



House of Lords  
House of Commons  
Joint Committee on  
Parliamentary Privilege

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# Parliamentary Privilege

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*Oral and Written Evidence*

## The Joint Committee on Parliamentary Privilege

The Joint Committee on Parliamentary Privilege is appointed by the House of Commons and the House of Lords to consider and report on the Green Paper on Parliamentary Privilege (CM8318).

### Membership

#### HOUSE OF LORDS

Lord Bew (Crossbench)  
Lord Brabazon of Tara (Chair) (Conservative)  
Lord Davies of Stamford (Labour)  
Baroness Healy of Primrose Hill (Labour)  
Lord Shutt of Greetland (Liberal Democrat)  
Baroness Stedman-Scott (Conservative)

#### HOUSE OF COMMONS

Sir Menzies Campbell (Liberal Democrat)  
Mr William Cash (Conservative)  
Thomas Docherty (Labour)  
Tristram Hunt (Labour)  
Mr Bernard Jenkin (Conservative)  
Mrs Eleanor Laing (Conservative)

### Powers

The committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via [www.parliament.uk](http://www.parliament.uk).

### Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/jcpp/new-committee-publications/>.

### Committee staff

The staff of the Committee were Christopher Johnson (Lords Clerk), Liam Laurence Smyth (Commons Clerk), Eve Samson (Commons Clerk), Anthony Willott (Lords Clerk), Christine McGrane (Committee Assistant) and David Burrell, (Committee Support Assistant).

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# Oral evidence

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TUESDAY 29 JANUARY 2013

Members Present:

Lord Brabazon of Tara (Chairman)  
 Lord Bew  
 Sir Menzies Campbell  
 Mr William Cash  
 Lord Davies of Stamford  
 Baroness Healy of Primrose Hill  
 Tristram Hunt  
 Mr Bernard Jenkin  
 Baroness Stedman-Scott  
 Lord Shutt of Greetland

## US House of Representatives [Charles W Johnson III] (QQ 1-27)

### Examination of Witness

*This evidence was taken by video conference.*

**Q1 Chairman:** Mr Johnson, thank you very much indeed for agreeing to appear before our Committee.

**Charles Johnson:** Good afternoon.

**Chairman:** I gather that you gave evidence to our predecessor Committee back in 1998-1999. You have probably seen the Green Paper at which we are looking at the moment. Would you like to say anything at the beginning or go straight into questions?

**Charles Johnson:** Thank you. May I address you as Mr Chairman?

**Chairman:** You may.

**Charles Johnson:** I am honoured to be here. My successor in office as Parliamentarian, Mr Tom Wickham, has recently visited the House of Commons, as did his predecessor John Sullivan. We have developed a wonderful relationship, but none better than my relationship with Sir William McKay, former Clerk of the House, currently Chairman of the West Lothian Commission. I imagine you are familiar with him. He, hopefully, will be available to your Joint Committee at some point. This is really his area of expertise.

We wrote a book called "Parliament and Congress". We co-authored it several years ago; the second edition is now available. Thank you for holding it up; thank you for having that. It goes into excruciating detail upon most of the questions that I can anticipate you will ask, but I don't want to totally anticipate your questions. I would commend it to your reading, at least as bedside reading if you are having insomnia. But, otherwise, it does go into some of the questions that Ms Samson has been kind enough to suggest you may want to pursue. With that, I am honoured to be with you and hopefully I can be helpful.

**Q2 Chairman:** Thank you very much indeed, Mr Johnson. I will kick off, if I may, with the first question. Parliamentary privilege has been described as "the rights and immunities

which the two Houses of Parliament and their members and officers possess to enable them to carry out their parliamentary functions effectively”. Can you summarise the rights and immunities which it is considered Congress and its members need?

**Charles Johnson:** Yes. To some extent, the term “privilege”, as used in Congress, is much broader, and my testimony in 1998 made that distinction. I will not go into the various notions of privilege as they relate more procedurally, but, as far as privileges and immunities of members are concerned, as you may know, our Article 1 Speech or Debate protection derives from the Bill of Rights of 1689, almost verbatim, but not exactly. Yours, I think, says “questions outside of Parliament”; ours uses the term “in any other Place”. It is Article 1, section 6 of the Constitution.

From that has derived much jurisprudence, because under our system, as you know under separation of powers, from 1789 and forward, the federal courts have been given jurisdiction, at least as they have assumed it, to look at Congress as far as its compliance with the Constitution is concerned but in the context of cases or controversies. The courts are not sitting as an advisory body; they are not giving anticipatory rulings or advice on issues of parliamentary privilege. For those questions to be cognizable in the courts, they have to arise in the context of a case or controversy. Having said that, the rights and immunities that members enjoy derives primarily but not exclusively from the Constitution .

The other basic immunity that members derive is the right of freedom from arrest, which is specifically stated in the same section of article 1, but which has the major exceptions stated there—except for commission of a felony or a breach of the peace. That is a broad exception. Members can be arrested during sessions of Congress if they have allegedly committed felonies or even a misdemeanour breach of the peace. But the real protection enures to civil litigation, which members assume and have been advised protects them during sessions of Congress from having to appear either as witnesses or as the party defendant in civil actions so as not to remove them from their primary responsibility, which is to attend sessions of Congress.

Clearly, the privileges and immunities that inure to the individual members are primarily protections for the Congress as an institution. I will be speaking more often, I suppose, about House responses to these issues, but I think you can assume for the most part that I will be speaking broadly for House and Senate responses. But the need to protect members, to confer on them those two immunities—Speech or Debate and arrest—inures to the protection of the legislative branch as a separate coequal branch, not to be interfered with by the Executive or Judicial branches any more than is constitutionally permissible.

Beyond those two basic constitutional immunities, there are the impowerments of each House of Congress to make its own rules and to judge the elections and conduct of its members, but you also have some statutory protections that are afforded to members. There is what is called the Westfall Act, which derives from the notion of sovereign immunity that members of Congress, beginning in 1988, when that statute was amended to include members of the Executive and legislative branches as well as the judicial branch, cannot be sued. They enjoy a sovereign immunity against lawsuits because of their official positions.

Recently, there have been federal cases which suggests that members can seek immunity from prosecution which the Justice Department, under the law, enforces on their behalf. The Justice Department has, on several occasions, refused to waive an immunity from civil process for members who have spoken outside the precincts, as you might say, of the House of Representatives. So, if their statements are connected with the legitimate legislative function of a member, press releases and comments in the press or republications outside a Committee report may enjoy a statutory protection of sovereign immunity if the Justice Department seeks to impose them on a member's behalf and does not seek to waive it.

That statutory protection has been interpreted to include a member making an offhand remark. In the Ballenger case, which you will note is cited, in a press conference, a Member's wife, who lived on Capitol Hill—they are now divorced—had made a public comment, which he repeated, that they lived next to an Islamic temple which housed terrorists. That Islamic group sued the Congressman for defamation and the case was dismissed, surprisingly, under a notion of sovereign immunity because the member's statement to the press was considered a legitimate part of his legislative activity in trying to explain to the public how a member of Congress carries on his duties, part of which included his wife, being a part of his family, being fearful of living in the District of Columbia. If that sounds far-fetched, it was, but the courts upheld that as a statutory immunity. I don't know that you are heading down that road, Mr Chairman, from what I have been reading. It is, though, a separate statutory protection.

The third area I would describe, on which you may want to proceed more closely in your follow-up questions, is in the context of employment by members of Congress and the extent to which they are shielded by the Speech or Debate clause in hiring and firing decisions of persons in their office that may have been discriminatory and may have impinged on the rights of the employee but which are protected for the member against any kind of compulsory testimony or liability because those persons held positions with the member that were a part of the legitimate functioning of the legislature. If a member fires a legislative assistant who is part of his responsibilities and he makes a decision, not only is that person as a staffer protected by extension with Speech and Debate immunity, but the Member is protected if that person tries to litigate against him, whereas somebody who is employed to get the Member re-elected or perform administrative matters within the office is not so protected.

That is an area referenced in the Congressional Accountability Act passed in 1995. Congress applied for the first time, to its own Members, the notion of non-discrimination in the workplace but with the caveat "except as protected by article 1, section 6". It was part of the statute, not that it needed to be. It has been that exception, in a number of appellate court cases which have been denied review by the Supreme Court, that has enabled members to hide behind the fact that article 1 protects them from what might otherwise have been clearly discriminatory employment activities.

**Chairman:** Thank you very much indeed. Menzies, would you like to ask a question? There was something covered in that actually already.

**Q3 Sir Menzies Campbell:** Good afternoon, Mr Johnson. My name is Campbell. I am a member of the House of Commons. I am interested in what you said about the extent of

the jurisdiction of the federal courts in relation to interpretation of the Constitution. As I understand it, and please correct me if I am wrong, the federal courts have the jurisdiction to consider whether or not an action is compliant with the Constitution, but only if that issue arises in the course of an action before the court. Am I right to make that interpretation and does that mean that it is not possible to go to a federal court and institute a declaratory action, asking the court to rule as to whether or not a proposed or potential act would not be compliant?

**Charles Johnson:** Thank you, Sir Menzies. I have followed your career in the House of Commons. I have become somewhat of an Anglophile watching Prime Minister's Questions since my frequent visits there. I commend you for your efforts there.

