

Parliamentary Privilege and the Scottish Parliament

Parliamentary Privilege

1. At a general level, parliamentary privilege refers to the rights and immunities that protect proceedings of a Parliament and those that participate in them. It ensures that elected representatives can carry out their duties without fear or favour and that a Parliament can carry out its functions.
2. There are two main components to parliamentary privilege; they have been described in the Westminster context as:

“Freedom of speech is for all those who participate in parliamentary proceedings, whether MPs, peers or non-members. This freedom of speech exists only in parliamentary proceedings, which includes (among other things) debates, committee hearings and published reports, but does not apply to anything said by an MP or a peer outside parliamentary proceedings.

*The **exclusive cognisance** of each House of Parliament (sometimes referred to as “exclusive jurisdiction”) – which broadly translates as the right of each House to regulate its own proceedings without interference from the courts. This includes the conduct of its Members and of other participants such as witnesses before select committees. If the Houses did not have such rights, any person might be able (to take one example) to question in the courts the decision-making processes behind the passage of legislation. This would undermine the independence of a sovereign Parliament, and in particular of the democratically elected House of Commons.”*

(2012 Green paper consulted upon by the UK Government when examining the scope of parliamentary privilege in Westminster)

3. The Scottish Parliament is a creation of statute, and the Scotland Act 1998 gives the Scottish Parliament and its members certain powers, protections and responsibilities. These protections against certain legal proceedings, like parliamentary privilege at Westminster, are intended to enable it to carry out its functions effectively and give it a “protected space” within which it can carry out its role robustly without fear of legal challenge.¹ However, unlike Westminster and other sovereign parliaments, the Scottish Parliament’s ability to amend the scope and extent of these protections and privilege more widely is determined by statute – the Scotland Act 1998.

The Houses of Parliament and parliamentary privilege

4. The key aspects of parliamentary privilege at Westminster are enshrined in Article 9 of the Bill of Rights (1689) which provides that *“the freedom of speech and*

¹ Commission on Scottish Devolution, The Future of Scottish Devolution within the Union: A First Report (December, 2008) para.2.26, available at:

http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/02_12_08_calman.pdf

debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.” The Claim of Right Act 1689 in Scotland, states “*That for redress of all grievances and for the amending strengthening and preserving of the Laws Parliaments ought to be frequently called and allowed to sit and the freedom of speech and debate secured to the members.*”

5. Article 9 of the Bill of Rights is now the basis for the two primary components of freedom of speech and exclusive cognisance outlined above. However, Erskine May, the authoritative guide to parliamentary practice, defines parliamentary privilege, at Westminster, in its wider sense as “*the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Some privileges rest solely on the law and custom of Parliament, while others have been defined by statute.*” (para 12.1) The historical breadth covers a wide range of privileges, including freedom from arrest, access to the Crown and the power to punish a breach of privilege and contempt. Privilege at Westminster has evolved over the years and so far attempts to legislate on matters related to privilege have been resisted.²

6. Article 9 of the Bill of Rights means that anything said by MPs (or Members of the House of Lords) within proceedings in Parliament is not justiciable in the courts i.e. any statement made is immune from liability in the civil and criminal courts, including defamation and contempt of court.

7. One aspect of this is that MPs (or Members of the House of Lords) may make statements in proceedings which, if made out of Parliament, would breach court orders. Members of both Houses have relied on parliamentary privilege to circumvent court orders by naming individuals where the media and general public have been prohibited from doing so.³ This has raised questions over responsible use of privilege and whether it is an ‘abuse’ of privilege to undermine the rule of law. This is left as a matter for the House to regulate e.g. by the Speaker, and it is now customary for Members to be reminded to exercise their right to free speech responsibly.⁴ The House of Commons and the House of Lords regulate themselves through Codes of Conduct and Standing Orders, and there is a *sub judice* rule –

² For a full explanation of privilege and its historical development in the Westminster context see Part 2 of Erskine May, ‘Powers and Privileges of Parliament’, available at: <https://erskinemay.parliament.uk/browse/?part=2>

³ Examples of this include: the naming of Ryan Giggs, Hansard, 23 May 2011, Column 638 <https://publications.parliament.uk/pa/cm201011/cmhansrd/cm110523/debtext/110523-0001.htm>; in 2018, Lord Hain made a personal statement indicating that having been contacted by someone intimately involved in the relevant case he felt it was his duty to under parliamentary privilege to name Philip Green despite an injunction <https://hansard.parliament.uk/lords/2018-10-25/debates/F359E581-838E-48D3-A46E-49010058BCD5/PersonalStatement>; more recently, the naming by Ian Blackford of an individual covered by a restriction order of the Scottish Child Abuse Inquiry <https://hansard.parliament.uk/Commons/2023-01-16/debates/4E8ABFF4-A650-4E3C-B78E-B8CADF27F995/TeacherRecruitmentAndRetention>

