Ellenborough said (104 E.R. at 558): "[I]f a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the case of that Court, nor of any other of the Superior Courts, inquire further .."""*

8.3 In summary the only area for court review is at the initial stage to determine the existence or otherwise of a privilege that is necessary for the legislature to function. Once the courts have established that a privilege exists they will decline jurisdiction to enquire any further into the manner in which the legislature in question has exercised the privilege.

8.4 In a democratic society it is essential that the courts and parliament are aware of their respective constitutional roles. Just as the courts will not interfere in the internal affairs of parliaments so parliamentarians should refrain, through the *sub judice* rule from interfering with matters that are before the courts. The 1999 Joint Committee Report referred to the relationship between parliament and the judiciary in the following way –

> *226. Much of this report is necessarily concerned with the relationship between Parliament and the courts. The effective working of the constitution depends on the courts being ever sensitive to the need to refrain from trespassing upon the province of Parliament or even appearing to do so, and on Parliament being similarly sensitive to the need to refrain from trespassing upon the province of the courts. This is generally recognised by both institutions. This relationship would not be helped if judges were to make unnecessary or exaggerated critical comments on the actions of politicians, or if politicians use*

[44] Stockdale v Hansard [1839] 112 ER at 1168
[45] Syvret v Bailhache and Hamon [1998] JLR 128

parliamentary privilege to attack particular judicial decisions or the character of individual judges.

227. So far as Parliament is concerned, both Houses consider opprobrious reflections on members of the judiciary to be out of order unless made on motion. In the Commons 36 motions critical of judges or seeking their removal have been tabled since 1961. None has been debated.

228. Occasionally statements or actions by members of Parliament may merit judicial criticism. Likewise, judicial decision or comment may merit criticism by members of Parliament. It is important for both institutions that such criticism is made in measured terms. In all cases members should pause to consider before tabling motions which often receive wide publicity. We agree with the Lord Chief Justice of England that a tradition of mutual reticence serves the country best.

8.5 The reference above refers to the evidence to the Joint Committee on 17th February 1999 of Lord Bingham of Cornhill, Lord Chief Justice, who stated *"I am inclined to support the existing rules on the basis that the system works best if there is mutual reticence. I have no doubt that, if Members of Parliament were more free in their criticism of judges, then judges would be tempted to become more free to criticise Members of Parliament. I think that is totally undesirable. I think a tradition of mutual reticence probably serves the country best."*

8.6 Although the manner in which the courts interpret the scope of parliamentary privilege will undoubtedly evolve over time it is important to stress that it remains open to parliaments to legislate to clarify or amend its scope. This was done, for example, in Australia in the 1980s where the Parliamentary Privileges Act 1987 (Cth) was enacted primarily to settle a disagreement between the Australian Senate and the Supreme Court of New South Wales over the scope of the privilege of freedom of speech following judgements by the court in 1985 and 1986 that Parliament considered to be unacceptable. The 1987 Act was introduced for the express purpose of overturning the adverse court judgements. This course of action remains open to parliament at any time.

9. PARLIAMENTARY IMMUNITY – THE CONTINENTAL EUROPEAN MODEL

9.1 Unlike in most European national parliaments, parliamentary privilege in the United Kingdom eschews any concept of the personal immunity or 'inviolability' of individual Members except in so far as is necessary to enable the relevant House to perform its functions and exercise its collective privileges.

9.2 Although it is no direct relevance to the position in Jersey it is nevertheless perhaps of interest to compare briefly the scope of immunity available to parliamentarians in the 'British model' with the position in other jurisdictions, particularly those in many parts of continental Europe.

9.3 Parliamentary immunity traditionally takes one of two basic forms, each with advantages and disadvantages. In common with the British model, the United States and many Commonwealth countries including India, New Zealand, Canada, Malaysia, Singapore, South Africa and Malta, adopt a relatively narrow scope of immunity as described throughout this report, restricting protection to actions and statements that parliamentarians undertake directly in their capacity as politically elected representatives and lawmakers. Jersey follows this model. As explained above, if parliamentarians engage in illegal activity outside their legitimate role as representatives, they are subject to investigation, prosecution, trial, and punishment like any other citizen.

9.4 This approach can be contrasted with the model common in many, but not all, states of continental Europe which was based originally on the French system first established after the French Revolution when the need to safeguard the representatives of the people and protect them from abuse was seen as of paramount importance.