Article 3 of the Constitution, as you recite correctly, says that the federal courts, including the Supreme Court, have jurisdiction over cases and controversies arising under the Constitution. But, the Supreme Court in *Marbury v Madison* in 1803, determined that the courts had the authority to review the constitutionality of acts of Congress brought, as you say, in a case or controversy setting. The courts have expanded on *Marbury v Madison* in a long variety of cases to review Acts of Congress in a case or controversy context, most recently and, unfortunately, in the *Citizens United* case on congressional ability to legislate on campaign financing. The Court determined that corporations, for example, are persons within the protection of the First Amendment freedom of speech guarantee. The ability of the federal courts to judge the validity of a statute derives initially from the court's own interpretation of its authority, but we have had in recent years a statute pertaining to the Senate that enables the Senate legal counsel, as a matter of law, to pursue declaratory or injunctive relief in the federal courts, not necessarily involving a case or controversy that has arisen in the courts but one that has developed through a congressional proceeding in some form.

The Senate, strangely, has that authority in law, and the House has never by statute, had its own ability to seek declaratory or injunctive relief. But it has, in several recent cases, and I will mention two, by resolution, enabled its own counsel to seek or at least urge the court to accept that House counsel can go to the federal court on its behalf and, either as an amicus—a friend of the court—or as a party, to defend an action that the House has taken.

I mention that in the current context of a contempt proceeding against the Attorney-General. Attorney-General Eric Holder was held in contempt by the House in the last Congress for refusing to provide certain documents to the Committee on Oversight and Government Reform, relating to the so-called “fast and furious” investigation of illegal weapons being shipped to Mexico. The Bureau of Alcohol, Tobacco, Firearms and Explosives was sending weapons into the hands of drug lords and gangs in order to trace the origin of those weapons from the United States. It resulted in the killing of a federal agent using such a weapon and it was really a misguided policy, but the Attorney-General has refused to comply with some of those subpoenas. He has complied to a great extent, but in relation to some of the documents sought he is claiming Executive privilege, which is another entire range of privilege that the Executive can or has claimed against legislative encroachments into information that, presumably, the President needs to rely upon for his own decision-making. In that case, it had nothing to do with the President, but they are asserting it anyway. It was rather because the Attorney-General said he would not allow the US attorney for the District of Columbia, who was his subsidiary, to prosecute him—as you



can understand, under the contempt of Congress statute—and he would claim Executive privilege on behalf of the President. The House has appointed and reappointed its own counsel to go and argue in the federal courts the limits of Executive privilege. That is a matter now being litigated.

The same basic thing happened a few years ago when President Bush claimed Executive privilege on the firing of some US attorneys. He had staffers—Karl Rove, Josh Bolten and Harriet Miers—who all claimed Executive privilege because this was information that the Justice Department knew about but the President might have known about. They were held in contempt by the House, but the Attorney-General refused to prosecute them. That was later settled within the Judiciary Committee, when they reappeared, after the courts had said they could not just refuse to appear at all. They had to appear and, then and only then, assert their constitutional rights of Executive privilege on an ad hoc basis.

**Q4 Sir Menzies Campbell:** Could you sum up, in one sentence, how you would describe the nature of the relationship between the courts and the Constitution in that particular area you have just described?

**Charles Johnson:** I would say the extent of absolute Executive Privilege is an emerging, unsettled area and it is important litigation. The key cases that have arisen are, in the modern context, the *Citizens United* case, which I have mentioned. Separate from Congress' valid authority to tax persons not purchasing health insurance, the healthcare law was one that involved a new doctrine of coercion, where the court found that Congress had overstepped its bounds by forcing the states to spend Medicaid money that it didn't want to spend. Overall, the court's jurisdiction prevails, as opposed to Congress' sovereign authority to legislate, when it comes to a properly broad case or controversy and in the court's ability to intercede on behalf of a public or private litigant who is asserting a constitutional privilege against self-incrimination, a First Amendment privilege of freedom of speech or any other constitutionally protected freedom such as equal protection of the laws, due process of law, unreasonable searches or seizures. All of those protections are constitutionally guaranteed and become cognizable in the courts.

**Q5 Mr Cash:** Could I ask a question, please, Mr Johnson? Regarding the previous book that you have obviously updated—I think it was “Bradshaw and Pring”, if that is right—the question that I am interested in, relating to this question of the courts and Congress, is the role of the Attorney-General. I was Shadow Attorney-General for some time and there is a book by a man called Edwards—I forget the man's Christian name—who wrote the definitive work on the constitutional role of the Attorney-General. I am intrigued to know that the Attorney-General in the case that you have been citing is actually supporting the Executive, in a sense, it appears, as against the role of Congress.

I simply ask this question without wanting to elaborate too much because the Attorney-General, although he is appointed by the Government, owes his first duty to the House of Commons, in our case, in the United Kingdom. It just strikes me, for example, just to mention one instance, that Stephen Hastings, who was then the Attorney-General, misled the Cabinet, as a result of which Ramsay MacDonald actually was defeated on a vote of confidence in the House of Commons, as a result of which the Government fell in 1924. I just mention that without wanting to go deeply into it, because it does seem to me that the question of the role of the Attorney-General in the context of the relationship between the Executive and Congress is a matter where there is a somewhat distinct position from that

of the House of Commons, and maybe Parliament too for that matter, with regard to the role of the Attorney-General. I put that on the record because it seems to me to be rather intriguing that you should have the position that you have now arrived at in Congress with the Attorney-General.

**Charles Johnson:** Yes, Sir. That distinction is a correct one to make. The Attorney-General is an Executive branch official—the Justice Department is a Department in the Executive branch. He is appointed by the President and confirmed by the Senate. He is not a congressional official. Under the contempt statute that Congress has had in place since 1857, rather than Congress prosecute its own contempt—you may want to get to that issue of common law contempt, as you would call it, where a recalcitrant witness could be prosecuted within the precincts of the House—the law delegates any violation of refusal to testify which is found by either the House or Senate to be in contempt of that body. It is first reported in detail by the relevant Committee, which has to show that it has the proper jurisdiction, that the witness wilfully declined to answer proper questions.

But then, as happened in the Attorney General Eric Holder case, in other Executive branch cases and certainly in a lot of private witness cases, the statute says the US attorney for the appropriate district, which is usually the District of Columbia since that is where the contempt presumably occurred in the precincts of the Congress, “shall” bring the case to a Grand Jury for misdemeanour prosecution. But it has been in those cases that the US attorney, with that mandatory duty, has nevertheless been advised by his boss in no uncertain terms that “you will not bring that case before the Grand Jury”. The Attorney-General so advised the House in the Holder contempt, and it was then that the House decided that it had to appoint its own counsel to bring civil litigation. It also left open the question of whether the AG was in criminal contempt but so far there has been no prosecution. You are right in saying that the Attorney-General’s relationship with Congress is very different from your Attorney-General, and he is primarily beholden, as has been proven—at least until the courts say otherwise—to the President and the Executive branch to faithfully execute the laws of the Congress. Under another statute the President can decline to permit the AG from defending the constitutionality of an Act of Congress in court.

**Chairman:** We have covered the next question which we were going to ask. Can we move on to the right to free speech now? I wonder if members of the Committee, by the way, could introduce themselves to Mr Johnson before they start speaking.

**Q6 Tristram Hunt:** Mr Johnson, my name is Mr Hunt. I am a Labour Member of Parliament. On this Committee we are all rather wrestling with what the Government are up to with their Green Paper on privilege, which notes that the protection of freedom of speech in Parliament “might act as an obstacle to the prosecution of criminal offences” and asks whether it should be disapplied in cases of alleged criminality. From what we have heard from yourself this afternoon, it seems that that kind of debate would not even begin to be entertained in the United States. Can I ask, first of all, what your views are, as an Anglophile, on this question of privilege and the British Parliament? Secondly, can you see whether there are particular kinds of crime that could be exempted from absolute privilege speech?

**Charles Johnson:** Yes, Sir. Based on the Supreme Court decisions, that virtually any crime is exempt from an absolute privilege in terms of the commission of the crime itself by the Member. It is the compulsion of the testimony or evidence, either in court or in response

to a subpoena, which is the protection that the member enjoys. But the Justice Department or any state can prosecute a sitting member of Congress for a violation of any number of criminal statutes which have been on the books for a long time. Certainly, bribery and corruption of federal officials generally has been a long-standing statute that defines federal officials as including members of Congress. Under the landmark Brewster case, which I referred to in my 1998 testimony, the Supreme Court had said that, while evidence of activity such as a Member's speech in the House—other cases have expanded that to include Committee activity or any true legislative activity—cannot be entered as evidence in a prosecution or compelled in a summons. Nevertheless, a prosecution can go ahead if circumstantial and other evidence of the sitting Member's conduct can prove beyond a reasonable doubt the commission of a crime. That crime can include perjury, obstruction of justice or a false statement. All of those are federal felony statutes which could be applied to members. That is apart from the House or Senate punishing its own members for disorderly behaviour or for inappropriate behaviour.

**Q7 Tristram Hunt:** But then the two are clearly distinct in terms of absolute freedom of speech and then, at the same time, there is capacity to prosecute for criminal offences.  
**Charles Johnson:** Yes. If the evidence of a member's act—a speech or a legislative act—is so interwoven with other evidence, the courts would not admit that evidence, I would expect. The evidence has to be separate and apart from the Speech or Debate-protected activity, unless there is a fully understood and stated waiver. There is a separate Supreme Court case on what constitutes waiver, and it is not likely that a member will have waived his or her privilege under the Speech or Debate clause. The one case where that was involved was a Representative named Helstoski. That is a case where the waiver had to be explicit and where neither the House nor the Member did explicitly address a waiver. It should be understood that the protection does not just enure to the Member. The House or the Senate can, under House or Senate rules, address their own institutional concerns, notwithstanding an individual member's reluctance to do so, not that it is very often done. But a so-called question of privilege resolution can be brought to the House or Senate floor at any time, which would suggest that a member not testify to a certain line of questioning or not appear while the House is in session, or that counsel be appointed to litigate the matter either for injunctive or declaratory relief. The House can make its position felt on an ad hoc basis if it feels the Member has or has not properly asserted his own absolute immunity.

