



Parliamentary privilege and individual Members

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This Note reviews the operation of parliamentary privilege with respect to individual Members. It refers to the Joint Committee on Parliamentary Privilege, which reported in 1999. Library Standard Note 2024 *Parliamentary Privilege and Qualified Privilege* covers the question of the treatment in law of Members' constituency correspondence. It also refers to the Sessional Orders, which, although now discontinued, have been cited on a number of occasions in connection with the searching of an MP's office. Library Standard Note 4906 *Police powers of Entry, search and seizure* sets out the position in relation to search warrants. This Note also covers developments following the arrest of Damien Green and the adoption of a protocol by the House of Lords. The Committee on Issue of Privilege (Police Searches on Parliamentary Estate) was established on 13 July 2009 and further information is available at http://www.parliament.uk/parliamentary_committees/police_searches.cfm

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1 Parliamentary privilege

Parliamentary privilege has two main components:

- Freedom of speech, which is guaranteed by Article IX of the Bill of Rights 1689
- The exercise by Parliament of control over its own affairs, known technically as 'exclusive cognisance'.

The privilege of freedom of speech protects what is said in debate in either House. As Article IX states:

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 Joint Committee on Parliamentary Privilege set out the modern interpretation of Article IX in 1999, as follows:

... The modern interpretation is now well established: that article 9 and the constitutional principle it encapsulates protect members of both Houses from being subjected to any penalty, civil or criminal, in any court or tribunal for what they have said in the course of proceedings in Parliament.¹

The Joint Committee considered that this protection extended to preparations for debates and questions, citing the conclusions reached by the Select Committee on Official Secrets in the Duncan Sandys case in 1939 (see below).

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.²

Exclusive cognisance enables Parliament to have control over all aspects of its own affairs, to determine its procedures and to discipline its own members for misconduct. The Joint Committee on Parliamentary Privilege set out the justification as follows:

13. The other main component of parliamentary privilege is still called by the antiquated name of '**exclusive cognisance**' (or 'exclusive jurisdiction'). Parliament must have sole control over all aspects of its own affairs: to determine for itself what the procedures shall be, whether there has been a breach of its procedures and what then should happen. This privilege is also of fundamental importance. Indeed, acceptance by the executive and the courts of law that Parliament has the right to make its own rules, and has unquestioned authority over the procedures it employs as legislator, is of scarcely less importance than the right to freedom of speech. Both rights are essential elements in parliamentary independence.

¹ Joint Committee on Parliamentary Privilege, *Report*, 9 April 1999, HC 214-I 1998-99, para 37

² *Ibid*, para 113

14 Parliament's right to regulate its own affairs includes the **power to discipline its own members** for misconduct and, further, **power to punish anyone**, whether a member or not, for behaviour interfering substantially with the proper conduct of parliamentary business. Such interference is known as contempt of Parliament. This falls within the penal jurisdiction exercised by each House to ensure it can carry out its constitutional functions properly and that its members and officers are not obstructed or impeded, for example by threats or bribes. The sanctions available are reprimand, imprisonment for the remainder of the session and, possibly in the House of Lords but probably not in the House of Commons, a fine of unlimited amount. Even in the House of Lords the power to impose a fine has not been used in modern times. Members of the House of Commons are also liable to suspension for any period up to the remainder of the Parliament (though there is no modern case of suspension for anything like this length). Members so suspended usually forfeit their salaries for the period of their suspension. Members of the House of Commons can be expelled, although it is over 50 years since the power of expulsion was last used.

2 The Joint Committee's report in 1999

A joint committee of both Houses was established in 1997 as part of the new Government's initiative to modernise Parliament, with a brief to review parliamentary privilege and make recommendations. The Joint Committee reported in March 1999 and among other recommendations, argued that the meaning of 'proceedings in Parliament' and 'place out of Parliament' set out in Article IX should be clarified and defined; it also recommended a new Parliamentary Privileges Act.³ It recommended that "the absolute privilege accorded by article 9 to proceedings in Parliament should not be extended to include communications between members and ministers".⁴ The Australian Parliament had enacted an *Australian Parliamentary Privileges Act* in 1987, following court cases in New South Wales which appeared to give judgements contrary to the usual interpretation of Article IX.

The Joint Committee also recommended clarification of 'exclusive cognisance'; it suggested the enactment of a provision to the effect that the privileges of each House to administer its own affairs in its precincts apply only to activities directly and closely related to proceedings in Parliament. In addition, it suggested a principle of statutory interpretation that Acts of Parliament bind both Houses unless there was a contrary expression of intention.