⁴ See report by Joint Committee on Privacy and Injunctions (2012): “Although freedom of speech in Parliament is a fundamental constitutional principle, we do not think that parliamentarians should reveal information subject to injunctions in Parliament unless there is a good reason to do so.” Later endorsed by the Joint Committee on Parliamentary Privilege (2013- 2014).

subject to the discretion of the Speaker – in relation to cases in which proceedings are active before the courts.⁵ The Code of Conduct places on MPs a general duty to uphold the law, including the general law against discrimination (paragraph 5).⁶

8. There is statutory protection for written accounts of proceedings. The Parliamentary Papers Act 1840 provides statutory protection for the publication of papers by order of either House of Parliament.⁷ Hansard, transcripts of evidence taken before select or public bill committees and other House papers such as the Order Paper or Votes and Proceedings are published online on the authority of the two Houses and as such attract protection.⁸

9. In the last twenty years the UK Parliament has established two Joint Committees to consider parliamentary privilege, but there has been no legislation to address some of the tensions that emanate from a definition of parliamentary privilege rooted in the seventeenth century Bill of Rights operating in a twenty-first century context.

10. A Joint Committee on Parliamentary Privilege was established in 1997 after the “cash for questions” allegations. In 1999 it reported and recommended legislation to clarify a number of uncertainties in relation to parliamentary privilege that had emerged over time, but no legislation was introduced to Parliament.

11. In 2013, another Joint Committee was established and it identified a series of factors - including the development of human rights law; corruption and bribery legislation; parliamentary expenses; an incident in which an MP’s office was searched without a warrant; the use of super-injunctions; select committee powers, and the fulfilment of constituency responsibilities – which could interact with parliamentary privilege. Nevertheless, the 2013 Joint Committee report on Parliamentary Privilege recommended that there was no need for a comprehensive codification of parliamentary privilege at that point in time.⁹

12. Various sovereign parliaments including Australia (Parliamentary Privileges Act 1987), Canada (Parliament of Canada Act 1985), India, New Zealand (Parliamentary Privilege Act 2014) and the United States share, in varying degree, the concept and even the texts on which UK parliamentary privilege rests.

⁵ House of Commons Standing Orders Appendix, Resolution of 15 November 2001, Matters *sub judice*: [Standing Orders: Public Business 2021 \(parliament.uk\)](https://www.parliament.uk/business/publications/commons/standing-orders-appendix/2001-11-15/), p.187, for a recent example see the Speaker’s opening statement to a debate on police conduct <https://hansard.parliament.uk/commons/2023-01-17/debates/225B1CB0-3FE5-4713-900B-9F5E7DD41202/PoliceConductAndDavidCarrick>

⁶ The Code of Conduct for Members of Parliament, available at: <https://www.parliament.uk/business/publications/commons/hoc-code-of-conduct/>

⁷ Available at: [Parliamentary Papers Act 1840 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1840/1)

⁸ Erskine May 13.6. The Scottish Parliament equivalents of the documents listed are the Official Report (of both Chamber and committee meetings), the Business Bulletin and the Minutes of Proceedings.

⁹ House of Lords, House of Commons, Joint Committee on Parliamentary Privilege, Parliamentary Privilege, [Report of Session 2013-14](https://www.parliament.uk/business/publications/commons/joint-committee-on-parliamentary-privilege/reports/2013-14/).

The Scottish Parliament and parliamentary privilege

13. Privilege in the Scottish Parliament differs from the broad concept of parliamentary privilege that operates at Westminster. As a devolved legislature created by statute, the protection offered by the Bill of Rights does not extend to the Scottish Parliament and rather any protections afforded to the Parliament are detailed within the Scotland Act 1998.

14. The approach to parliamentary privilege in a new devolved legislature may have been influenced by the fact that the Scottish Parliament was established at the same time as the European Convention on Human Rights (“ECHR”) was given effect in domestic law in the UK. As such respect for individual rights, in particular those enshrined in ECHR and the Human Rights Act 1998, form part of the Scotland Act 1998 and the wider legal framework within which the Scottish Parliament operates.