**Q8 Tristram Hunt:** Very briefly, can you think of any case where the perpetration of an alleged criminal offence was interwoven with free speech?

**Charles Johnson:** A lot of it is in the civil libel and slander statutes, where there have been several litigations in court. The so-called Proxmire case concerned the republication by the then Senator Proxmire in a newsletter that he sent to his constituents which libelled a private citizen as one of the winners of the "Golden Fleece Award" which he had made a speech upon in the Senate and was protected. But the person was libelled because the Senator he republished that libellous statement in a newsletter that was not protected as legislative activity. There have been a number of those cases, where speeches on the campaign trail or out of the precincts, as you might say, of the House or its Committees have not been given that protection, so there is a definite line drawn by the courts in a number of cases.

**Q9 Tristram Hunt:** It seems very strange that the comments of a wife are protected but then the republication of a speech is not.

**Charles Johnson:** That protection is statutory. It was more a dismissal of the case because the Government refused to waive sovereign immunity to allow the case even to go forward. In that sense it was not a First Amendment protection fully litigated; it was just that the court could never get to the substance of the case because the Justice Department, in the lawsuit representing the member, refused to waive sovereign immunity for the Member. The court felt that republication of that statement by the wife was in the course of a member's proper responsibilities—it seems far-fetched, and I agree with you. I questioned it the day it happened, but that is the current law right now. That case was not appealed, so it is clearly a much broader range of statutory protection than maybe even I would have contemplated not so long ago.

**Chairman:** We must try and press on a bit because we do not have that much longer with you, Mr Johnson, but we will try and get through what we must and what we are interested in.

**Q10 Lord Davies of Stamford:** I very much hear what you have said, Mr Chairman. I will try and be as succinct as possible. Before I move on to another subject, can I just check with you what I think I have understood from your last answer, which is that a member of the Congress who repeats a statement made in the Congress outside the precincts is not protected and does not enjoy privilege, but a third party in the United States or elsewhere—a newspaper, a broadcasting station or whoever—who repeats a statement made on the congressional record is protected and is allowed to publish that record? Is that correct?

**Charles Johnson:** We have a different area of jurisprudence than you have in the UK on republication of libel by the press or a third party. The Sullivan case really does give much more licence to our press to repeat a libel of a public official as long as it is not considered intentionally defamatory by the person uttering it. A public official holds him or herself up to much greater scrutiny, so the republication by the press does enjoy some protection under the First Amendment freedom of speech protection of the press, unless it is libel that is so intentionally defamatory with respect to a public official that it loses that privilege. But it is the First Amendment protection there to the press that, to a great degree, protects republications.

**Q11 Lord Davies of Stamford:** Thank you very much. Mr Johnson, I should have introduced myself. My name is Lord Davies. I am a Labour Member of the House of Lords. There are, no doubt in the United States as here, many occasions when courts issue injunctions to protect the identity of parties to litigation or witnesses in court proceedings. There have been many occasions here when Members, using the privileges of Parliament, have ignored those injunctions and actually revealed the names that were protected by the injunction. Under our system, of course, any repetition by others of that parliamentary record is also protected. What is the position in the United States so far as either the law or the rules of the two Houses of Congress, or indeed the practice of members of the Congress, is concerned?

**Charles Johnson:** If an injunction had been issued against another person and then a member of Congress repeated it in a speech on the floor, that member would enjoy protection, as I assume would the press on republication of the speech, which is virtually simultaneous, as you know, electronically and in the written press; all such statements are

republished almost immediately. If the member enjoys a privilege to repeat something against which there is even an injunction and it is repeated in the press, I am not aware that our courts issue prior restrained injunctions very often against speaking out on matters. So I don't think we have an area of jurisprudence there that will necessarily help the courts to enforce their injunctions. The combination of the free speech and press guarantee in the First Amendment and the article 1, section 6 Speech or Debate protection to the members would allow someone to ignore that injunction, but, again, we don't have those injunctions.

**Lord Davies of Stamford:** Chairman, I think we have covered the next question already in the answer.

**Chairman:** Thank you, Mr Johnson. Could we now move on to the issue of the power to subpoena, which is quite an interesting one, and in this country the powers that either House of Parliament has to demand that a witness comes and gives evidence, usually before a Select Committee? Mr Cash would like to ask this question.

**Q12 Mr Cash:** I am Bill Cash and I am a Conservative Member of Parliament for Stone. I have been in Parliament 28 years. I was Shadow Attorney-General. The question I would like to ask is how effective is the power to subpoena in ensuring witness compliance? Could I follow that by adding that the courts, as we understand it, effectively enforce a subpoena? How deeply do they investigate such matters as the legitimacy of a Committee of inquiry, the reasonableness of the request and the right to avoid self-incrimination?

**Charles Johnson:** I could go on at length, as perhaps I have already in answer to your other questions. It is not an easy answer, Mr Cash. The House and Senate rules give each House the authority of standing rules to issue subpoenas, whether it is for testimony or documents. With regard to the enforceability of those subpoenas in the courts normally, if a witness remains reluctant—a Government or a private sector witness refuses compliance—contempt is the first step either House would take, first through its Committee, which would be gathering the evidence, then the full plenary session and then the certification for contempt. During the Committee hearings, where the evidence is sought, a witness can assert his or her constitutional rights against self-incrimination unreasonable search and seizure and 14<sup>th</sup> Amendment guarantees of equal protection and due process. All of those rights can be asserted by the witness through his counsel and can be determined preliminarily by the Committee to balance whether the Committee thinks the witness is being contemptuous. But, ultimately, those individual, constitutionally protected rights are litigated in the courts if and when there is a prosecution for a contempt. Then the witness could point to his or her assertion at the Committee level that has been denied by a vote of the Committee. The Committees listen to these. They don't make separate determinations necessarily of whether it is a protection well stated. The Committees, with a full majority quorum present, have to decide, in their vote on ordering the contempt, whether any or all of these constitutionally suggested protections enure to the witness. Ultimately, the prosecution comes when Congress can litigate through the Attorney-General whether the witness has been improperly reluctant to respond.

Subpoenas have a temporal life. Part of the problem has been that subpoenas run out every two years. In the case of Harriet Miers and others on the Attorney-General's firing of US attorneys, the Congress expired, just as it did on Eric Holder this time. Eric Holder was found in contempt, and Congress has reinvigorated its ability to litigate, just as it did in the Harriet Miers case. Quite often you will find a witness, whether it be private or public,

trying to run out the clock so that they have to start the subpoena process over again. That is a protection, but, ultimately, the courts are the arbiters of whether an asserted protection is cognizable, should have been supported in the Congress, or whether, at a later stage of prosecution, it will be granted by the courts.

**Q13 Mr Cash:** Thank you very much. Could I ask another question following on from that? It sort of connects with the point I made in an intervention earlier about the role of the Attorney-General in relation to the House of Commons as compared with the Executive in the context of the United States to the Presidency. As we understand it, there are certain difficulties in enforcing witnesses from the Executive branch. Do you think that this limits Congress's effectiveness, and is this inherent in the separation of powers in the US constitution? I ought to add that we are watching with great interest the film on Lincoln regarding the whole question of constitutional amendments at the moment.

**Charles Johnson:** It is a wonderfully done movie. One question was how accurate were some of the words they used in debate in describing each other. I have been asked to look at the old Congressional Globe to see if any of that language was ruled out of order. It is not the way it was portrayed.

Congress, obviously, has other ways of enforcing the compliance of the Executive branch without going through the subpoena route. Clearly, the power of the purse is the most annually recurring way. Government and Executive branch witnesses appear all the time before authorizing and appropriating sub-committees. If they are reluctant to respond voluntarily, they can be threatened as their budget is annually reviewed—90 or more per cent of the time the Executive branch will comply voluntarily, in whole or in part, in order to keep their budget intact, or to avoid the unfavourable publicity that an Executive branch official might get from the Committee for refusing to co-operate. You have those informal mechanisms most often. There is the ability of the Committees and the Executive branch, through participatory interviews with staff, without compulsion, with staff and/or members participating in a briefing or formal hearing where two members are required to constitute a quorum for a hearing, but many Committees allow their staff to use informal interrogatories or depositions to gather information without compulsion. Most Executive agencies are well advised, unless there is a strong constitutional prerogative such as Executive Privilege or national security classification to comply rather than to force it to compulsory compliance.

**Q14 Mr Cash:** Could I ask you one final question on this, just to amplify what I said earlier because it got a bit lost? Do you think that this problem about the effectiveness of Congress in this context is inherent in the separation of powers in the US Constitution, because our inquiry is with respect to the question of privilege in the United Kingdom, where, of course, Members of Parliament, including the Prime Minister and all members of the Government, are members of the House of Commons? Do you think this question, in terms of the analogy between what goes on in the United States as compared with the House of Commons, is not only to do with the separation of powers but that the distinction that could be made in the context of the House of Commons or Parliament would be dependent upon the fact that Members of Parliament, including the Prime Minister, are in fact in the House of Commons itself?