The report was debated in the House of Commons on 27 October 1999.⁵ No legislative action has followed the Joint Committee report. *Erskine May* remains the authoritative guide to precedent.⁶

3 Parliamentary privilege and individual Members of Parliament

Individual Members of Parliament do not have immunity from criminal or civil prosecution. A number of Members have been arrested and subsequently charged with offences.⁷ However, it is not possible for parliamentary proceedings to be used in evidence against Members when prosecutions are undertaken, because of Article IX. Further details are given in Chapter 2 of the report of the Joint Committee on Parliamentary Privilege. Chapter 3 states:

³ HL Paper 43/HC 214 1998-99 at <http://www.publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4305.htm>

⁴ Joint Committee on Parliamentary Privilege, *Report*, 9 April 1999, HC 214-I 1998-99, para 112

⁵ HC Deb 29 October 1999 336 cc1020-1074, http://pubs1.tso.parliament.uk/pa/cm199899/cmhansrd/vo991027/debtext/91027-23.htm#91027-23_head1

⁶ *Parliamentary Practice* 23rd edition 2004

⁷ Some examples are cited in *Parliamentary Practice* 23rd edition 2004 p119-120

242. One point is clear: the right [of exclusive cognisance] is intended to protect each House in respect of the conduct of its internal affairs. This privilege does not embrace and protect activities of individuals, whether members or non-members, simply because they take place within the precincts of Parliament. Thus, unless protected by article 9 as part of proceedings in Parliament, the speech and conduct of members enjoy no special privilege under this heading. Article 9 aside, members can be prosecuted for criminal conduct, such as a breach of the official secrets legislation, or pursued in the civil courts for slander or other wrongs, even when the conduct complained of occurred within the Palace of Westminster. If a member is charged with a criminal offence, no waiver of immunity is required. If one of their members is imprisoned and cannot attend the House, the two Houses expect only to be informed of the fact. The same principle applies to the premises in which Parliament meets. A criminal offence committed in the precincts is triable in the courts. A member may be arrested within the precincts.⁸

Further detail is given in paragraphs 243-245 which also discuss the Zircon case (see below).

Griffiths and Ryle's *Parliament: Functions, Practice and Procedures*⁹, an authoritative guide to parliamentary procedures states:

Members cannot claim freedom from arrest or imprisonment on criminal charges. A member of the House of Commons is in exactly the same position as any other citizen if he is suspected of, charged with, or found guilty of a crime. He may even be arrested in the House itself, and writs may be served on Members in the precincts of the Palace, provided, in both cases, that the House gives leave if it is on a sitting day. The Houses of Parliament cannot be used to give a Member sanctuary from the application of the law. The only special procedure relating to the arrest or imprisonment of a Member of Parliament is that if detained for any significant time (for example, if remanded in custody) the police or court concerned must notify the Speaker.¹⁰

Griffiths and Ryle cite the precedent of Lord Cochrane, who was arrested in 1815, while sitting on the Government front bench in the Chamber, having escaped from prison. The arrest took place before the sitting of the House. The Committee of Privileges concluded that no breach of privilege had taken place.¹¹ According to Josh Chafetz, the committee concentrated on the fact that the House was not meeting, rather than that the arrest took place on the floor of the House.¹²

Erskine May gives a series of examples of cases where the House has been informed following the arrest of a Member on criminal charges.¹³

Patricia Leopold has noted examples of criminal acts which have taken place within the precincts without referral to the police or courts, as follows:

There have been examples of criminal acts within the precincts of Westminster which Parliament has considered but has made no suggestion of involving the police or the

⁸ Joint Committee on Parliamentary Privileges, *Report and Proceedings*, 9 April 1999, HC 214-I 1998-99, http://www.parliament.uk/parliamentary_committees/joint_committee_on_parliamentary_privilege.cfm

⁹ Robert Blackburn and Andrew Kennon second edition 2003

¹⁰ Ibid para 3-006, note 10

¹¹ Ibid

¹² *Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American constitutions* Josh Chafetz 2007 p131

¹³ *Parliamentary Practice* 23rd edition 2004 p119-120

courts. In 1947 the Committee of Privileges report in connection with an affray between a member and a lobby correspondent was accepted by the House.¹⁴ A resolution was passed in which the House stated its determination to proceed with the utmost severity against such offenders in like cases.¹⁵ In 1988, when Ron Brown MP damaged the mace in the course of a heated debate, and failed to apologise in the way expected, the House exercised its penal powers not just in respect of the criminal damage, but in respect of the authority of the Chair.¹⁶ An attempt to bring a private prosecution for criminal damage was halted by the DPP.¹⁷

Some parliaments have developed protocols governing the role of the police within parliamentary precincts. The New Zealand Parliament agreed a protocol in June 2004 on the role of the police in maintaining law and order in the parliamentary precincts. The protocol was signed between the Speaker and the Commissioner of Police. Details are available on the internet and is discussed further below.¹⁸

Some recent examples of where there has been tension in relation to the role of legislature, judiciary and executive are set out below:

3.1 Damian Green

The offices of the Conservative frontbencher, Damian Green, were searched on Thursday 27 November 2008, while the House was prorogued. The Speaker noted in his statement of 3 December 2008 that the search had taken place without a warrant. He announced that a protocol would be developed which would require a warrant for any future searches or accesses to papers; he also announced that a debate on the appointment of a special select committee to consider the issues would take place on 8 December 2008:

A warrant will always be required when a search of a Member's office, or access to a Member's parliamentary papers, is sought. Every case must be referred for my personal decision, as it is my responsibility. All this will be made clear in a protocol issued under my name to all hon. Members.