15. The Scotland Act 1998 provides a degree of protection to MSPs conducting business in proceedings of the Parliament in relation to defamation and contempt of court. The most relevant provisions of the Scotland Act 1998 in relation to ‘privilege’ are the protections contained in sections 40 to 42 which cover legal proceedings against the Parliament, defamation, and contempt of court.

16. In June 1999, the guidance on parliamentary privilege attached as an Annexe was offered by the Presiding Officer to members. This guidance provides further information on defamation and sub judice.

The protections within the Scotland Act

Proceedings against the Parliament (Section 40)

40 Proceedings by or against the Parliament etc

“(1) Proceedings by or against the Parliament shall be instituted by or (as the case may be) against the Parliamentary corporation on behalf of the Parliament.

(2) Proceedings by or against—

(a) the Presiding Officer or a deputy, or

(b) any member of the staff of the Parliament,

shall be instituted by or (as the case may be) against the corporation on his behalf.

(3) In any proceedings against the Parliament, the court shall not make an order for suspension, interdict, reduction or specific performance (or other like order) but may instead make a declarator.

(4) In any proceedings against—

(a) any member of the Parliament,

(b) the Presiding Officer or a deputy,

(c) any member of the staff of the Parliament, or

(d) the Parliamentary corporation,

the court shall not make an order for suspension, interdict, reduction or specific performance (or other like order) if the effect of doing so would be to give any relief against the Parliament which could not have been given in proceedings against the Parliament.

(5) References in this section to an order include an interim order.”

17. The Scottish Parliament, as a statutory institution is - unlike Westminster - subject to the jurisdiction of the courts, as explained by Lord Hope in the case of *Axa*:

“...the Scottish Parliament is not a sovereign parliament in the sense that Westminster can be described as sovereign: its powers were conferred by an Act of Parliament, and those powers, being defined, are limited. It is the function of the courts to interpret and apply those limits, and the Scottish Parliament is therefore subject to the jurisdiction of the courts” [para 138].¹⁰

18. Section 40 of the Scotland Act 1998 limits the disposals available to the courts in any proceedings against the Scottish Parliament or against MSPs, the Presiding Officer and deputies, the SPCB and staff of the Parliament if the effect of making an order would be to give relief against the Parliament. The Explanatory Notes to the Scotland Act, although written after the Act was passed, give some background on privilege, the difference with Westminster and the intended effect of Section 40:

“Apart from the protection from defamation in section 41, there is no general provision which seeks to exclude judicial proceedings being brought against the Parliament or any MSP in respect of anything said or done in the Parliament. There is nothing similar to the privilege conferred upon the Westminster Parliament by Article 9 of the Bill of Rights Act 1688 which confers upon “proceedings in Parliament” protection from being “impeached or questioned” in any “court or place out of Parliament”. Against this background, this section makes provision as to how legal proceedings may be taken by or brought against the Parliament. Instead of protecting the Parliament or its proceedings by preventing such judicial proceedings from being brought, this section restricts the remedies which may be granted directly or indirectly against the Parliament. It prevents coercive orders being granted by the Parliament which would require it to do something or prevent it from doing something on the grounds that this could interfere unduly with the proceedings of the Parliament. Instead, it will be open to the courts to make a declarator and it would then be for the Parliament to decide how it should react. Similar protection is also provided for MSPs, the Presiding Officer and his deputies, the SPCB and staff of the Parliament if the effect of making an

¹⁰ *AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents) (Scotland)* [2011] UKSC 46, available at: <https://www.supremecourt.uk/cases/docs/uksc-2011-0108-judgment.pdf>

order would be to give relief against the Parliament. This is intended to prevent the protection for the Parliament being circumvented by taking action instead against individual members or office-holders.”¹¹

Defamatory Statements (section 41)

41 Defamatory statements.

(1) For the purposes of the law of defamation—

(a) any statement made in proceedings of the Parliament, and

(b) the publication under the authority of the Parliament of any statement,

shall be absolutely privileged.

(2) In subsection (1), “statement” has the same meaning as in the Defamation Act 1996.

19. The Explanatory Notes to the Scotland Act set out the intention to ensure that members are free to debate and the Parliament is free to report on matters of public interest without fear of an action for defamation being raised.

20. During the consideration of amendments to the Scotland Bill, Lord Hardie, the then Lord Advocate provided the following reasoning relating to the approach taken to defamation:

“... it is quite proper that we should provide the parliament's proceedings with some shelter from the risk of actions of defamation. Absolute privilege is, of course, the strongest form of legal protection from defamation proceedings. It confers a powerful protection in any circumstances in which it applies.