**Charles Johnson:** Yes; that is a very basic distinction, but it doesn't completely separate the two areas of jurisprudence here, because the House and Senate have the inherent authority

to investigate. The Supreme Court has said that. Incidental to its authority to legislate is the authority to investigate in an appropriate field of inquiry. Until 1930, there were infrequent so-called inherent contempts actually punished in the House or Senate on the floor in a plenary session, but it has not been tested in the modern context because it involves putting time-consuming procedures in place for witnesses, which is why the criminal statute on contempt has superseded that and now both Houses go into court for civil and declaratory relief. But, no, I don't think the fact that there is a separation of powers and the authority of the Executive branch to execute the laws necessarily detracts from Congress's ability to protect itself and to make its own initial decision. It is just that the Constitution itself has overarching protections that inure to private citizens and public officials, either expressly in the Constitution or by a small amount of case law in the case of Executive privilege.

As I say, the Executive privilege line of jurisprudence is only beginning to be firmed out by the federal courts. The only Supreme Court case in point is the *Nixon* case, where President Nixon refused to submit the Watergate tapes to a federal court. That was not to Congress, but the notion of Executive privilege was dismissed there by the Supreme Court because he had committed crimes. For the same reason, the notion of absolute Executive privilege will not inure, I don't think ultimately, to the protection of the Executive, unless the Privilege is directly related to the President's own decision making or ability to make decisions, rather than a "deliberative process" qualified privilege where a balancing test is applied.

**Q15 Lord Davies of Stamford:** Mr Johnson, how many people, whether public officials or private citizens, have been successfully prosecuted for contempt of Congress over, say, the last 20 years and what have been the punishments that they have received at the hands of those courts?

**Charles Johnson:** Sir, in 1981, a Cabinet rank official, the Administrator of the Environmental Protection Agency, was held in contempt for refusing to turn over certain documents. But only in the last several years has a Cabinet Secretary been held in contempt by the House, namely, Eric Holder now, and Harriet Miers, Carl Rove and John Bolton for refusing even to appear before the committee. A larger number of private citizens have been held in contempt and prosecuted.

**Q16 Lord Davies of Stamford:** Can you give us an estimate of how many private citizens over 20 years?

**Charles Johnson:** Over 20 years?

**Lord Davies of Stamford:** Yes.

**Charles Johnson:** In the last century I would say maybe 15 maximum, because most times compliance is assured by informal persuasion.

**Q17 Lord Davies of Stamford:** We have that point. This is a sort of ultima ratio—the final deterrent. It obviously works pretty well because most people comply, but, in order to see whether a deterrent is effective, you have to see what the punishments are and what the reality is of a successful prosecution, hence my questions. Let us say that 15 to 20 have been successfully prosecuted for contempt of Congress over the last 100 years. What punishments have they received at the hands of the courts?

**Charles Johnson:** Under the statute it is a misdemeanour punishable by up to one year in prison a misdemeanour, and a fine. But it hasn't been finally prosecuted to Executive officials. There have been two since I have been here: Secretary of Interior Watt in the Reagan Administration and Secretary General Reno, under the Clinton Administration,

who were certified in contempt by the Committee but where the House has not taken up that case and certified it to the court because there has ultimately been an agreed-upon compliance.

It is a misdemeanour. It is not a felony and it has been applied in a number of cases to private citizens, unless they recant before the prosecution is complete and they decide to co-operate, in which case the House can vote not to proceed to prosecution any longer.

**Q18 Lord Davies of Stamford:** Let me ask my question in another form. How many people, whether private citizens or public officials, have been successfully prosecuted? I think you said 15 over the last century, roughly. What punishments did those 15 people receive?

**Charles Johnson:** The only range of punishment, really, is up to one year imprisonment and a fine.

**Q19 Lord Davies of Stamford:** Some were fined and sent to jail for that.

**Charles Johnson:** Yes. I will submit to your Committee the accurate number, Sir, of those cases in the course of the last century and more recently. I will submit that.

**Q20 Lord Davies of Stamford:** That would be very helpful, together with the verdict, the punishment and the date. Those are all very significant facts to us.

**Chairman:** That is very kind; thank you.

**Charles Johnson:** There is a paper, submitted by the Library of Congress, on contempt, which is in great detail. You can get that paper on contempt online through the legislative research service of the Library of Congress. I will forward that document to you.

**Q21 Mr Jenkin:** Mr Johnson, my name is Bernard Jenkin. I am a Conservative Member of Parliament. I think I can be very brief. Just to summarise, from what you have told us, neither House of Congress relies on its inherent powers of subpoena in order to bring witnesses to Committees or to obtain documents of which people are resisting disclosure.

**Charles Johnson:** No. They rely on the power to issue the subpoenas but not to punish for refusal to comply. The power to initiate, authorise and serve the subpoenas is clearly one that either the House alone or its Committees have the authority to do. It is the follow-up of the unwillingness to comply that is not inherently punished any more. That is the distinction.

**Q22 Mr Jenkin:** Except by use of statute.

**Charles Johnson:** Yes, or most recently by the Senate through statute or the House through ad hoc authority to intervene.

**Q23 Mr Jenkin:** Can you explain that ad hoc authority? What do you mean by “ad hoc authority to intervene”?

**Charles Johnson:** That means the House adopted a standing order on opening day this month to allow the House counsel to continue to seek declaratory relief against the Attorney- General, who was held in contempt in the last Congress, to continue to make representations before the federal courts to enhance the standing of the House counsel to go into federal court and make a case for civil relief. That is what I mean by continuation of the authority.



**Q24 Mr Jenkin:** That is analogous to our traditional notion of parliamentary privilege which we exercise in this country.

**Charles Johnson:** Our book says something about Parliament's willingness to co-operate in court—to help a court gather information pursuant to a subpoena. Is there such jurisprudence in the United Kingdom? I am not aware of it.

**Q25 Mr Jenkin:** Where the Senate, for example, resorts to the use of statute to enforce a subpoena, how do you avoid the court then becoming embroiled in what we could call proceedings in Parliament to establish whether the witness has been properly summoned, whether the witness is relevant to the inquiry, whether the Committee was properly constituted when it initiated the process, and all those matters? How do you avoid the courts getting embroiled in Senate proceedings?

**Charles Johnson:** You don't, ultimately, because they are there to litigate a criminal statute or, in this most recent case, to declare or give injunctive relief. That is the point. The separation of powers does not totally separate and isolate the ability of either House to compel evidence, to gather evidence or to protect its own members, because Congress long ago decided it was not going to take exclusive cognizance of its privileges and offences against it. They were going to criminalise some of it; they were going to make some of it enforceable through the Justice Department and through the criminal code, either in terms of contempt before committees or actual criminal behaviour by members of Congress as public officials. So there is a hybridisation of it, if you will, which has been on the statute books for a number of years. We are well beyond, for better or for worse, the notion that Congress could or should be the sole arbiter of what goes on before it, either by its own members or by witnesses. Congress would not have the machinery or the time or the inclination to do it successfully and it knows that.

**Chairman:** That is a big difference between here and there probably—that the courts are involved in the United States.

**Q26 Mr Jenkin:** What I draw from this is that the situation in the United States is remarkably similar to our own—

**Chairman:** Except the courts.

**Mr Jenkin:** —in that our exclusive cognizance has become very limited and the question we are grappling with is whether in fact we require a statute in order to have any ability to subpoena witnesses, or whether we pass some standing orders and just hope that the courts don't interfere. But we are left rather without any sanctions or penalties that could be enforced.

**Charles Johnson:** Each House adopts its rules, giving its Committees subpoena authority. The courts have upheld those grants of authority to Committees if the subpoena was validly served, if the Committee had proper jurisdiction over the subject matter of the inquiry and if the questioning was not overly broad. All of that information was developed initially in the context of the Committee hearing itself, but, ultimately, it becomes a defence if there is a prosecution for contempt. The initial decision on whether to enforce or to consider constitutional protections is that of the Committee, if it is properly asserted in a timely fashion in the Committee by the witness.

**Mr Jenkin:** Thank you, Mr Johnson. That is very helpful.

**Q27 Chairman:** Are there any more questions for Mr Johnson? If not, can I thank you very much indeed, Mr Johnson, for taking the time in your afternoon to speak to us? We

are very grateful indeed. We will let you know how we get on with our inquiry. Thank you very much indeed.

**Charles Johnson:** Thank you, Mr Chairman. I am honoured to have been here. I urge you to try to get Sir William to give what would be expert testimony. Again, in my testimony of 15 years ago I was a little less well prepared, but I will do now what I did then, and ask for permission on the record to “revise and extend”, as they say.

**Chairman:** Thank you very much indeed.

## Cambridge University, Counsel [David Howarth and Nigel Pleming] (QQ 28-59)

### Examination of Witnesses

*Witnesses:* **David Howarth**, Reader in Law, Cambridge University, Former MP and Liberal Democrat Shadow Solicitor-General and Shadow Minister of Justice, and **Nigel Pleming QC**, Former Counsel to the Parliamentary Commissioner for Standards in the Al Fayed investigation, Counsel in the Chaytor case, examined.

**Q28 Chairman:** I am sorry to have kept our next witnesses waiting a little while, but they are Mr David Howarth, who is a reader in law at Cambridge University, and Mr Nigel Pleming, former counsel to the Parliamentary Commissioner for Standards. I believe, Mr Pleming, you gave evidence in the previous inquiry into parliamentary privilege.

*Nigel Pleming:* Yes. I am sorry, it seems so long ago.

