

DEFAMATION (PARLIAMENTARY PROCEEDINGS) (AMENDMENT) BILL [HL]

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Defamation (Parliamentary Proceedings) (Amendment) Bill [HL], as introduced on 10th October 2013. They have been prepared in order to assist the reader of the Bill and to help inform debate.
2. The Notes are to be read in conjunction with the Bill. They are not a comprehensive description of the Bill. Where a clause or part of a clause does not seem to require any explanation or comment, none is given.

COMMENTARY ON CLAUSES

Clause 1

Reports etc of certain Parliamentary matters protected by privilege

Effect

3. Clause 1 inserts a provision into the Defamation Act 2013 to provide that reports of proceedings in Parliament; reports of anything published by or on the authority of Parliament; and fair and accurate copies of, extracts from, or summaries of anything published by or on the authority of Parliament are protected by qualified privilege.
4. Where the defendant shows that the proceedings relate to such a publication the court must stay the proceedings.
5. Clause 1(3) provides that the section applies to such publications in relation to proceedings in the Welsh Assembly and Northern Ireland Assembly. To be clear, the aim of this section is not to extend the territorial reach of the bill further than permitted under current devolution arrangements. It is simply to ensure that within England and Wales reporting of the proceedings of regional Assemblies are covered by the protection afforded by Clause 1(1) and 1(2) (subject to Clause 1(4)).
6. The defence may be defeated if the claimant can prove that the defendant acted with malice in publishing the statement complained of.

7. The provision would be subject to the interpretive provisions of the Defamation Act 2013, which defines “publish” and “publication” by reference to the law of defamation generally.

Background

8. This clause bolsters and clarifies the protection afforded by the common law and the Parliamentary Papers Act 1840 to publishers of reports, copies, extracts and summaries of parliamentary proceedings. In doing so it gives effect to recommendations contained in the 2013 Report of the Joint Committee on Parliamentary Privilege, the 2012 Report from the Joint Committee on Privacy and Injunctions, the 2011 Report of the Joint Committee on the Draft Defamation Bill, the 2010 Report of the Committee on Culture, Media and Sport, and the 1999 Report of the Joint Committee on Parliamentary Privilege.
9. Section 1 of the Parliamentary Papers Act 1840 prevents any civil or criminal proceedings in respect of a ‘report, paper, votes or proceedings’ published by order of either House. Section 2 confers similar protection on copies of such publications. Section 3 confers a lesser degree of protection on ‘any extract from or abstract of’ such publications, which must be published in good faith and without malice.
10. Newspaper reports which are not taken from Hansard are also protected at common law. *Wason v Walter*¹ established that, by analogy with reports of court proceedings, a publisher of a report of a parliamentary debate is protected at common law from actions for defamation. If the whole debate is published the protection is absolute; if less than the whole is published, the protection is qualified by the requirement that it is published without malice.²
11. *Wason v Walter* was decided by analogy with the privilege afforded to court proceedings, and Cockburn CJ stated:

“[given the] paramount public and national importance that proceedings of the Houses of Parliament shall be communicated to the public, ... to us it seems clear that the principles on which the publication of reports of proceedings of Courts of Justice have been held to be privileged apply to the reports of Parliamentary proceedings. The analogy between the two cases is in every respect complete.”³
12. Section 15 of the Defamation Act 1996 confers qualified privilege on reports of the proceedings in public of a legislature anywhere in the world,⁴ as well as material published by or on the authority of a government or legislature anywhere in the world.⁵

¹ (1868-69) 4 QB 73

² Joint Committee on Parliamentary Privilege Report 1999, paragraph 356.

³ *Wason v Walter* (1864) 4 QB 73 at 89.

⁴ Schedule 1, paragraph 1.

⁵ Schedule 1, paragraph 7.

The report must be fair and accurate and published without malice, and in the public interest.

13. In 1999 the Joint Committee on Parliamentary Privilege described the 1840 Act as being “drafted in a somewhat impenetrable early Victorian style” and recommended that:

“[T]he protection given to the media by the 1840 Act and the common law itself should be retained. We consider, further, that the statutory protection would be more transparent and accessible if it were included in a modern statute, whose language and style would be easier to understand than the 1840 Act. We recommend that the 1840 Act, as amended, should be replaced with a modern statute.”⁶

14. The 1840 Act was considered also by the House of Commons Culture, Media and Sport Committee in their report *Press Standards, Privacy and Libel*.⁷ Referring to the 2009 case between *Trafigura* and the *Guardian* Newspaper, the Committee concluded that Parliamentary questions which had been tabled regarding the case were clearly covered by these provisions and would not therefore be covered by the then existing ‘super-injunction’ which prevented publication of any reference to the case.