Lastly, I have decided, myself, to refer the matter of the seizure by police of material belonging to the hon. Member for Ashford to a Committee of seven senior and experienced Members, nominated by me, to report as soon as possible. I expect the motion necessary to establish this Committee to be tabled by the Government for debate on Monday. I also expect a report of the Committee to be debated by this House as soon as possible thereafter.¹⁹

Select committee on Damien Green events

A debate on a Government motion to establish a select committee to consider the matter was scheduled for 8 December 2008. The motion and the associated business motion appeared in the Order Paper for 4 December as follows:

¹⁴ HC 36 1946-47

¹⁵ HC Deb 10 February 1947 c41

¹⁶ HC Deb 19 April 1988 c929-953

¹⁷ "The application of the civil and criminal law to MPs and parliamentary proceedings" in *The Law and Parliament* edited Dawn Oliver and Gavin Drewry Study of Parliament Group 1998. *Times* 234 April 1988, 9 June 1988

¹⁸ "Signing the agreement on policing functions within the parliamentary precincts" 24 June 2004 Speaker's Office <http://www.parliament.nz/en-NZ/Admin/Speaker/Speeches/4/8/a/48aca0a98c6b4358aedf0199a37c5e8d.htm>

The Protocol is available at <http://www.parliament.nz/NR/rdonlyres/3EFFE86B-F7F6-45F6-B793-39B865EBB986/21407/Policingfunctions1.pdf>

¹⁹ HC Deb 3 December 2008 c3

25 BUSINESS OF THE HOUSE

Ms Harriet Harman

That, at this day's sitting, the Speaker shall put the Questions necessary to dispose of proceedings on the Motion in the name of Ms Harriet Harman relating to the Speaker's Committee on the search of offices on the Parliamentary Estate not later than three hours after the commencement of proceedings on the Motion for this Order; such Questions shall include the Questions on any Amendments selected by the Speaker which may then be moved; proceedings on the Motion for this Order; such Questions may include the Questions on any Amendments selected by the Speaker which may then be moved; proceedings may continue, though opposed, after the moment of interruption, and Standing Order No 41A (Deferred divisions) shall not apply.

26 SPEAKER'S COMMITTEE ON THE SEARCH OF OFFICES ON THE PARLIAMENTARY ESTATE

Ms Harriet Harman

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 applicable rules and procedures of the House for securing permission for such action and to make recommendations;

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

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

The motion for the main debate on establishing the committee was subsequently revised, and reappeared on 5 December as follows:

26 SPEAKER'S COMMITTEE ON THE SEARCH OF OFFICES ON THE PARLIAMENTARY ESTATE

Ms Harriet Harman

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.

An amendment to the motion was lost by four votes (285 to 281) at the end of the debate on 8 December 2008. The amendment was sponsored by the Liberal Democrat, Menzies Campbell. It read as follows:

Amendment proposed: (e), leave out from 'action' to end and add

'and to investigate all the circumstances, including Ministerial, official and police actions, which led to the search, and to review the applicable rules and procedures of the House and to make recommendations;

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

That the Committee should be bound in its proceedings by the existing resolution of the House on matters of sub judice; and

That the Committee consist of seven members appointed by the Speaker.'— (*Sir Menzies Campbell*.)²⁰

Points of order followed the debate; Simon Hughes and Theresa May stated that the Liberal Democrats and the Conservatives would not participate in the planned committee.

In responding to points of order, the Speaker said:

That is not a point of order, but I can tell the hon. Gentleman that the House has been able to access the protocol that I have set out. If similar circumstances emerge in future—God forbid—the protocol will be used. Every hon. Member, every Officer of the House and every Speaker will know exactly what to do with the protocol.²¹

Protocol on controlling access to precincts of the House

The protocol was issued on 8 December 2008 and made available in the Vote Office and Press Gallery. The Speaker noted that he would take into account any representations made by Members and issue a revised version, if necessary. The protocol set out future procedures to be used:

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 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

²⁰ HC Deb 8 December 2008 c292

²¹ HC Deb 8 December 2008 c304

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.²²

On 9 December, the Speaker made a further statement:

Mr. Speaker: I undertook to look into the matter of the Wilson doctrine and access to the House of Commons server, which was raised by the hon. Member for Newbury (Mr. Benyon) on 4 December. The Parliamentary Information and Communications Technology service takes the security of its systems very seriously, and is grateful for the support that the Joint Committee on Security, the Administration Committee and the Commission give in that respect. PICT would not allow any third party to access the parliamentary network without proper authority. In the Commons, such access previously required the approval of the Serjeant at Arms. Following my statement on 3 December, if PICT receives any requests to allow access in future, it will also seek confirmation that a warrant exists and that I have approved such access under the procedure laid down and the protocol issued yesterday.