**Q29 Chairman:** It was a very long time ago and the result of it was absolutely nothing, I am afraid. Anyway, can I welcome you this afternoon? I have not dished out the questions to members at this stage. I don't know if there is anything that either or both of you would like to say by way of introduction or general remarks to begin with.

*David Howarth:* Straight into the questions, as far as I am concerned.

**Q30 Chairman:** Let us kick off with the questions.

*Nigel Pleming:* I have nothing to say by preliminary position. I look forward to the questions, if my voice survives. I have been talking since 8 o'clock this morning so if I collapse, please—

**Chairman:** We are live, are we not? Yes, we are at the moment. Lord Bew, would you like to kick off?

**Lord Bew:** I would like to start, but I wanted to jump to question 12. Is that acceptable?

**Q31 Chairman:** We would like to try and get all the questions asked. Shall I kick off? The Green Paper says that recent developments have seen proceedings in Parliament used in court more regularly than in the past, without encroaching upon the protections provided by parliamentary privilege. Do you agree with that analysis? I don't know how you are going to handle it between you.

*David Howarth:* I will defer to the senior—

*Nigel Pleming:* We know that the question of parliamentary process was considered in great detail in the Chaytor case, and that went to three tiers, so it looked like three hearings. It was three hearings but it was a single case. There has been close judicial examination of particularly the concept of proceedings in Parliament; so, to that extent, yes. Other cases, if you can remind me of them, I can try and fit into the jigsaw.

*David Howarth:* Perhaps I could add that I haven't done a precise count, but if you feed the word "Hansard" into Westlaw, the main legal database, or into Lexis—other databases are available—you get numbers in the thousands of references to Hansard. I haven't looked at every one of these cases, but it seems that more recently there are more references. If you were to look at them in detail, my guess is that they would fall into three categories.

One is simply the application of *Pepper v Hart*. My impression is that the courts are fairly careful these days to make sure that the *Pepper v Hart* jurisdiction does not go too far.

There was a time when it was drifting toward a US free-for-all interpretation of parliamentary intention. Since the remarks of Lord Steyn in particular, extra judicially, where Lord Steyn was warning about the overuse of *Pepper v Hart*, the courts have come back to the straight and narrow, although they have not gone as far as Lord Steyn himself wanted, which was to turn the rule into a very strict rule. It is simply a rule that the Government were not allowed to say to the court the opposite of what they said to Parliament—a form of estoppel. The courts have not gone that far, but certainly they are quite restrained now in *Pepper v Hart* cases. That is the first category.

The second category, which is quite enormous, is where *Hansard* is simply referred to incidentally in giving a narrative, in explaining what happened, without any issue arising in the case about precisely what was said by a Minister on a particular occasion. It is simply part of the story, which I think is pretty much in line with the resolution of 1980. I don't see many problems in those cases, but there are a lot of them.

Then, thirdly, there is a category where there might be a problem. That is the category of judicial review, where Ministers' remarks to the House in statements—not legislatively but in statements—are used to help the court decide whether a Minister had taken into account all the relevant considerations and not taken into account irrelevant considerations, and, in one case, where the Minister had been irrational. For Nigel's benefit, I am trying to remember which cases they would be, but one is the *British Civilian Internees* case in the Court of Appeal and another was the *Diedrick* case. Do you remember the *Diedrick* case about the stop and search?

**Nigel Fleming:** Yes. Can I come back because I had rather misunderstood the question, probably because it was the first one? I thought you were asking a question about exploration of what goes on in Parliament and that is why I mentioned the *Chaytor* case. The reference to *Hansard* does fit those three broad categories, but there is a bit of unpicking that is necessary. The *Pepper v Hart* approach—that you can go behind the words of the statute or the piece of legislation to see what was intended—is subject to fairly strict rules. When attempts have been made to broaden that entrance into *Hansard*, the judiciary have been closing it on a fairly regular basis.

There is a case called *Transco*, which I was involved in. I fear that some of these cases might be ones I have been involved in because they are easier to remember, but *Transco* was the case about who was responsible for clean-up after the privatisation of British Gas. It was considered necessary by the unsuccessful advocate to look at the evolution of the environmental legislation. The House of Lords, in one of the last House of Lords cases, said, "We're not allowing you to do that." That is a typical *Pepper v Hart* case.

The category, when you are looking at what the Minister might have said, will fall into many subcategories. There is a Privy Council case called *Toussaint*, dealing with what was said by the Minister in the House in *Trinidad*, as to whether or not that could be used in investigation of ministerial behaviour and interference with the judiciary. There are some broad statements there by Lord Browne in the *Toussaint* case.

But the most recent example—again, I have been involved in two of them—was the third runway at Heathrow case, the *Hillingdon* case, where it was considered helpful, for want of a better word, to look at what had been said in Parliament about the relationship between

the construction or non-construction of the third runway and climate change. There was a whole series of discussions in court about those exchanges in Parliament.

The other recent one that I recall is the Badger Trust case, where it was considered necessary to go back through the history of the legislation about decisions in relation to culling of badgers, to see what had been said at the time in Parliament. The last one, the Badger Trust case, is an example of the story being told so that the court understands the context in which legislation was amended or changed. That, really, is nothing more than the old mischief rule as a method of interpretation.

If you will excuse me just for one second, going back to pre-*Pepper v Hart*, what you would have is the judge sitting in front of you as an advocate and underneath the desk would be the copy of Hansard or, more likely, the annotated version of the current law statutes. All the history would be there, but it couldn't be specifically relied on. Then we got *Pepper v Hart*. When it came out into the open, it was necessary to be a bit more transparent. But that is still going on. You are looking at Hansard, if not every day, on a regular basis to see what was intended as the mischief that is being addressed by the legislation. That then makes it much easier to explain to a court why this particular piece of activity was contemplated or not, without going to the strict meaning of a particular word. So, yes, there is a massive growth in references to Hansard, but that is usually in relation to a ministerial decision rather than to question what actually went on in Parliament; it is using it as information. That is a rather more complete answer than my first one.

**Chairman:** Thank you very much.

**Q32 Lord Davies of Stamford:** You mentioned this increase in the references to Parliament and proceedings in Parliament in the courts under these three headings. Is this a bad thing? To me, as a Parliamentarian, it is not *prima facie* a bad thing. It means that Parliament is very central to our national life and that people are taking an intelligent interest in what is going on here in the relationship between speeches and the laws that we pass. It means, also, that people are taking the law seriously and trying to interpret it professionally when they have to in the courts and when they have to apply it. None of those things offend me. What would be, of course, an abuse would be if the courts started to second-guess Parliament and say, "Those people were barmy and we shall ignore them", or "The Committee wasn't properly constituted. They weren't following their own proper procedures. Lord Davies or Mr Cash wasn't in his position on the day when the thing was decided"—all that kind of thing. They should not be doing that, and, as far as I can see, those sorts of protections are being maintained by the courts so we should not be worried about that. But the actual fact of *Pepper v Hart* I regard as a great advance in a transparent democracy.

**Nigel Pleming:** As a citizen, it is an excellent development because it shines a light where light should be shone. As a lawyer working in public law, it is an even more excellent development because it does give you a better armoury with which either to present the case or to defend the case. Relying just on the written word of the legislative provision can lead to creative judicial interpretation, which sometimes rolls down through the history books and is not always helpful. It is better to be informed. The danger—

**Q33 Lord Davies of Stamford:** If I could just interrupt you for a second, Mr Pleming, *Pepper v Hart* arose on a tax case, and anybody who knows the Finance Acts or is familiar with them knows that they are an extremely obscure part of legislation and sometimes a

literal interpretation of the words would lead to an entirely perverse result, quite contrary to the intentions of the article. So it is a necessary corrective to that.

**Nigel Fleming:** That is why *Pepper v Hart*, in its proper usage, is an essential part of the tools for the interpretation of statutory provision. The concern, when *Pepper v Hart*—

**Q34 Sir Menzies Campbell:** Is there not another element to this, of course, which you have to take into account in this discussion, and that is the question of certainty from the point of view of the citizen, who opens up the book and finds the current law statutes, finds the statute set out there and assumes, as is an important principle, that words are given their ordinary meaning unless the context decides otherwise? You have to balance *Pepper v Hart* against the fact that the citizen is entitled to know that words will be given their usual meaning and, therefore, to have a degree of certainty about whether these actions constitute or do not constitute a particular breach of statute.

**Lord Davies of Stamford:** Sir Menzies is a Roman lawyer, so he believes in always going back to the original text.

**Sir Menzies Campbell:** Well, I am a civil lawyer, if that is what you mean.

**Nigel Fleming:** There is everything to be said for starting with the position that the words mean what they say on their plain reading. First of all, the plain reading is not always that clear when you have read it a few times. It is when you then apply that so-called plain reading to a set of circumstances that it might become more difficult. But the danger with *Pepper v Hart*—which I don't think I have yet seen an example of—which was talked about at the time, is that ministerial statements would be planted into Hansard so that, whatever Parliament thought it was voting for or passing as legislation, there would be a nugget of ministerial statement which could then be deployed to give a slightly different meaning.