15. However, this interpretation was challenged by Carter-Ruck, the firm acting for *Trafigura*, in evidence to the Committee. Carter-Ruck submitted that the *Guardian* was restrained under the injunction from reporting the question on the basis that:

“[T]he *Guardian* did not contend that the information which it proposed to publish would be confined to material within the scope of Section 3 of the [1840] Act; even if it had been, it would still beg the question whether a newspaper which is subject to an injunction can claim to be acting ‘bona fide’ within the definition of the Act if, rather than seek a variation, it chooses to publish material in breach of the injunction.”⁸

16. The Committee commented that:

“The free and fair reporting of proceedings in Parliament is a cornerstone of a democracy. In the UK, publication of fair extracts of reports of proceedings in Parliament made without malice are protected by the Parliamentary Papers Act 1840. They cannot be fettered by a court order. However, the confusion over this issue has caused us the very gravest concern that this freedom is being undermined. We therefore repeat previous recommendations from the Committee on Parliamentary

⁶ Paragraph 374.

⁷ House of Commons Culture, Media and Sport Committee *Press standards, privacy and libel* Second Report of Session 2009-10, paragraphs 94-102.

⁸ Ev 462, quoted at paragraph 99, vol I. Although the issue in question in this situation was once of Contempt, it is possible to foresee a similar argument being deployed in the context of a defamation claim.

Privilege that the Ministry of Justice replace the Parliamentary Papers Act 1840 with a clear and comprehensible modern statute.”⁹

17. The Joint Committee on the Draft Defamation Bill recommended that reports of parliamentary proceedings should be absolutely privileged, on the basis that it is of fundamental importance that proceedings in Parliament can be reported upon freely by the press to ensure that people can discover what is being said and done by elected representatives on their behalf.

“We recommend adding a provision to the Bill which provides the press with a clear and unfettered right to report on what is said in Parliament and with the protection of absolute privilege for any such report which is fair and accurate.”¹⁰

18. The Government response left the issue to the Parliamentary Privilege Green paper, which drew a different conclusion¹¹

“An absolute privilege for “fair and accurate reporting” would remove the existing conditions in common and statute law that reports of parliamentary proceedings are in good faith and without malice. The Government believes these protections remain crucial. For example, in considering these issues in its recent report, the Joint Committee on Privacy and Injunctions raised the possibility of the media passing private information covered by a court injunction to Members, encouraging them to use the information in parliamentary proceedings, and then reporting on those proceedings in the knowledge that no legal consequences can follow. The Government believes that in such circumstances it is right that the person who took out that injunction should have the right at least to ask the courts to consider whether the newspaper had acted in bad faith and so was in contempt of court.”¹²

19. The 2013 Joint Committee on Parliamentary Privilege did not support extending absolute privilege to all reports of proceedings in Parliament, on the basis that the existing protection of qualified privilege already provides a robust defence of press freedom, and that to claim otherwise would mean that those reporting on Parliamentary proceedings would have carte blanche to publish defamatory stories about individuals, who would be left without a remedy.

20. The Committee concluded that there is uncertainty as to the extent of the current protection in law, and that this uncertainty significantly inhibits press reporting of the

⁹ Paragraph 101

¹⁰ Paragraph 51

¹¹ The Green Paper proposed instead to change the burden of proof so that it would lie with the claimant to establish malice, paragraphs 304 – 313.

¹² Paragraph 311

work of Parliament. The Committee recommended that qualified privilege should attach in all circumstances to fair and accurate reports of things said or done in Parliament.¹³

Clause 2

Parliamentary Papers Act 1840

21. Clause 1.4 of the draft bill creates a possible conflict with section 3 of the Parliamentary Papers Act 1840 (“PPA”), which states:

“It shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any extract from or abstract of such report, paper, votes, or proceedings, to give in every . . . such report, paper, votes, or proceedings, and to show that such extract or abstract was published bonâ fide and without malice; and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant or defendants”.

