

**WRITTEN QUESTION TO THE CHAIRMAN OF PRIVILEGES AND PROCEDURES
COMMITTEE BY DEPUTY G.P. SOUTHERN OF ST. HELIER
ANSWER TO BE TABLED ON TUESDAY 28th APRIL 2009**

Question

Will the Chairman outline for members the extent to which parliamentary privilege extends to the protection of the privacy of members' correspondence and documentation, whether in hard copy or electronic forms:

- (a) relating to the business of the States of Jersey
- (b) relating to the representation of individual constituents

and how that compares with the UK and other parliamentary bodies?

Does the Chairman consider that the actions of the States of Jersey Police in their behaviour towards Senator Syvret constitute a breach of such privilege?

Answer

The extent of parliamentary privilege is an extremely complex and wide-ranging issue that parliaments across the world have cause to consider frequently. It is therefore only right at the outset to point out that it would be naïve to suggest that a complete and definitive statement of the position in Jersey could be prepared and presented to members in the one week period since the submission of this question. PPC is nevertheless extremely aware that members are keen to understand more about this issue and had already initiated research into this subject when this question was submitted. The Committee expects to be in a position to provide a more comprehensive statement to members in the coming weeks.

As a general rule parliamentary privilege is only applicable in relation to 'proceedings in Parliament', with that protection extending to parliamentary proceedings such as committee work and matters such as reports and propositions presented to parliament. It does not extend to members' activities outside Parliament unless they are directly related to 'proceedings in Parliament' and in this context members do not benefit from any additional legal protection when compared to other members of the community.

The most definitive work in recent years on privilege in the United Kingdom Parliament, even though its conclusions have not yet been implemented, is still considered to be the First Report of the Joint Committee on Parliamentary Privilege of the House of Lords and the House of Commons that was published on 30th March 1999¹. The Joint Committee worked for nearly 2 years on this topic and its Report sets out in great detail the nature of parliamentary privilege and its practical implications. The most relevant sections of that Report as it relates to this question are as follows –

¹ <http://www.publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4302.htm>

Members' correspondence

103. One important area of uncertainty is members' correspondence. There has been long-standing concern about correspondence and other communications undertaken on behalf of constituents by members of the House of Commons. Members of both Houses now engage in many different activities in discharging their parliamentary duties. As well as speaking in debates, participating on committees and asking parliamentary questions, they write letters and make representations to ministers, government agencies and a wide variety of bodies, both public and private. Constituents of members of the House of Commons expect their members to take up their concerns at local and at national level. In recent years members' work has been transformed by a very substantial increase in this type of constituency correspondence. Most of these activities are not protected by parliamentary privilege. Article 9 [of the Bill of Rights 1689 which states that "freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament] protects parliamentary proceedings: activities which are recognisably part of the formal collegiate activities of Parliament. Much of the work of a member of Parliament today, although part of his duties as a member of Parliament, does not fall within this description.

104. This issue arose in 1958 in a case concerning a member, Mr George Strauss. He wrote an allegedly defamatory letter to a minister on a matter he might later have wished to raise in the House, namely, criticism of the purchasing policies of the London Electricity Board. The House resolved by a narrow majority that the letter was not a proceeding in Parliament as it did not relate to anything then before the House.

105. Both the 1967 House of Commons committee on parliamentary privilege and its 1977 committee of privileges, as well as the 1970 joint committee on publication of proceedings in Parliament, considered the House's decision was right in law. But all agreed that the argument in favour of correspondence with ministers having the benefit of absolute privilege in defamation actions was so compelling that the law should be changed. The 1977 committee considered it was anomalous for a member's communications with the parliamentary commissioner for administration to enjoy absolute privilege under the Parliamentary Commissioner Act 1967 while his communications with a minister did not. The 1970 joint committee's proposed statutory definition of 'proceedings' included:

'all things said, done or written between members or between members and officers of either House of Parliament or between members and ministers of the Crown for the purpose of enabling any member or any such officer to carry out his functions as such . . .' (our italics).

106. There is force in the view that proceedings in Parliament should include letters to ministers raising matters which could equally well be pursued by parliamentary question and thus be absolutely privileged. The parliamentary question developed as a device for raising specific matters capable of being answered shortly and without the need for debate. The 1967 committee commented:

'Many members now use the parliamentary question as a weapon of penultimate resort to give publicity to its subject-matter when, and only when, they cannot obtain satisfaction by correspondence; yet the House has taken the view that such

correspondence does not fall within the ambit of 'proceedings in Parliament' . . . The practical effect of this distinction seems to Your Committee to be indefensible'.

To some extent the distinction has recently been blurred further, now that a question to a minister may elicit a reply in the form of a letter from the head of the executive agency more directly concerned. Even if not 'proceedings', such replies, when published in the official report, are protected by the absolute privilege afforded by the Parliamentary Papers Act 1840.

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 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 preemptorily, 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.

Members' drafts and notes

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'.

The House agreed with this conclusion.

The above extract shows that, in the United Kingdom, the protection provided by parliamentary privilege is not considered to extend to matters such as correspondence sent by members and there is no reason to believe that the position in Jersey is any different. PPC does nevertheless intend to research the position relating to documentation such as draft propositions or correspondence from a States member relating directly to a matter being brought to the Assembly to ascertain the point at which parliamentary privilege begins.

PPC notes that some members have referred to the concerns expressed in relation to the recent arrest of Damien Green MP and the search of his office and other premises. The recent report by the House of Commons Home Affairs Committee "Policing process of Home Office Leaks Inquiry" (HC 157 published on 16th April 2009) raises concerns firstly in relation to the manner in which the Police were allowed by the Serjeant-at-Arms to access the Palace of Westminster without a search warrant and secondly to the proportionality of the actions of the Home Office and the police in the light of the nature of the 'leaked' documents. Questions of parliamentary privilege were said by the Committee to be outside its remit.

During the States sitting of 20th January 2009, the Deputy of St. John asked H.M. Attorney General to advise whether States members had 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 to 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 responded as follows -

'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.'

As set out above PPC has already begun the research as suggested by the Attorney General and expects to be in a position to present a more definitive statement once that work is completed.

The Committee plans to publish this in the form of a comprehensive report covering all aspects of parliamentary privilege and this will include addressing issues that are raised in this question such as the relationship between parliamentary privilege and the arrest of members, the search of their premises (including searches of the States Building) and the seizure of their documents under the Police Procedures and Criminal Evidence (Jersey) Law 2003 and other legislation.

It would not be appropriate for PPC to comment at this stage on the individual case of Senator Syvret as it knows nothing about the circumstances of the police action or the nature of the material seized.