SHOULD THERE BE CODIFICATION OF PARLIAMENTARY PRIVILEGE?

The Committee will, doubtless, have a considerable amount of evidence to consider on this subject. I approach the question of codification of Parliamentary privilege on a selective basis; that is the relationship between the powers of select committees and Parliamentary privilege.

I am a practising barrister with a special interest in constitutional and administrative law. I have written widely on that subject including, most recently, *Repairing British Politics: A Blueprint for Constitutional Change* (Hart Publishing 2010) as well as co-authoring a paper on *Select Committee Powers – Clarity or Confusion*?1 I am a member of the Advisory Board of the Constitution Society and am writing a Paper for the Constitution Society with Sir Malcolm Jack on the subject of codification of Parliamentary privilege. I spoke recently at an invitation only seminar at Worcester College, Oxford to the Group for the Study of Parliament on codification of Parliamentary privilege.

I attach the above-mentioned paper that I co-authored on select committees. This paper reflects my interest in the subject (and so forms part of my possible qualifications for providing oral evidence) and also addresses Parliamentary privilege albeit in the context only of select committees. This Paper was referred to (with approval) by Sir Robert Rogers when giving evidence to the Liaison Committee in respect of its inquiry into select committee powers.

There are some members of select committees (including chairs of such committees) who appear implicitly to consider that absolute parliamentary privilege as far as their proceedings are concerned means that they can ask any questions and make any findings they like and that witnesses appearing before them have no real choice but to answer them on possible pain of being in contempt of Parliament if they do not. This, as Erskine May suggests, is so whether or not (for example) a witness wishes to claim legal professional privilege or to rely on the privilege against self-incrimination.

It is undoubtedly true that select committee proceedings are, in principle, covered by absolute privilege. But three questions arise (the last two of which go together) that have practical significance for the exercise of committee powers.

They are: (i) who decides the scope of such Parliamentary privilege and with what consequences for the future of the doctrine in its present form? (ii) what is the scope of protection afforded by that doctrine for witnesses giving evidence before select committees? (iii) what protection (if any) does Parliamentary privilege give to third parties affected by the evidence of witnesses appearing before, or findings made by, select committees?

As to the first question, the scope and ambit of Parliamentary privilege is, as a matter of law, adjudicated by the courts. This was made very clear (if it had not been so before) in the MPs’ expenses cases of *Chaytor* which reached the Supreme Court.

There, Lord Phillips said this:

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15. It is now accepted in Parliament that the courts are not bound by any views expressed by parliamentary committees, by the Speaker or by the House of Commons itself as to the scope of parliamentary privilege...

16. Although the extent of parliamentary privilege is ultimately a matter for the court, it is one on which the court will pay careful regard to any views expressed in Parliament by either House or by bodies or individuals in a position to speak on the matter with authority...

This means that if and to the extent that a select committee were to conduct its proceedings in a manner which the courts found legally objectionable it might be that the courts would find it possible to adjudicate directly on the legality of some aspects of select committee proceedings by interpreting Article 9 of the Bill of Rights not to encompass select committee proceedings that (to take one example) were argued to violate a witnesses’ fundamental rights such as, for example, the right to privacy.

Thus far, these issues have not surfaced and entities such as Starbucks have appeared willingly before select committees. This may not always be so. One has only to think of the 2002 Strasbourg ruling in A v.UK to see that European courts are not averse to deciding cases involving Parliamentary privilege even if on that occasion the court held that the privilege asserted was proportionate.

Of course, Lord Phillip’s statement of principle in Chaytor requires qualification on conventional constitutional lines. In theory at least, Parliamentary sovereignty could prove a trump card. If Parliament were to legislate in clear and express terms to set out the scope of Parliamentary privilege, including the immunity of Parliament from the courts, current constitutional doctrine might be thought to prevent the courts from adjudicating in respect of select committee proceedings.

Yet matters are not, perhaps, as straightforward as this. In deciding whether or not to legislate so as to widen the scope of Parliamentary privilege, Parliament would need to give very careful thought to whether or not it was, having regard to the possible involvement of the courts, desirable to do so and if so how best to do it. For example, to the extent that Parliament wished to immunise itself from the strictures of EU law (which contain very similar fundamental rights protection to that contained in the European Convention in Human Rights) it would be subject to the legal doctrine of EU law supremacy and could probably not legislate effectively without withdrawal from the European Union.

It also seems distinctly possible that any attempt by Parliament to legislate to expand the immunity of Parliamentary privilege further than already contained in the Bill of Rights could result in direct conflict with the judiciary. In one recent case two Law Lords (Lord Hope and Lord Steyn) went so far as to suggest that ultimately Parliamentary sovereignty itself (the agent of any legislative change in this area) was merely a construct of the common law and was, hence, controllable by the courts.