With regard to the incident involving the hon. Member for Ashford (Damian Green), no access was given to data held on the server, as PICT was not instructed to do so by the Serjeant at Arms. No access will be given unless a warrant exists and I approve such access.²³

On 17 December the Speaker made a further statement, indicating that the nominations to the Committee would not be made at present:

Mr. Speaker: Several right hon. and hon. Members have raised with me the matter of the search of a Member's office. The House has recently come to a decision that the matter should be considered by a specially appointed Committee. The House has also determined that the Committee must not in any way prejudice any police inquiry or any potential criminal proceedings. There is, therefore, not yet a basis on which to

²² Extract from *Mr Speaker's Protocol on the Execution of a Search Warrant in the Precincts of the House of Commons* [issued on 8 December 2008]

²³ HC Deb 9 December 2008 c408

nominate that Committee, since consideration of criminal proceedings is still under way.²⁴

Privilege (Police Searches on the Parliamentary Estate) Committee

There followed some months when the committee failed to meet. Speaker Martin was replaced by Speaker Bercow on 22 June 2009. At Business Questions on 3 July Harriet Harman indicated that the committee would begin work shortly in response to a question from Alan Duncan:

Ms Harman: The hon. Gentleman asked me about privilege and what happened with the office of the hon. Member for Ashford (Damian Green). As he will remember, the House decided, following a request from the then Speaker, that a Speaker's Committee would be established to look into search powers and the arrival of police on House premises. It was decided to set up such a Committee, but not before the police action had concluded, since when the shadow Leader of the House has asked for wider questions relating to privilege and criminal proceedings to be looked at. Discussions are under way on whether a two-pronged approach, involving the Standards and Privileges Committee as well as the Speaker's Committee, may be necessary.

I have agreed with the hon. Gentleman that we should look more widely than at questions of search and seizure and take the whole question of privilege into account. What still needs to be finalised is whether we need the two Committees to achieve that or just the one. The shadow Leader of the House rolls his eyes, but I want to get right the number of Committees—not too many or too few—to deal with these issues.²⁵

On 13 July the following order was approved by the House without debate:

Ordered ,

That the Order of 8 December 2008 relating to the Speaker's Committee on search of offices on the Parliamentary Estate be rescinded and the following Order be made:

(1) 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, to consider any matter relating to privilege arising from the police operation, and to make recommendations for the future;

(2) 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 to appoint one specialist adviser either to supply information which is not readily available or to elucidate matters of complexity within the committee's order of reference;

(3) That Sir Alan Beith, Mr David Blunkett, Sir Menzies Campbell, Ann Coffey, Mr Doug Henderson, Ms Patricia Hewitt, Mr Michael Howard and Sir Malcolm Rifkind be members of the Committee;

(4) That Sir Menzies Campbell be the Chairman of the Committee; and

(5) That the committee report by 31 December 2009. —(Mary Creagh.)²⁶

The Committee has a website.²⁷

²⁴ HC Deb 17 December 2008 c1097

²⁵ HC Deb 3 July 2009 c483

²⁶ HC Deb 13 July 2009 c127

Attorney General memorandum

The Attorney General submitted a memorandum to Harriet Harman on 3 April 2009 which sought to clarify some of the issues involved, in her role as legal adviser to Parliament.²⁸ The memorandum was deposited in the Commons Library.²⁹ The memorandum concluded that it was the role of the courts to determine any questions of law relating to parliamentary privilege, especially in relation to Article IX. On 16 April 2009, Keir Starmer, the DPP, announced that he had decided not to proceed with prosecutions against Mr Galley and Mr Green. His reasons were set out in full, but related to the insufficient evidence of harm to the public interest of the alleged leaks under the offence of misuse of public office. He also noted:

38. In coming to a conclusion in this case, it has not been necessary for me to resolve the question of the legality of the searches of Mr Galley's home address and Mr Green's home address, his Constituency offices and at his Parliamentary office. I do not propose to do so. However, as noted above, once the pattern of leaks was established in this case it was inevitable that a police investigation would follow. There has been a thorough investigation and, without it, I would not have been able to reach a conclusion on the particular facts of this case.³⁰

Therefore, without a court case, there appeared no opportunity for a decision on whether material taken from Mr Green's office was protected by parliamentary privilege. The Attorney General's memorandum argued that it would not be the responsibility of the Standards and Privileges Committee or the House to determine whether such material was considered parliamentary proceedings. This opinion was not fully accepted. Bill Cash argued in a letter to the Times that Baroness Scotland had paid insufficient attention to the Duncan Sandys precedent., which is described below.³¹

3.2 Procedures in the Lords

As a response to developments, Lord Brabazon of Tara set out Lords procedures in December 2008:

Asked by Lord Oakeshott of Seagrove Bay

To ask the Chairman of Committees on what grounds and by whose authority the police may arrest a Peer in the Palace of Westminster, or remove papers and property from a Peer's office. [HL57]

The Chairman of Committees (Lord Brabazon of Tara): On 3 December the Lord President informed the House (Official Report, House of Lords, col. 20) that she had asked the House authorities to prepare a report setting out the current position on this matter. In the mean time, it is clear that, before the police were permitted to enter the House of Lords' part of the Palace of Westminster to arrest a Member or search a Member's office, Black Rod would need to establish their authority so to do. Black Rod would consult other House authorities, including in particular the Lord Speaker and the