22. Under s3 PPA 1840, the burden of proof lies with the defendant to show that he did not act with malice. Under Clause 1.4 of the draft bill, the claimant must prove that the defendant acted maliciously. The wording of the draft bill accords with s15 of the Defamation Act 1996 (as amended by the Defamation Act 2013), under which publication of fair and accurate reports of proceedings in public in a legislature anywhere in the world is privileged unless the publication is “shown to be made with malice” i.e. unless malice is proven, rather than disproven.

23. The 1999 Joint Committee on Parliamentary Privilege recommended that the PPA 1840 be replaced with a new statute which would reverse the burden of proof under s3 PPA 1840, in line with the common law (para 363). This recommendation for the reversal of the burden of proof was repeated by the 2013 Report of the Joint Committee on Parliamentary Privilege (para 196). The effect of Clause 2 is to implement the recommendations of these two Committees, to avoid a conflict of law and to avoid placing an unfair burden on the defendant to a libel action. To require him to prove that publication was malicious unless he shows otherwise is not to give him the benefit of the doubt.

Clause 3

Evidence concerning proceedings in Parliament

Effect

24. Clause 3 provides for the repeal of section 13 and s15(3) of the Defamation Act 1996.

¹³ *Ibid*, para 13.

Background to repeal of Section 13 Defamation Act 1996

25. Section 13(1) provides that where the conduct of a person in or in relation to proceedings in Parliament is an issue in defamation proceedings, he or she may waive the protection of Parliamentary privilege for the purpose of those proceedings. Accordingly, if an MP is accused of accepting money to ask Parliamentary Questions, the MP may waive the privilege given by Article 9 of the Bill of Rights, and, in that event, evidence may be given and questions asked about the MP's conduct without infringing Parliamentary privilege. It is not possible to counterclaim for damages for a slander spoken in Parliament even against a claimant MP who has himself waived privilege for the purpose of the proceedings.

26. Section 13 was passed as an amendment to the 1996 Act in response to the perceived injustice suffered by Neil Hamilton MP as a result of Article 9 of the Bill of Rights of 1689, which meant that he could not pursue a defamation claim against *The Guardian* for allegations of corruption. The amendment was controversial despite widespread sympathy for Mr Hamilton, and even its sponsor, Lord Hoffman, acknowledged that it had defects:

“The [problem] I have in mind arises in a case in which two or more Members are together concerned in conduct in respect of which one of them wants to sue for libel. How, in that case can one of them allow his conduct to be investigated by the court without at the same time exposing the conduct of his colleagues to investigation as well?”¹⁴

27. Further principled objections were raised during debate, including the unjustifiable interference with free speech which would arise if a newspaper seeking to criticise an MP had no idea whether, or upon what basis, parliamentary privilege might be waived so as to establish the truth.¹⁵

28. Section 13 was strongly criticised by the 1999 Report of the Joint Committee on Parliamentary Privilege, chaired by Lord Nicholls of Birkenhead¹⁶ as undermining the basis of privilege and creating indefensible anomalies.

“A fundamental flaw is that it undermines the basis of privilege: freedom of speech is the privilege of the House as a whole and not of the individual member in his own right, although an individual member can assert and rely on it. Application of the new provision could also be impracticable in complicated cases; for example where two members ... are closely involved in the same action and one waives privilege and the other does not. Section 13 is also anomalous: it is available only in defamation proceedings. ... The Committee considers these criticisms are unanswerable.”¹⁷

¹⁴ HL Hansard 7 May 1996, col 28.

¹⁵ Col 40.

¹⁶ HL Paper 43/HC 214-1, 1998-99, Chapter 2

¹⁷ Paragraph 69

29. The Joint Committee recommended that section 13 should be repealed and replaced by a new provision under which either House on the advice of a committee, would make a general waiver of Article 9 in an appropriate case.