However, to accept that there might be practical difficulties in legislating so as to extend privilege does not mean that there is no case for codifying Parliamentary privilege. There is, indeed, a strong case in my opinion for doing so.

The two remaining questions I have raised seem to me to support the case for codification. They may conveniently be taken together for they raise – by reference to current principles - the scope of protection of Parliamentary privilege both for witnesses coming before select committees and for third parties who may well either be adversely affected by the published content of such evidence or (without Parliamentary privilege) have been able to take advantage of such evidence.
There are perhaps regrettable ambiguities in Article 9 of the Bill of Rights. Although the vagueness of the term ‘proceedings in Parliament’ is not really an issue in the context of select committees (since what a witness says before or provides to a select committee is plainly covered by Parliamentary privilege) what is less clear is, as Erskine May observes ‘whether “impeached” or “questioned” are to be understood as inhibiting only the exposure of members to legal sanctions for what was done or said in the House, or whether the protection goes further’.

Whether or not the protections go further, damage could be done to other legal regimes by the blanket application of Parliamentary privilege to seek to compel a witness to give evidence or to divulge information. One can, for example, envisage circumstances in which the evidence of a witness appearing before a select committee might be capable of being used in a manner adverse to him but without necessarily exposing him to legal sanction or other liability.

Take, for example, the case of a witness undertaking statutory, public law, functions. A select committee might seek to compel that person to answer questions or to divulge materials which were inimical to the exercise of his public law obligations. Parliamentary privilege would be likely to have the effect of protecting him from legal liability (even perhaps – though this is not free from doubt - going as far as to accord protection to judicial review proceedings commenced against him). But such protection says nothing about the compromising of the statutory functions in question and/or the protection of third parties affected by the exercise of those functions.

We have seen, recently, the vigorous questioning of senior HMRC officials by the Public Accounts Committee in an endeavour to uncover details of global tax settlements. The HMRC owes duties of confidentiality to affected taxpayers under primary legislation as well, no doubt, as duties to taxpayers and other individuals under the Human Rights Act 1998 in respect of certain Convention provisions. Is recitation of the mantra of Parliamentary privilege sufficient to justify requiring the provision of information in such circumstances whatever the immunity from suit of those providing such information?

Moreover, there would seem to be no redress against select committees using Parliamentary privilege as a shield to make extremely damaging allegations, without any clear factual foundation. In this respect, I refer to an email that I received last year:

‘... the same Culture Media and Sport Select Committee used a report last year as a platform to publish serious, damaging but baseless allegations of corruption against another client of mine, the Qatar 2012 Bid Committee. I can’t think of any other institution which would have been able or prepared to act in such an unmeasured way....

...for these reasons, I have significant concerns that Select Committees are in danger of migrating from their proper role as fact finders at large to mini Star Chambers with no recognisable due process. That may be good fun for their members and a good way to deliver on political agendas, but it cannot be good for the majesty of Parliament in the longer term. Ultimately, if they carry on like this, Strasbourg may have something to say on the Select Committee procedures which would probably occasion something of a constitutional crisis.’

This list of damaging effects could, no doubt, be added to. Could evidence given in select committee by a witness be used by a third party in order to assist a defence to a criminal charge?

We can see from these examples how the interests of both the witness and third parties are affected in these examples by a view of Parliamentary privilege that is perhaps
insufficiently subtle or flexible to take on board the fact that in the modern era (and in a very different climate to that when the Bill of Rights was enacted) other interests are involved in select committee proceedings beyond (important though that is) the protection of free expression in Parliament.

The Green Paper on Parliamentary privilege which was published in April last year (Cm 8318, April 2012) took, in my view, a rather timid line with regard to codification saying, essentially, that the case for codification had not been clearly made out.

In this respect it is, perhaps, to be borne in mind that the Joint Committee on Parliamentary Privilege recommended codification in its 1998-99 Report. It did so for clearly stated reasons of principle one of which was that a Code could maintain flexibility by stating principles. The antiquity of the Bill of Rights is, in this area, likely to prove more of a hindrance before modern courts than a hallowed source of continuing wisdom.

It is to be hoped that the present Joint Committee can be persuaded to go further than the Green Paper. Since the 1998-99 session, select committees have become much more high-profile and there is now a relationship that is beginning to be recognised between, on the one hand, the need for such committees to have clearly established and arguably greater powers and, on the other, the need for an injection of greater flexibility into Parliamentary privilege so as to provide safeguards against abuse of those powers. This can, in my view, best be achieved by some form of codification.

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