9.5 The immunity of French Parliamentarians is set out in Article 26 of the Constitution of 5th Republic as follows –

> *Article 26*
>
> *Aucun membre du Parlement ne peut être poursuivi, recherché, arrêté, détenu ou jugé à l'occasion des opinions ou votes émis par lui dans l'exercice de ses fonctions.*
>
> *Aucun membre du Parlement ne peut faire l'objet, en matière criminelle ou correctionnelle, d'une arrestation ou de toute autre mesure privative ou restrictive de liberté qu'avec l'autorisation du bureau de l'assemblée dont il fait partie. Cette autorisation n'est pas requise en cas de crime ou délit flagrant ou de condamnation définitive.*
>
> *La détention, les mesures privatives ou restrictives de liberté ou la poursuite d'un membre du Parlement sont suspendues pour la durée de la session si l'assemblée dont il fait partie le requiert.*

L'assemblée intéressée est réunie de plein droit pour des séances supplémentaires pour permettre, le cas échéant, l'application de l'alinéa ci-dessus.

(In its official translation from the French Constitutional Council –)

Article 26

No Member of Parliament shall be prosecuted, investigated, arrested, detained or tried in respect of opinions expressed or votes cast in the performance of his official duties.

No Member of Parliament shall be arrested for a serious crime or other major offence, nor shall he be subjected to any other custodial or semi-custodial measure, without the authorization of the Bureau of the House of which he is a member. Such authorization shall not be required in the case of a serious crime or other major offence committed flagrante delicto or when a conviction has become final.

The detention, subjecting to custodial or semi-custodial measures, or prosecution of a Member of Parliament shall be suspended for the duration of the session if the House of which he is a member so requires.

The House concerned shall meet as of right for additional sittings in order to permit the application of the foregoing paragraph should circumstances so require.

9.6 The continental model generally provides parliamentarians with a much wider immunity than the 'British' model, including protection from both civil and criminal prosecution, within and outside of their roles as parliamentarians. In general parliamentarians are protected from all arrest or prosecution unless parliament agrees to waive the immunity.

9.7 The immunity, often referred to as 'inviolability' has its origin in the legitimate purpose of allowing legislators to express themselves freely and adopt policy positions without fear of politically motivated retribution in the face of a strong executive power or other authoritarian abuses. The extent of the immunity varies but can even extend in some countries as far as making parliamentarians immune from personal searches, house or office searches, preliminary enquiries and other investigations unless the House concerned has given its consent. In most states, however, no consent is required if the member is caught red-handed *(in flagrante delicto)* when committing a serious offence. It is worth noting, however, that in all cases the immunity merely serves to suspend legal proceedings during a member's term of office (or in some cases during the parliamentary session) and it ceases to have effect after this has expired. Legal action is therefore only postponed and not permanently prevented.

9.8 In order for the immunity to be lifted an application is usually made to the Speaker of the House concerned normally either by the prosecution services or the court. The issue is often referred to a parliamentary committee before being considered by the whole House. Refusal by parliaments to lift immunity can arise if members see definite signs that the purpose of the criminal proceedings is to unfairly persecute the member concerned and threaten his or her freedom and independence in carrying out his or her mandate, if the facts considered criminal are seen to be of a political nature or if the facts are not considered to be serious or without any obvious grounds. Immunity will usually be waived if the alleged offences are seen to be of a serious nature, not politically motivated and their urgent evaluation by the court is seen to be appropriate.

9.9 Although the wide-ranging immunity available under the continental model offers protection to parliamentarians there are concerns that broad protection from prosecution can allow parliamentarians to engage in illicit behaviour with impunity. Corrupt politicians may use a seat in parliament to cloak illicit activities and, if they are government supporters, they can then be protected by a refusal of their colleagues in the parliamentary majority to lift the immunity. Conversely, in jurisdictions with a corrupt Executive power, the parliamentary majority can vote to lift immunity to persecute opposition members in relation to politically motivated allegations.

10. CONCLUSION

10.1 This Report has tried, as far as possible, to set out in a purely factual way the history and scope of parliamentary privilege as it applies in legislatures such as the States of Jersey that follow a 'Westminster' model.

10.2 As stated earlier it is impossible to say with total certainty how the courts in Jersey would determine the precise boundaries of privilege as it applies to the States and States members individually. It is nevertheless clear from the statutory provisions found in the States of Jersey Law 2005 and the judgement of Commissioner Beloff QC in the case of *Syvret v Bailhache and Hamon* that privileges very similar to those that exist in the United Kingdom and in many other parts of the Commonwealth are applicable in Jersey and the courts in Jersey would undoubtedly consider judicial precedents from those jurisdictions in determining any matter coming before them. In common with the position in other jurisdictions the role of the court would be limited to determining whether or not a privilege existed and not to enquiring into the manner in which the States had exercised that privilege.

10.3 As stated in many of the extracts quoted in this Report there will always be areas of uncertainty in relation to the scope of privilege and it is also inevitable that its boundaries will evolve over time. It always remain open to the States of Jersey to clarify and define those boundaries through legislation if it is felt that there are areas of uncertainty that need to be addressed.