**David Howarth:** The danger is the combination of what Nigel has just said and what Sir Menzies was saying, which is that *Pepper v Hart* is fine as far as it goes and it is good in the context of litigation, but the thing to remember about statutes is that they are very often used by people who are not involved in litigation. Many statutes are properly addressed to the public at large or to the officials who are dealing with that particular aspect of public life. The statute has to be clear to them. It is an interesting question about whether it has come to pass, but the danger of *Pepper v Hart* was that Parliament would not bother being very clear about what it meant in statutes. You would have political statements between Minister and planted backbencher in place of—as a substitute for—clear drafting, so the drafting would progressively get less and less clear and less and less understandable to the non-litigious world. I have not seen that happen, although I have seen legislative drafting change in other ways, but it is the constant worry about allowing more and more use of parliamentary debate in the courts.

**Q35 Lord Davies of Stamford:** So what is the best solution? What is the right balance?

**David Howarth:** The best balance is to make sure that the judiciary is not moving too far in the free-flowing direction that at one stage it looked as though *Pepper v Hart* was going.

**Q36 Lord Davies of Stamford:** But that is happening.

**David Howarth:** Now they have come back. They have come back to the straight and narrow.

**Q37 Mr Cash:** Could I intervene on this? When we are talking about parliamentary proceedings of course, it does not say “ministerial statements”. To try to divine what meaning should be ascribed to a particular provision in a statute, judging from a debating

Committee between Members of Parliament and the Minister, where there may be a very different degree of interpretation even by those who are participating in the debate, raises questions about who the judges effectively are going to go by. Is it going to be what the Minister said because he has done it on the basis of the Parliamentary Counsel as he drafted it, or is it going to be because they are able to somehow divine what Parliament intended?

**David Howarth:** That is an important point, because the very strict interpretation of *Pepper v Hart*, to which we have returned, is that it is ministerial statements or the statements of the promoter of the Bill, if a different person.

**Q38 Mr Cash:** Indeed, but that is not necessarily, as I am suggesting, a tremendously good guide because it slightly depends on who drafted the statute. If it was Parliamentary Counsel, he has his view. But I would like to move on from that to the question of whether or not there is a movement towards investigating the object of the legislation, as compared with the exact words, because there has been quite a lot of movement in this direction, much of which has come from the European context, in which legislation is looked at more with regard to the object and the purposes of the legislation—the purposive approach—as compared to the literal approach.

I just ask the question in that context about the comment of Lord Browne-Wilkinson, in *Prebble*, that the courts and Parliament are both astute to recognise their constitutional roles. Does that really hold good today, and what is your assessment, in the context of this broad debate, about, for example, the clear criticism by Lord Bingham, in the *Jackson* case, in respect of the relative roles of the courts and Parliament of judgments that were given? Chapter 10 of the Rule of Law probably sums it up pretty well. What is your sense of that? Do you think that *Prebble* states the case and that chapter 10 of the Rule of Law tries to answer it?

**David Howarth:** That is one interpretation. I should say that what Lord Browne-Wilkinson said in *Prebble* was largely the exact opposite of what he said in *Pepper v Hart*, so there is a rather difficult interpretive problem. The idea that you interpret statutes in a way that furthers their objective or their purpose in fact is not all that different from the traditional common law idea that you try to discover the mischief of the statute as a way of interpreting it. Nigel, is it not the badger case where you were arguing *Pepper v Hart* at one stage and then shifted to the mischief rule? I think that was the case. I obviously don't want to accuse my colleague of this.

**Nigel Fleming:** I said I was not relying on *Pepper v Hart*.

**David Howarth:** You were not relying on *Pepper v Hart*, but you were relying on the mischief rule. It is a perfectly respectable, almost Elizabethan technique, isn't it?

**Nigel Fleming:** Yes. Can I just separate out the mischief and the purpose of interpretation, because they are subtly different? We have always had the mischief rule. Why was this piece of legislation necessary? Was it necessary to correct a piece of the common law that had gone wrong and a particular incident that had happened, or whatever—to deal with a crisis? The purposive approach may be linked to the emergence of the European Convention of Human Rights jurisprudence from Strasbourg, before we adopted it in 1998 or 2000, but also from the membership of the European Union from 1972. What the judges have been doing now for many years—you will see repeated examples of this—is that they are trying to get to the purpose of the legislation. The purpose of the legislation is a different way of saying, “What is the intention of the legislation?” They are, if necessary,

shifting around being tied to the strict meaning of a single word or the literal or golden rule—whatever it used to be called when I studied law—to try and find a proper, sensible meaning which reflects the purpose which must have been the intention of Parliament.

The textbooks are full of examples of how this has developed over recent years, and it does not seem to be a bad thing, as far as I can see, and it does not seem to be revolutionary, except when there is a need to try and tie British legislation to European legislation where the courts have been willing to write in words, sometimes seven or eight additional words, to make it compliant in a VAT case and a couple of employment cases. That just seems to have given the judges a bit more freedom in how they interpret it. Does that sound right?

**David Howarth:** I think that is right. Before we lose this, can I just come back to Lord Davies' original question, because we have been talking about *Pepper v Hart* and we started with three categories of case? *Pepper v Hart* is not, I don't think, a problem at all—I agree with him on that—as long as the judges do not fade in the general direction of taking too broad a view. The narrative cases I do not think are a problem either, when judges are simply getting the story right about how something came about.

But I think there is a problem in the third category, which we have not discussed, which is the judicial review cases, where in the *Diedrick* case, which is about stop and search, and the *British Civilian Internees* case about Government compensation, you have a situation where, it seems to me that, on any ordinary meaning of the word “question”, the judges are questioning what was said by a Minister in Parliament to discover whether the Minister meets the legal test of rationality or meets the legal test of relevance. You can argue, politically, that that is a really good thing, which is what Lord Davies is saying—that it is very important that, when Ministers are challenged by citizens about the legality of what they have done, especially in terms of delegated legislation, and whether they have acted within the powers granted to them by the statute, everything they say should be used and taken down against them. But there is a problem. I cannot see an interpretation of the Bill of Rights that makes that lawful. It is a problem.

**Q39 Lord Davies of Stamford:** What is the solution?

**David Howarth:** There is only a legislative solution to that, where, if you think that it is a good thing that ministerial statements should be used within certain limits in judicial review cases in this context, then you can say so in a statute, but if you don't think it is a good idea then perhaps they should stop doing it.

**Q40 Mr Jenkin:** Could I interject with a question? Basically, what was considered to be the exclusive cognizance of Parliament has become more and more limited by judicial activism. Perhaps I should not use the word “activism”. It has just become more and more limited in that the Serjeant at Arms can no longer send out a posse of soldiers to arrest someone.

**David Howarth:** Oh, I don't know.

**Q41 Sir Menzies Campbell:** That is desuetude, isn't it?

**David Howarth:** I was going to point this out. It is a really important point. Desuetude is not a doctrine of the English common law. It is a doctrine of the Scots common law. The question is which system the Union Parliament is bound by. I don't know.



**Q42 Mr Jenkin:** My question is simply this. Let us say that Parliament was to say, in a standing order or by a declaratory motion or by some means, that such and such we regarded to be in our cognizance, and it was relatively uncontroversial. Perhaps *Pepper v Hart* might be an example of where we just say, “Hang on a minute, before you do this too often, from now on we will express it in statute if we want you to do this, but, for the avoidance of doubt, if it’s not in the statute for you to do this, don’t do it”.

If we were to claim, for example, that correspondence between Ministers and Members of Parliament about parliamentary business shall be in our exclusive cognizance, reflecting the case in the 1930s of *Duncan Sandys*—if we were to make these declarations, preferably in my view in standing orders—don’t you think the courts would just say, “Parliament has made this issue clear. We won’t say anything about it, but, when the time comes and we find ourselves up against it, we will weigh in the consideration of what Parliament feels is in its exclusive cognizance and we might just let discretion be the better part of valour”? I don’t sense the courts want a confrontation with Parliament about this, so, if we just took possession of what we think is legitimately ours by this means, would the courts stand off?

**David Howarth:** I would hope so. The problem is that this is an almost 200-year battle from the 1830s to the *Chaytor* case, which Nigel was involved in. In the 1830s and 1840s, in the *Stockdale v Hansard* case, the courts claimed to be able to be the final arbiter of the scope of privilege, but the House never accepted that. It never accepted that. The courts kept saying that the House had accepted it and said it again in *Chaytor*, but, as far as I am concerned, the House has never accepted that the courts are the final arbiter of that question.

Later, in the 19th century, in *Bradlaugh v Gossett*, you get the courts going in the direction that you and I would want, which is that, when *Bradlaugh* refused to take the oath and said that the Speaker had a statutory duty to undertake the oath, and it appeared that there was a statute that said this, the court said the application of this statute is a matter for the House. Even though there is a statute, it is still within the exclusive cognizance of the House, so the courts there are not even standing on their ability to interpret statutes. They are allowing the House to decide even when there is a statute.

These are the two extremes. On the one side, the courts are being very aggressive in asserting jurisdiction over jurisdiction, and then, later on, the courts are being very standoffish, allowing Parliament to decide even when there is a statute.

Then we come right up to date, to *Chaytor*, which Nigel knows far more about, where it seems to me that the court was asserting, in a rather 1830s-1840s way, that it got to decide these things. The question you have taken us to is one that is not decided. It is rather a good thing it has not been decided, which is why I rather prefer your approach. I would not want to get into a situation where we decide absolutely or attempt to decide absolutely, for all time, which side of the line this question falls.

**Nigel Fleming:** Could I go back to where you started, and that is the House, by declaration, saying this is a no go area or whatever? The slight danger or potential conflict area is whether or not, by doing that, you are telling the court what is meant by article 9. The two phrases that we have been struggling with over the centuries, almost, are proceedings in Parliament and impeach or question. As has just been said, a lot of the judicial review investigation is that; it is close examination of what was said in the House. That might not

be impeaching it, but you would perhaps say that it is questioning it; it is investigating it. But does questioning mean challenging and disagreeing or does it mean investigating?