²⁷ http://www.parliament.uk/parliamentary_committees/police_searches.cfm

²⁸ For background, see "Leak files may be used in court" 7 April 2009 *BBC News*

²⁹ DEP

³⁰ Decision on prosecution: Mr Christopher Galley and Mr Damien Green MP CPS 16 April 2009

http://www.cps.gov.uk/news/articles/decision_on_prosecution_-_mr_christopher_galley_and_mr_damian_green_mp/#the_alleged_offences

³¹ "Mps and secrets: letters to the editor" 18 April 2009 *Times*

Clerk of the Parliaments. In the absence of Black Rod, the Yeoman Usher may act in his place (Standing Order 13(4)).³²

Subsequently, the Lords adopted a protocol. The background to its publication is described in a report from the House Committee in April 2009:

2. The Leader of the House indicated on 3 December last year (HL Deb., col. 20) that she had asked the Clerk of the Parliaments to submit a memorandum on the conditions governing police access to the House of Lords. This was in the context of a recent police search of a Member's office in the House of Commons.

3. In a written statement on 2 February (HL Deb., col. WS 40) the Leader of the House indicated that she had placed a copy of the memorandum by the Clerk of the Parliaments in the Library of the House and that Members were invited to submit comments on the draft protocol until the end of February. The draft protocol was subsequently referred to the Committee for Privileges and the House Committee for approval.

4. The Clerk of the Parliaments has recommended a number of changes to the text of the draft protocol which was submitted for comment, to which the Committee has agreed.

5. The Committee considered from whom Black Rod should seek authority before responding to a police request to conduct a search within the precincts of the House. The Committee noted the view of the Clerk of the Parliaments and Black Rod that there would be some advantage in a procedure involving a single representative of the House. The Committee agreed that Black Rod should seek the authority of the Lord Speaker, who would consult, as appropriate, the Leader of the House and others. Paragraph 8 of the protocol reflects this decision.³³

The Committee invited the House to adopt the protocol, which was deposited in the Lords Library.³⁴

3.3 The Duncan Sandys affair

On 27 June 1938, Duncan Sandys raised on the floor of the House, the fact that he had been asked by the Attorney General about the sources of information Mr Sandys had used to draft a parliamentary question. The Attorney General had, Mr Sandys, said, threatened him with prosecution under the *Official Secrets Acts*. This was denied by the Attorney General. The detail of Mr Sandys allegations and the general question of the applicability of the *Official Secrets Acts* to Members was referred to a special select committee, the Select Committee on the Official Secrets Act. This issued a first report in September 1938³⁵ and a further report in April 1939.³⁶ These concluded that the soliciting or receipt of information was not a proceeding in Parliament, but that it would be inadvisable to attempt to define "the extent of immunity from prosecution under the Official Secrets Act to which Members of Parliament are or ought to be entitled."³⁷

³² HL Deb 11 December 2008 c10WA

³³ House Committee, First Report HL 74 2008-09

³⁴ DEP 2009/0343. The text is at <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldhouse/74/7404.htm>

³⁵ HC 173 1937-38

³⁶ HC 101 1938-39

³⁷ Ibid paras 16 and 22

3.4 The Zircon affair

On 21 January 1987 it became apparent that some Members were planning to show a film within the precincts which dealt with a secret security project (code named Zircon), although an interim injunction had sought to prevent that earlier in the day. *Griffiths and Ryle* note:

The Attorney General sought another injunction against the Member concerned to prevent them showing the film in the House of Commons until the House could decide whether or not to allow it. The judge in chambers refused this request, apparently because he considered that the matter could and should be under the control of the House of Commons authorities. Later that morning, having received advice on "Privy Councillor terms" the Speaker agreed to issue an order banning the showing of the film in any room under the control of the House. This, he later explained, was intended to be a holding operation, pending a decision by the House.

On January 27 1987, the Leader of the House moved a motion to confirm the order of the Speaker, but after a full debate, the House agreed an amendment, without a division, to refer the matter to the Committee of Privileges. This was a major parliamentary occasion, when the will of the House prevailed over that of the Government.

The committee reported on three main matters. First, it found that the showing of a film was not a proceeding in Parliament, and that therefore was not protected by privilege;; the Speaker's order of January 22 had, therefore, not restricted the protection afforded by privilege; the Speaker had acted within the powers vested to him, and in order to enable the House to decide for itself, the Speaker had acted wholly correctly.³⁸

The report from the Committee of Privileges concluded against change to the privileges of the House, but affirmed the conclusion in the Duncan Sandys case in 1939 that disclosure by Members in the course of debate or proceedings in Parliament cannot be made the subject of proceedings under the *Official Secrets Acts*.³⁹ The Joint Committee on Parliamentary Privilege supported this interpretation.

3.5 Search of Sinn Fein offices in Northern Ireland Assembly in 2002

On 4 October 2002, "police raided Sinn Fein's Stormont offices and arrested a senior party official as part of swoop on an IRA spy ring".⁴⁰ The *Guardian* reported that:

More than 200 officers, including special branch, CID and uniformed police officers, burst into a number of republicans' homes in north and west Belfast at 5am, where they seized documents and computer disks and arrested three men and a woman.