“We recommend that the mischief sought to be remedied by section 13 ... should be cured by a different means. Section 13 should be replaced by a short statutory provision empowering each House to waive Article 9 for the purpose of any court proceedings, whether relating to defamation or any other matter, where the words spoken or the acts done in proceedings in Parliament would not expose the speaker of the words or the doer of the acts to any legal liability. Each House will need to consider appropriate machinery once the section has been repealed.”¹⁸

30. The 2013 Joint Committee on Parliamentary Privilege received evidence on this issue from the Newspaper Society to the effect that a discretionary power to waive privilege would be unpredictable and retrospective and could therefore create a chilling effect which would be detrimental to openness of debate and press reporting of proceedings in Parliament.¹⁹

31. The Government also acknowledged “concerns with introducing a general power of waiver for Parliament given the potential chilling effect on debate.”²⁰

32. The Committee concluded that section 13 should be repealed without replacement on the basis that the anomalies it creates are more damaging than the mischief it was intended to cure, and that there is no persuasive argument for granting either House a power of waiver, which would have the potential to undermine the fundamental constitutional principle of freedom of speech in Parliament.²¹

Background to repeal of Section 15(3) Defamation Act 1996

33. The protection awarded to fair and accurate reports of parliamentary proceedings published without malice under the Defamation Act 1996 is not, under s15(3) (as amended by s7(2) Defamation Act 2013), applicable to a matter:

‘which is not of public interest and the publication of which is not for the public benefit’.

34. The 2012 Joint Committee on Privacy and Injunctions recommended the introduction of qualified privilege for fair and accurate reports of parliamentary proceedings²². The

¹⁸ Paragraph 89

¹⁹ Written evidence from the Newspaper Society, cited in Joint Committee on Parliamentary Privilege: Report of Session 2013-14 HL Paper 30 HC 100, para 168

²⁰ Written evidence from the Deputy Leader of the House of Commons, para 10, *ibid* para 169.

²¹ *Ibid.*, para 170

²² Session 2010-12, HL Paper 273/HC 1443, paragraph 241.

Government opposed this recommendation. The Green Paper setting out their opposition stated that they were alarmed that the recommendation omitted the qualification under existing common law that such media reports be for the public benefit²³. Discussing this, the 2013 Report of the Joint Committee on Parliamentary Privilege states (at para 183) that:

“This additional qualification of privilege, by reference to the public benefit, echoes the terms of section 15(3) of the Defamation Act 1996, but does not appear to have any foundation in common law. The judgment in *Wason v. Walter*²⁴, which expressed the common law protection afforded to reports of parliamentary proceedings, also confirmed the “paramount public and national importance that proceedings of the Houses of Parliament shall be communicated to the public”. Thus the “public benefit” of reporting proceedings in Parliament has been established as a general principle, and does not need to be demonstrated in each individual case”.

35. Repeal of s15(3) brings the Defamation Act 1996 into line with well-established common law and with the recommendation of the 2012 Joint Committee on Privacy and Injunctions and the 2013 Joint Committee on Parliamentary Privilege.

COMPATIBILITY WITH CONVENTION RIGHTS AND FREEDOMS

36. Lord Lester of Herne Hill considers that the provisions of the Bill are compatible with the Convention rights.
37. The Bill engages Articles 8 and 10 of the Convention. Article 10(1) protects the right to freedom of expression. The reporting of what is said and done in Parliament plays an important function in the realisation of the right to receive and impart information on matters of significant public interest.
38. The right to freedom of expression is qualified by exceptions and limitations contained in Article 10(2). Accordingly its exercise may be subject to restrictions where necessary in a democratic society for the protection of the reputation or rights of others.
39. Article 8 protects the right to personal privacy, which includes the right to reputation.²⁵
40. In *Von Hannover v Germany*²⁶ the European Court of Human Rights held that where both Articles 8 and 10 are engaged there is a need to ensure that a fair balance is struck between the competing rights.

²³ Cm 83189, paragraph 311.

²⁴ (1868-69) L.R. 4 Q.B. 73

²⁵ *Karako v Hungary* Application no 39311/05

²⁶ (2005) 40 EHRR 1.

*These notes refer to the Defamation (Parliamentary Proceedings) (Amendment) Bill [HL]
as introduced on 10th October 2013 [HL Bill 51]*

41. Clause 1 of the Bill strikes a balance between these two competing rights by conferring qualified privilege on reports of Parliamentary proceedings. Publishers are therefore free to publish such reports, even where they may contain defamatory material, provided they are not motivated by malice.
42. Clause 3 removes an anomaly from the law, whereby individual parliamentarians may waive parliamentary privilege in certain circumstances for the purposes of adducing evidence in defamation proceedings. It ensures that those involved in defamation proceedings will have greater certainty as to the application of parliamentary privilege.
43. The Bill thereby achieves a balance between Articles 8 and 10, providing positive guarantees of Article 10 rights and safeguards against abuse.

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[HL Bill 51]*

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