For that reason we need to be clear about why that protection is conferred and to be sure that we have applied it no more widely than is justified. ... For that reason we have deliberately framed Clause 37 [Section 41] so that absolute privilege applies only to any statement made in the proceedings of the parliament, and to any publication made under the parliament's authority. This is deliberately done to ensure that the work of the parliament is not hindered or inhibited by fear that actions for defamation may be raised, while at the same time restricting the areas which are protected.”

21. The term "proceedings of the Parliament" is not defined in the Scotland Act, except to clarify that, it includes proceedings of committees and sub-committees of the Parliament. It is considered to also cover the lodging of parliamentary questions and giving notice of motions and amendments. During the passage of the Scotland Act, Lord Hardie spoke to the intentions in using this phrase, when addressing

¹¹ Explanatory Notes to section 40, available at: [Scotland Act 1998 - Explanatory Notes \(legislation.gov.uk\)](https://legislation.gov.uk)

amendments which sought to expand the privilege afforded to MSPs in relation to defamation:

*“I hope it will be helpful... if I clarify that we intend that the same broad construction should be placed on the term "proceedings of the parliament" in this Bill as applies in relation to the equivalent privilege at Westminster. **Therefore we are going no further than the Westminster privilege** but we would hope that the same approach would be taken. The words "proceedings of parliament" have not been defined in statute for the purposes of Westminster. However, their meaning has been established by convention and case law over many years.*

We are aware that attempts have been made for some purposes to make explicit what activities the term "proceedings of the parliament" may include, albeit not in an exhaustive way. The noble Lord, Lord Thomas of Gresford, referred to the Defamation Act 1996. Section 13(4) of that Act sets out a range of activities which are to be construed as falling within the definition of things said or done, "in the course of, or for the purposes of or incidental to, any proceedings in Parliament".

These include, for example, communications with the Parliamentary Commissioner for Standards or with any person having functions in connection with the registration of members' interests.

In this Bill we are deliberately choosing to make a simple reference to "proceedings of the parliament". However, I recognise that there is an element of judgment being exercised in taking this approach. As I have mentioned, we intend that this reference should be taken to have the same broad scope as it has in the case of this Parliament. By relying on this general term, we also leave room for the development of new ways of working in the parliament which may not be easily foreseen at present, and we ensure that the privilege conferred by this clause need not be limited only to the particular types of parliamentary activity we are able to identify at the present time.” (emphasis added)

22. The Explanatory Notes state that it is intended that it should be construed in a similar way as “proceedings in Parliament” has been construed for the purposes of Article 9 of the Bill of Rights Act 1688.

23. The Standing Orders of the Scottish Parliament (Rule 14.4) provide that “Any statement which is required or authorised to be published in pursuance of these Rules is published under the authority of the Parliament”. For example, this covers the publication of the minutes of proceedings and the Official Report which are required to be published under Standing Orders and the broadcasting of proceedings which is authorised under Standing Orders. It also includes the publication of any report or other document which is laid before the Parliament and which the Clerk is required by the Parliament to publish under Standing Orders, such as a committee report.

24. The defence of absolute privilege only applies in relation to actions for defamation; it does not affect other areas of the law, such as whether an MSP is in

contempt of court or, for example, remarks during a meeting of the Parliament which might constitute a criminal offence, such as an incitement to racial hatred.

Contempt of court (section 42)

42 Contempt of Court

“(1) The strict liability rule shall not apply in relation to any publication—

(a) made in proceedings of the Parliament in relation to a Bill or subordinate legislation, or

(b) to the extent that it consists of a fair and accurate report of such proceedings made in good faith.

(2) In subsection (1), “the strict liability rule” and “publication” have the same meanings as in the Contempt of Court Act 1981.”

25. The “strict liability” rule in the Contempt of Court Act 1981 treats conduct as a contempt of court where there is a substantial risk that the course of justice in particular proceedings will be seriously impeded or prejudiced, regardless of intent. The rule applies without the need for a specific court order to be in place. Section 42 of the Scotland Act 1998 disapplies the strict liability rule as regards any publication made (a) in “proceedings of the Parliament” in relation to a Bill or subordinate legislation or (b) to the extent that it consists of a fair and accurate report of such proceedings made in good faith. “Publication” includes any speech, writing, or other communication in whatever form, which is addressed to the public at large or any section of the public.