One of those detained was Denis Donaldson, a former IRA prisoner and hunger striker who was in the Maze jail with Bobby Sands in 1980. Mr Donaldson is now Sinn Fein's head of administration at the east Belfast-based assembly.

A few hours later, seven police Land Rovers arrived at Parliament Buildings and politicians looked on aghast as about 30 officers rushed upstairs and burst into Mr Donaldson's office, from which they took two computer disks.

Sinn Fein condemned the raids as a politically motivated attack on their party and the peace process. But the drama fed unionists' worst fears that republicans are publicly talking peace while secretly plotting violence.⁴¹

³⁸ Ibid para 3-043

³⁹ Committee of Privileges, First Report, HC 365 1986-87

⁴⁰ Rosie Cowan, "Peace process in turmoil after police raid Stormont", *Guardian*, 5 October 2002

On 13 October 2002, the Sunday Herald reported that the Secretary of State for Northern Ireland, John Reid, knew nothing of the police's decision to raid the Stormont offices:

John Reid, the Northern Ireland Secretary, claims he knew nothing of the decision by the police to raid the Stormont Offices of Sinn Fein which triggered the latest crisis at the devolved Assembly and lead to its expected suspension tomorrow.

Reid is to tell an internal inquiry into the incident that he did not know a search warrant had been issued which allowed police to move from raids on known republican homes in west and north Belfast into the Stormont Offices of Sinn Fein.

Reid has come under pressure from both republicans and unionists to explain why he apparently knew for almost a year that a police operation was investigating suspected leaks of intelligence material out of both the Stormont Offices and from his own offices in the nearby Castle building where the Good Friday Agreement was agreed four years ago.

Reid's close aides said yesterday that while he knew the Police Service of Northern Ireland (PSNI) teams were engaged in an operation, he did not know where they were going to go.⁴²

The raid was referred to the Northern Ireland Police Ombudsman. The Ombudsman, Nuala O'Loan issued her report in August 2002. Press coverage of her report noted that she found no evidence to substantiate claims that the raid was politically motivated but she did express concerns about the way in which the police searched offices in the parliamentary building:

The Ombudsman, Mrs Nuala O'Loan, found no evidence to substantiate allegations from republicans that the searches were politically motivated. But while Mrs O'Loan found that the police operation was justified, she criticised officers for acting in a heavy-handed manner.

The report on the raid at Parliament Buildings in October 2002 during an investigation into an alleged IRA spy ring was compiled after complaints from Sinn Féin's Mr Conor Murphy.

These included allegations that the search of the offices had been politically motivated and that the search itself had been excessive. It was also alleged that people were not permitted to enter the room to be searched prior to the search. Two people also alleged that police officers had assaulted them.

The Ombudsman said she has found no evidence to suggest that the search was politically motivated, or that it was designed to damage Sinn Féin and the peace process.

She added the search of an office was part of normal police process following an earlier search of a home. But she added: "No proper consideration was given by police to the fact that they were searching the buildings of a legislative assembly. This was a significant failing by police."⁴³

It should be noted that, unlike the Stormont Parliament established in the *Government of Ireland Act 1920*, the current Assembly does not enjoy the full range of Westminster

⁴¹ *Ibid*

⁴² James Cusick, "Reid – I didn't order raid", *Sunday Herald*, 13 October 2002

⁴³ "Raid on Stormont offices justified – O'Loan", *Irish Times*, 2 August 2004

parliamentary privilege. Instead, section 49 of the *Northern Ireland Act* provides for absolute privilege for the purposes of the law on defamation.⁴⁴

3.6 Scottish Parliament Protocol

The Scottish Parliament agreed in June 2009 a Memorandum of Understanding about the execution of search warrants in MSPs' offices with the Procurator Fiscal and the Crown Office and the Borders and Lothian Police.⁴⁵ The BBC News reported that a search warrant had been executed at Holyrood on one occasion.⁴⁶ This appears to be a search related to Tommy Sheridan's office, in connection with the charges of perjury against him.⁴⁷

3.7 Search of offices of Australian senator

The *Table (Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments)* reported in 2000 the case of a senator whose offices had been searched by the Australian Federal Police investigating alleged misuse of travel entitlements. He challenged the seizure of documents partly on the grounds of parliamentary privilege. The Federal Court dismissed the application to defeat the warrants, but suggested that any question of parliamentary privilege arising from the search warrants had to be determined between the House concerned and the executive.⁴⁸ In 2000, the Senate appointed a person to receive the documents and divide them into documents immune from seizure and those not immune, returning the former to the senator and the latter to the police who obtained the search warrants.⁴⁹

Protocols have been agreed in a number of Australian Parliaments at federal and state level, as indicated in an extract from the 12th edition of *Odgers Australian Senate Practice*:

A memorandum of understanding and Australian Federal Police Guidelines agreed to by the President, the Speaker, the Attorney-General and the Minister for Justice and Customs, governing the execution of search warrants in the premises of senators and members, were tabled and debated in March 2005. The documents provide that any executions of search warrants in the premises of senators and members are to be carried out in such a way as to allow claims to be made that documents are immune from seizure by virtue of parliamentary privilege and to allow such claims to be determined by the House concerned. The agreement underlying these documents was the result of several years of effort by the Senate, successive Presidents and the Privileges Committee, arising from the committee's consideration of the cases referred to above.(9/3/2005, J.451, SD, pp 91-2.) An agreement of the same kind was entered into with the Tasmanian government in 2006 (15/8/2006, J.2496).⁵⁰

In 2003, documents belonging to a Member of the New South Wales Legislative Council were seized under warrant by officers of the Independent Commission against Corruption (ICAC), who were enquiring into the alleged misuse of parliamentary allowances. The action led to two reports from the Procedure Committee, adopted by the House, which concluded that decision as to whether the documents were covered by parliamentary privilege belonged

⁴⁴ See Library Research Paper 98/77 *The Northern Ireland Bill: Some Legislative and Operational Aspects of the Assembly* pp21-22

⁴⁵ http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/25_06_09_holyroodmemo.pdf

⁴⁶ "Holyrood police raid rules agreed" 25 June 2009 *BBC News*

⁴⁷ "Scottish Parliament police" 25 June 2009 *Guradian*

⁴⁸ *Crane v Gething and others* FCA 45 2000

⁴⁹ *The Table Volume 68* 2000 pp86-87. See also *Table Volume 69* p98 and *Table Volume 70* 2002 p102, and *Table Volume 71* 2003 p178 for subsequent developments

⁵⁰ <http://www.aph.gov.au/SENATE/pubs/odgers/pdf/chap02.pdf> p47. The Memorandum itself can be found at <http://www.aph.gov.au/house/committee/pmi/complete.pdf>

to the House and not the ICAC. The *Table 2005* (the journal of the Society of the Clerks of the Table in Commonwealth Parliaments) contains further details.⁵¹

3.8 New Zealand protocol

In October 2006 police entered the parliamentary estate in New Zealand to gather evidence against a Member for a criminal offence. An interim agreement was concluded:

Speaker's Statements

Search Warrant for Parliamentary and Electorate Offices—Interim Agreement

Madam SPEAKER: On 27 October 2006 the police executed a search warrant as part of the investigation into the activities of Taito Phillip Field. The search involved material held in parliamentary and electorate offices. It was conducted in accordance with a search warrant, and an interim agreement between the Speaker and the Commissioner of Police. The interim agreement was designed to ensure that the search warrant was executed without improperly interfering with the functioning of Parliament, and that any claim of parliamentary privilege in relation to physical or electronic documents that the police may have wanted to seize could be raised and properly resolved. Such a situation had not arisen before, and an interim agreement was required to provide for the immediate circumstance. Members may wish to consider the terms of the interim agreement before any ongoing agreement is formalised. Therefore, I intend to present the interim agreement to the House today, and seek to have the Privileges Committee consider it once the police investigation and any subsequent action is concluded. Copies will be available in the Bills Office.

It appears that the matter has not yet been discussed by the New Zealand Privileges Committee, since the police brought charges against Mr Field, which are still before the court.⁵²

4 Sessional Orders of the House of Commons

Traditionally, Sessional Orders were agreed by the House at the beginning of each Session, just before the debate on the reply to the Queen's speech. They appear to date from the end of the seventeenth century.⁵³ The House would agree to three Orders and three Resolutions. These related to elections, witnesses, the Metropolitan Police, and the Votes and Proceedings. However, the Sessional Orders are no longer being moved at the beginning of each session. The last time they were moved was on 17 May 2005. This follows an inquiry by the Procedure Committee which was reported as Third Report of Session 2002-03. The Committee explained:

During a recent discussion with this Committee, the Speaker encouraged us to look at these Sessional Orders and Resolutions, to consider whether they should be abolished or updated, and, in particular, whether the Order requiring the Metropolitan Police Commissioner to prevent obstructions hindering access to the House by Members was appropriate, in the light of recent experience with demonstrations around the Houses of Parliament. The previous Clerk of the House, Sir William McKay, had also provided us with memoranda and suggested such an inquiry.⁵⁴

⁵¹ Pp178-182

⁵² Information from Select Committee Office, New Zealand Parliament.

⁵³ *An Encyclopaedia of Parliament* (4th ed) Norman Wilding and Philip Laundry p690

⁵⁴ Procedure Committee, *Sessional Orders and Resolutions*, 19 November 2003, HC 855 2002-03, para 2

The Speaker had encouraged the Committee to consider whether the Sessional Orders and Resolutions should be abolished or updated, and, in particular, whether the Order requiring the Metropolitan Police Commissioner to prevent obstructions hindering access to the House by Members was appropriate.

The Committee recommended that:

(a) the passing of the Sessional Orders and Resolutions relating to elections, witnesses and the Votes and Proceedings be discontinued;

(b) the House should decide, by agreeing to this Report, that all Members who are returned for two or more places in any part of the United Kingdom should choose for which of the places they will serve, within one week after it appears that there is no question about their election for that place.