If the House itself is going to say that exchanges between Ministers and Members of Parliament are not to be looked at by the courts, all you need really is a very bad example—a factual example—to show to some of the more creative judges or enthusiastic judges, or just judges, who want to say, “This is what I’m not allowed to look at, and what I’m not allowed to look at shows me that there is something which has gone seriously wrong here.” I would have thought that some of the modern judiciary would follow what the House has said and some would resist. That is the reality at the moment and that is why it is important at some stage—this is exactly what this Committee is doing—to focus on whether or not you need to create a statute to support the protection of the privileges of the House, or leave it to the House, because as soon as you produce a statute that is for the courts to interpret.

**Q43 Lord Davies of Stamford:** What do you think?

*Nigel Fleming:* My own view, after doing the Chaytor case, is that I would like to see a definition of proceedings in Parliament because—

**Q44 Lord Davies of Stamford:** But not a definition of question or impeach.

**Mr Jenkin:** In statute or in standing orders?

*Nigel Fleming:* That is an excellent question. The Bill of Rights is one of our most cherished statutes, but it is a statute, and a standing order cannot change the meaning of a statute. If it is necessary to clarify the mass of case law we have had over the years as to proceedings in Parliament, then I think it has to be by statute. It may be that the House is entirely satisfied with what the Supreme Court has said in Chaytor. Then it is unnecessary. But you will know better than I that there may be circumstances when the proceedings in Parliament—the business of the House—are rather wider than identified by the Supreme Court.

**Chairman:** I am going to have to suggest we move on a bit because we have only got through the first paragraph of our questions so far and we only have about 20 minutes left. Could we move on to the disapplication of the freedom of speech, which Lord Bew was going to deal with?

**Q45 Lord Bew:** This is a subject discussed with some vigour in the report of the previous Committee, chaired by Lord Nicholls, to which you gave evidence in the context of the Neil Hamilton affair. I am going to try and condense this by putting the question in this form. Is there a case for the disapplication of article 9 of the Bill of Rights in some criminal proceedings? Secondly, which is a related question, is there a case for giving each House the power to waive privilege to be used in civil cases such as defamation?

*David Howarth:* The short answer is no. Disapplication in criminal cases is a very tempting thing to do in an era of populism, when the public thinks itself entirely pure and all politicians to be impure, but it would be very unwise. In fact, it is my main reason for thinking this is quite an unwise time to be legislating about this subject at all and the minimum possible should be done. I suppose the thing to mention is that, in the course of the passage of the Bribery Bill, I was asked in my then capacity by the then Secretary of State whether I minded in the inclusion of the Bill provisions about parliamentary privilege and the waiving of it in bribery situations. At the time, I said I did not think that would be a problem, but I underestimated the problems. Also, when the Bribery Bill itself came out in

its final form, most of parliamentary misbehaviour—accepting bribes by Members of Parliament—was covered anyway without there needing to be any reference to what had been said or done in Parliament because it included “intending to do something inappropriate”. There are four examples given in the Bribery Bill of bribery, and the first two—situations three and four—can be proven in court without any reference to parliamentary proceedings at all. So, in the end, there was less of a problem there than I thought.

Then the question is what about the other circumstances that the Green Paper envisages for our disapplying article 9 and extending the scope of the criminal law? I just start to wonder that there are certain members now, I notice, who have a habit of writing to the police at the drop of a hat to complain about the behaviour of other members.

**Q46 Sir Menzies Campbell:** Or the Registrar.

*David Howarth:* Yes, but the police in particular. It is incredibly risky that you will just set off a parliamentary tit-for-tat as Members of a more aggressive nature decide to use the disapplication of article 9 as a way of broadening the scope of the accusations that they make. If this were a calmer time, if you are asking me as an academic, there is a case to be made for this change, but, if you are asking me as a former politician, I would say think very carefully before you do this.

**Q47 Chairman:** Can we move on to Select Committee powers?

*Nigel Fleming:* Could I just add one very brief response, because, looking at the Green Paper, I was struck by the struggle that went into the description of the offences to which section 1 does not apply? I see the intention is sound—that it is trying to capture those moments in parliamentary life when somebody might be saying something to advance an argument or might inadvertently say something which could be criminal. But I was trying to put together a list of other common law offences which are not dealt with. It seems to me that it is quite a difficult exercise, and I know you have thrown it out for consultation. I would be really interested to see how many additions you get back and whether this will be one of the statutes where the schedule of exclusions is far longer than the four clauses that start the statute off.

**Chairman:** Thank you very much. Let us turn to Select Committee powers.

**Q48 Mr Jenkin:** You will be familiar with the fact that Select Committees are regularly issuing invitations and getting rebuffed. The word “contempt” arises. Then we persist and we either drop the invitation, because in fact it turns out to be an unreasonable invitation, or we pursue it and usually the miscreant witness agrees to appear. But there have been one or two recent cases where the bluff has been called. We thought it was going to be called over the Murdochs. It wasn’t, but there have been one or two cases where the bluff has been called and we don’t know what to do. This is a very serious matter because it really reflects very badly on Parliament if we cannot get our witnesses to attend and give us evidence.

**Chairman:** We were advised by another QC just last week that in fact he would advise his clients probably not to come.

**Mr Jenkin:** On the basis that there is nothing we can do.

**Chairman:** On the basis there was nothing we could do about it.

**Mr Jenkin:** The only reason most people come is because they are worried about what it will do to their reputation if they refuse. The suggestion we got from the Clerk of the House

was that maybe we should publish a tariff of retributive motions, saying, “He is a bad person”, “He is a very bad person”, “He is not a fit and proper person”, depending on how angry we felt, but this is all really very, very lame. At the same time, if we legislate on this in order to give powers to Select Committees to summon witnesses, and to make them tell the truth, incidentally, we are getting right into the mess we heard about from the United States Congress, with the courts crawling all over proceedings in Parliament. What should we do?

**Nigel Fleming:** This is the most interesting part of the Green Paper for me. Walking around the meaning of article 9 and all that goes with it is a debate that has been going on for years. What has changed is that the practices of the House have been overtaken by the Human Rights Act 1998 and October 2000 onwards, so you have potentially two groups of people who are affected by your processes. Prefacing all of that, it is fundamental to the working of both Houses that you have the fullest information with which to make your decisions, which then become legislative or recommendations decisions.

The group of people who are within the House—that is the Members, the Lords—can be the subject of discipline as long as certain procedures are followed. Maybe they don’t have to be followed, but you can consent to how you are treated. Some human rights lawyers will disagree, but that is the starting point. Your real problem is the outsider—the person who is in any way in contempt of your procedures. You will have been told about the Maltese case—the Demicoli case; I never get it right. That is where an outside journalist called a Minister a clown and was penalised by the House for bringing the workings of the House into contempt. That was held by the European Court of Human Rights to be a criminal process, and, as soon as it is a criminal process, then article 6 bites and you require the protections of an independent impartial tribunal, warning of representation and so on.

The reason I am telling you that at the beginning is that the objective is to get people to give you information, to answer questions truthfully, to provide you with documents. If they do not, you need to have a regime of penalty. As soon as you introduce a regime of penalty, if it is going to be a prison system, it is clearly criminal because it will apply to the non-Members of the House. Even a fine is potentially an indicator of a criminal process, but a fine without a penalty for not paying the fine is a pretty worthless penalty. So you are moving into grasping the nettle, and the nettle is: do we set up through the courts—the American route—or through the House as the Houses of Parliament as a court, a system to enforce your privileges? This is why desuetude becomes important and relevant.

Your practices of many years ago of penalisation have not been cancelled by legislation; they just have not been used. So you then have to consider who can, within both Houses, create an article 6-compliant system to compel evidence that is truthful and punish evidence that is either untruthful or not provided. You have set out the beginnings of the problem, but this is a fork in the road. Do you push it over to the courts system or do you handle it yourself? If you handle it yourself, this is not a report, with the greatest of respect, that you might be finalising by April.

**Q49 Lord Davies of Stamford:** So your recommendation is to go the court route—the American route.

**Nigel Fleming:** No. My recommendation is that, because I am ill-prepared because of other commitments, I am still not sure. I would prefer it to be in the House. I just don’t see a practical way of doing it.

**Q50 Mr Jenkin:** What about actually having a mixture of the two? It seems to me, on the American evidence we have heard earlier this afternoon, that Congress seems to have a mixture of the two. Up to a certain point we rely on our own resources, but at the point at which it goes criminal we have to rely on outside courts. I hear what you are saying—that somehow we set up a parliamentary court and some hapless retired judge presides over some parliamentary court. I just don't see it myself. It is beyond most people's imagination. What about a mixture of the two systems?

**Nigel Fleming:** I don't have an objection in principle to a system that achieves the objective and is human rights-compliant. I have no objection at all, but clearly you are now faced with a problem of non-compliance and therefore contemptuous behaviour. You need to have in place a mechanism to deal with it. I would have thought that one possible variant is for the House to be the prosecutor, whether using Parliamentary Counsel. Towards the end of the evidence from the American witness, there was the point, what if the person who is refusing to co-operate then decides to co-operate? Whose decision is it to let that person back into the House, rather than stay with the civil/criminal prosecutor? It may be that a system needs to be manufactured that allows the parliamentary process to have rather more control over the progress of the criminal process. It is a very difficult problem.