26. Section 22 of the Scotland Act 1998 requires that the Scottish Parliament be regulated by standing orders. Schedule 3 to the Scotland Act 1998, at paragraph 1, provides that the standing orders shall include provision for preserving order in the Parliament, including provision for – (a) preventing conduct which would constitute a criminal offence or contempt of court; and (b) a sub judice rule. This is provided for in Rules 7.3 and 7.5 of Standing Orders, which also apply to committees by virtue of Rule 7.8. Under the sub judice rule (7.5), a member may not in the proceedings of the Parliament refer to any matter in relation to which legal proceedings are active except to the extent permitted by the Presiding Officer. Even where the Presiding Officer permits such a reference that does not remove the requirement to comply with the strict liability rule outwith the exemption in section 42 for proceedings in relation to legislation.

27. The requirement for a Rule preventing conduct which constitutes contempt, means that MSPs must comply with the terms of any court orders. This includes orders under section 11 of the Contempt of Court Act 1981, covering the publication of matters exempted from disclosure in court, for example to protect the identity of an individual. In making such an order the court will balance the various rights involved. For example, in Scotland where unlike England and Wales there is no statutory prohibition on the disclosure of the identity of sexual offence complainers, the court may make such an order to protect complainers from the distress and indignity that

might arise from public knowledge and make it less difficult for other complainers to come forward.

28. Members are not above the law and aside from the specific protections in the Scotland Act 1998 for defamation and the strict liability rule in certain circumstances, Members' speech is subject to any legal restrictions (civil and criminal and contempt), including, for example, reporting restrictions on criminal proceedings involving children under 18 (s.47 of the Criminal Procedure (S) Act 1995); orders made by the Chair of an Inquiry under s.19 of the Inquiries Act 2005; information provided by the prosecution to an accused (s.162 and 163 of the Criminal Justice and Licensing (S) Act 2010); or information protected by the Official Secrets Acts (s.5 of the Official Secrets Act 1989).

29. In summary, the protection of elected members' speech provided in the Scotland Act 1998 is not absolute and Members' expression and behaviour is balanced with the rights of individuals enforced through the courts.

The power to expand protections

30. The ability of the Scottish Parliament to legislate for privilege reform is subject to the statutory framework of the Scotland Act 1998. In describing the Scottish Parliament's powers in the case of *Axa* the Supreme Court recognised that within the limits of section 29(2) of the Scotland Act 1998 the Parliament's "power to legislate is as ample as it could possibly be" and that within the limits of its legislative competence "its powers are plenary, they do not require to be exercised for any specific purpose or with regard to any specific considerations." [paras 146 and 147]. In considering the nature and purpose of the Scotland Act 1998, the Court went on to note that "*Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.*" [para 153] The Court decided that the ordinary grounds of judicial review did not apply to the Parliament and that, except to the extent that the courts were authorised to do so by section 29 of the Scotland Act, or required to do so in order to protect fundamental rights or the rule of law, it would be wrong for the judges to substitute their views for the considered judgment of a democratically elected legislature.

31. The power of the Scottish Parliament to make legislative reforms in relation to privilege in the Scottish Parliament is subject to these limits in section 29(2) on legislative competence. The most relevant of the limits in section 29(2), in the context of privilege, are that an Act of the Scottish Parliament would be outside legislative competence if:

(b) it relates to a reserved matter (e.g. the Union, the Parliament of the United Kingdom, data protection, employment etc)

(c) it is in breach of the restrictions in Schedule 4 (which lists various protected enactments, such as the Human Rights Act 1998 and that the Parliament cannot modify or confer powers by subordinate legislation to modify, the Scotland Act 1998 itself – subject to specific exemptions covered below)

(d) it is incompatible with any Convention rights (this is covered in the section on fundamental rights below).

32. The Scottish Parliament does have some powers to amend elements of the Scotland Act, and these powers are considerably more extensive following the Scotland Act 2016. Some specific changes can be made provided they fall within the limits of section 29(2) of the Scotland Act 1998. This includes using the authorised powers within the Scotland Act. But there are some aspects of the Scottish Parliament's status and position that it cannot itself amend. Paragraph 4(1) of Schedule 4 to the Scotland Act details that an Act of the Scottish Parliament cannot modify (amend) the Scotland Act 1998. However, paragraph 4(2) provides for exceptions to this rule and now enables modification to be made to sections 40, 41, and 42. This would enable the Parliament to amend the key relevant provisions on proceedings by or against the Parliament etc., defamatory statements and contempt of court. However, any such reform would require careful consideration of the other limits on the Parliament's competence, including interaction with reserved matters, such as data protection, and compatibility with fundamental rights.