The survival of the Sessional Orders and Resolutions for so long may reflect a desire by the House to begin the Session with a reminder of matters which it considers important. As we have explained, the Sessional Orders and Resolutions are no longer appropriate for this purpose, but we recommend that they should be replaced by a statement of the duties and responsibilities of Members, possibly the seven principles of public life as set out in the Code of Conduct together with historic claims to privilege including those of freedom of speech and freedom from legal challenge embodied in the Bill of Rights 1689; however, we believe that the details might be left to the Speaker's discretion, perhaps after taking such soundings as seemed appropriate.⁵⁵

The Committee also made recommendations on the Sessional Order relating to the Metropolitan Police and access to Parliament. They recommended that the Government should introduce appropriate legislation to prohibit long-term demonstrations. However, until such legislation came into force, the Committee recommended that it would be sensible to continue with a Sessional Order, to reflect the House's concerns and to act as a marker that "it expects Members' access to Parliament to be maintained as far as the existing law allows."

The Government agreed to these recommendations.⁵⁶ The House agreed to the Procedure Committee's proposals on 3 November 2004. Some concern was expressed as to the need to consult Members on the wording to be used in the Speaker's statement which would replace the Orders.⁵⁷ The main proposals on disruptions in the locality of Parliament were dealt with in sections 132-138 of the *Serious Organised Crime and Police Act 2005* which came into force on 1 August 2005. This remains in force.

The first Speaker's statement was made in the 2006-07 session, as follows:

Mr. Speaker: As the House will recall, it was agreed that the Speaker should make a brief statement at the beginning of each Session about the duties and responsibilities of hon. Members.

Our ancient privileges allow us to conduct our debate without fear of outside interference. In particular, we enjoy freedom of speech, in both Committee proceedings and debates on the Floor of the House. Parliamentary privilege is essential for proper democratic debate and scrutiny, and it should be exercised responsibly. It is up to each

⁵⁵ Procedure Committee, *Sessional Orders and Resolutions*, 19 November 2003, HC855 2002-03]

⁵⁶ Procedures Committee, *Sessional Orders and Resolutions: The Government's Response to the Committee's Third Report of Session 2002-03*, 20 March 2004, HC 613 2003-04

⁵⁷ HC Deb 3 November 2004 c370-423. See comments by Andrew Mackinlay in the debate

one of us to ensure, as individuals and collectively, that we do not misuse the rights that we have. They should be exercised in the public interest. We must ensure that we follow the letter and spirit of the code of conduct and related rules which we have approved to regulate our business.

Each Member is here to represent the views of his or her constituents and to participate in the process of democracy. We should ensure that every Member is heard courteously, regardless of the view that he or she is expressing.

Every member of the public has a right to expect that his or her Member of Parliament will behave with civility, in the best traditions of fairness, with the highest level of probity and with integrity. [Hon. Members: "Hear, hear."] I am glad that you are listening.

I turn now to security, not only for Members of Parliament but for the staff of the House who work so hard on our behalf, and for those who are pass-holders. I expect every Member of the House to co-operate fully with those officials who are responsible for security, which ensures that our democratic process is not disturbed and visitors to Parliament can continually be made welcome.

As Members, we are aware that the boundary commissioner is looking constantly at constituency boundaries. Hon. Members have a duty to look after the constituents who elected them. Those boundaries do not change until the next election, so we must obey the convention of not involving ourselves with another Member's constituency until that time.⁵⁸

In the *Constitutional Renewal* white paper of March 2008, the Government promised to repeal sections 132-138 of SOCA.

27. In moving to repeal sections 132-138 of the Serious Organised Crime and Police Act, the Government nonetheless takes seriously the need to ensure that the operation of Parliament is safeguarded. For many years this principle has been given expression in sessional orders which provided the Metropolitan Police with clarity on the House's expectations on the Commissioner.

28. The Government believes that Parliament itself is well placed to contribute to proper consideration of what needs to be secured in order to ensure that Members are able freely and without hindrance to discharge their roles and responsibilities.⁵⁹

The *Constitutional Reform and Governance Bill 2008-09* makes the repeal in clause 32. For further details see Library Standard Note 3658 *Protest around Parliament*

The Speaker's statement on the first day of the 2008-09 session did not include any general comments on the duties and responsibilities of Members. This statement was subsequently made on 16 December 2008, following the end of the Queen's Speech debate.⁶⁰ The Lords continues to pass the traditional order requiring the police to keep passages open for peers to access the House of Lords. This reads as follows:

7 Stoppages in the Streets It was ordered that the Commissioner of Police of the Metropolis do take care that the passages through the streets leading to this House be kept free and open and that no obstruction be permitted to hinder the passage of Lords to and from this House during the sitting of Parliament; or to hinder Lords in the pursuit

⁵⁸ HC Deb 6 November 2006 c2

⁵⁹ MoJ, *The Governance of Britain – Constitutional Renewal*, Cm 7342-I, March 2008, p 14

⁶⁰ HC Deb 16 December 2008 c963

of their Parliamentary duties on the Parliamentary Estate; and that the Gentleman Usher of the Black Rod attending this House do communicate this Order to the Commissioner.⁶¹

⁶¹ HL Deb 3 December 2008 c3