**Q51 Mr Jenkin:** The defendant, if we call them that as the Americans do, would have the right to question anything that is referred to in the statute in terms of proceedings in Parliament leading to the proposals.

**Nigel Fleming:** That would be the end of article 9 in relation to that process, because the criminal process would otherwise be unfair.

**Q52 Mr Jenkin:** How serious is that for parliamentary privilege?

**David Howarth:** I am with you in trying to use statute as little as possible here. It seems to me that there are processes that can be set up by statute that give Parliament jurisdiction, quite broadly, and the courts would find it quite difficult to intervene. They will probably find a way eventually. For example, just on the analogy of what happens in magistrates courts with powers of contempt, they are not legally qualified people themselves. They have legal advice from a clerk. They proceed against people who hold them in contempt themselves. They do not refer to another court, so there is no reason why Parliament should give itself fewer powers than the magistrates court. In fact, the way Parliament is set up to deal with this, I would have thought, is simply to bring in Speaker's Counsel to act as the legal adviser to the Committee when it is dealing with a contempt. That is just the same as a magistrates court. The magistrate is advised by a legally qualified clerk. That might be enough. Obviously, in the magistrates court the defendant has some right to have a legal representative. It is usually someone who has asked to apologise on their behalf so that they can be let out. I don't think we need these vastly elaborate internal tribunals and judges. I don't think that is needed at all. We just need to be procedurally fair in some reasonable way.

**Q53 Mr Jenkin:** Can I just ask one final question, which is a broader question—if certain judges in the Supreme Court go on coming after us, to put it bluntly? There have been one or two obiter dicta where it has been suggested that the courts are limiting parliamentary sovereignty or even the common law somehow pre-dates parliamentary sovereignty and is therefore available for judges to overrule Parliament in certain circumstances. The power of Parliament to assert its sovereignty by removing judges has

again fallen into desuetude. Do we need to look at how Supreme Court judges are appointed, because, whereas the Law Lords used to sit in Parliament and it used to be the High Court of Parliament, we now have this somewhat spurious separation of powers where the Supreme Court has almost become a self-appointed body?

*Nigel Fleming:* It has a commission.

**Q54 Mr Jenkin:** Who sits on the commission?

*Nigel Fleming:* Not me yet.

**Q55 Mr Jenkin:** The point is that, if you are going to have a judicial system that avails itself of a certain flexibility, in such systems—as in the United States, for example—the appointment of Supreme Court judges becomes a much more political matter. Are we drifting in that direction, or is there some way we can set it back, reflecting the 1660 Settlement that put the Lord Chancellor in Parliament and in the Cabinet, in order that Parliament should control the judiciary and not the King?

*Nigel Fleming:* I think we may have moved on to a slightly different topic.

**Chairman:** I think we are moving away from parliamentary privilege.

**Q56 Mr Jenkin:** But it affects parliamentary privilege because it is what they are doing to parliamentary privilege.

*David Howarth:* There is an underlying problem, which is the separation of lawyers from Parliament. Over the past 30 years there has been a slow decline of the number of lawyers in Parliament. It has gone slightly back up again in the last two Parliaments, but, overall, especially in the Commons, for example, there is a far lower percentage of lawyers in the Commons now than in the '70s. On the opposite side, it used to be the case that Members of the Commons could be appointed directly to the bench. Lord Reed, for example, a famous Scottish Law Lord, was appointed directly from the Conservative side of the House of the 1945 Parliament to the House of Lords. He was one of the most famous jurists of the 20th century. That doesn't happen anymore. In fact, there is only one judge of High Court rank or above who previously served as a Member of Parliament, and that is Ross Cranston. There is not one other.

It seems to me that the way to think about the question is not in these formal structures but to think about the people. Parliament is increasingly taken up with people who don't have a fundamental instinct for the rule of law because they are from different parts of society. The judiciary is taken up with people who don't have an instinct for democracy because they have never been involved in it. These two groups need to be mixed up a bit more so they can see one another's point of view. That would help, rather than having American-style hearings.

**Q57 Mr Jenkin:** It might help this question of understanding why parliamentary privilege exists.

*David Howarth:* Absolutely right.

*Nigel Fleming:* I would rather we went back to the old system, where the Members of the House of Lords were Members of the House of Lords. The contact between those judges and parliamentarians I considered to be a helpful thing.

Could I just go back to where we were, because I am attracted by the suggestion that it would be possible to set up an internal system to police, particularly, the Committees, with

legal advice, with an opportunity to appear and explain? But you then need to consider whether, if you reach a decision and the decision is adverse to the person who has turned up, and you find that person or you have created a power of imprisonment, there is a right of appeal. I would have thought there must be or there is likely to be a right of appeal, or is it judicial review?

**Q58 Mr Jenkin:** You want the judge to look at it, sniff the air and say, “This is nothing to do with me.”

**Nigel Fleming:** Then you do have a problem, I envisage, under the European Convention. There is a difference between a Committee and magistrates, to begin with. If the Committee is itself requiring the information in order to discharge its public duty, slaps a fine on somebody who refuses to disclose a document because it would affect their business development or whatever, and that person cannot challenge the decision, I think there may be problems.

**Q59 Chairman:** There would be a terrible row about it. We are rather past our witching hour. Can I just move very quickly on to one last subject, and that is the reporting of parliamentary proceedings? The Nicholls Committee recommended that the Parliamentary Papers Act 1840 should be replaced by a modern statute. Do you agree and what, if anything, needs to be clarified? Maybe nothing needs to be clarified.

**David Howarth:** It does need to be clarified. It is very confusing to have the burden of proof different in different sorts of cases. It is not clear what it covers. Does it cover contempt of court? Probably not. Who knows? I gave evidence to the Injunctions and Privacy Committee to the effect that it does need to be updated and changed in line with what the Nicholls Committee said. I see no reason to reconsider that position.

**Nigel Fleming:** I don't disagree.

**Chairman:** Thank you. Do any members of the Committee have any more questions for our witnesses? In which case, could I thank you very much indeed for coming this afternoon? It has been most interesting. We might have done with a little more time perhaps, but we do not have it, I am afraid. We are running quite a tight timetable for this inquiry. Thank you very much indeed.

**TUESDAY 5 FEBRUARY 2013**

Members present:

Lord Brabazon of Tara (Chairman)  
 Lord Bew  
 Sir Menzies Campbell  
 Mr William Cash  
 Lord Davies of Stamford  
 Thomas Docherty  
 Baroness Healy of Primrose Hill  
 Tristram Hunt  
 Mr Bernard Jenkin  
 Mrs Eleanor Laing  
 Lord Shutt of Greetland  
 Baroness Stedman-Scott

**Former Clerk of the House of Commons [Sir Malcolm Jack] (QQ 60-70)****Examination of Witness**

*Witness:* **Sir Malcolm Jack**, Former Clerk of the House of Commons, examined.

*This evidence was taken by video conference.*

**Q60 Chair:** Sir Malcolm, you can see us and we can see you. Thank you very much for agreeing to talk to us this afternoon. We are under a rather tight timetable, and we have until 5.40 pm our time—I do not know what time that is with you.

May we kick off? We read with interest your evidence to us and your support for the codification in statute of parliamentary privilege, as proposed in our predecessor inquiry back in 1999. What for you would be the benefits or risks of this approach? What do you think can be learned from the Australian experience of codification?

**Sir Malcolm Jack:** Thank you very much, Chairman, for your welcome. Perhaps I could make a few background points, and I will come to your question via them, if I may.

First, I want to make a confession to the Committee, if I may put it that way: I have not been a lifelong codifier, if there is such an expression. I have come to believe that codification is the right avenue, from experience basically, as Clerk of the Journals and then Clerk of the House of Commons. It was not a road to Damascus, but something that has come about over a period.

The other thing I want to say as a preliminary is that the reason why I support codification is, and I hope I do not have to emphasise this to the Committee, to protect and enhance the privileges of Parliament. I believe, for reasons that I will discuss with you, that a code would do that, so that is my motivation.



Will you indulge me, Chairman, with one personal reference before I get to the substance of your question? I thank the South African Parliament very much, and the acting Secretary to the Parliament, Kamal Mansura, for facilitating this video conference.

**Chair:** I am afraid that there is a Division in the Lords, which means that the Lords Members will have to go and vote.

*Sitting suspended for a Division in the House of Lords.*

*On resuming—*

**Q61 Chair:** Sir Malcolm, you are back and we are back.

**Sir Malcolm Jack:** Shall I charge on?

**Chair:** Please charge on. We are going to allow you an extra five minutes or so at the end because of that interruption, but we will still try to be fairly brief.

**Sir Malcolm Jack:** It is appropriate that I am addressing you from a Commonwealth Parliament, because privilege is a community in the Commonwealth, if I can put it that way. I was just thanking the South African Parliament for hosting this.

Coming to your question about the advantages of codification, I hope that I have set those out fairly clearly in my memorandum, but I will quickly summarise the points as I see them. The most important thing of all is that a modern statute would clarify ambiguities in the Bill of Rights of 1689. The Bill of Rights of 1689 has words that have been mulled over, chewed over and fought over in the courts for years, and nobody knows exactly what they mean. For example, “ought not to be impeached or questioned in any court or place out of Parliament”—we need a modern definition of that in statutory terms.

The Australian Act that you mentioned, which I have in my hand—the Parliamentary Privileges Act 1987—gives a very clear definition of proceedings in Parliament. It sets those out as: “the giving of evidence before a House or a committee...the presentation or submission of a document...the preparation of a document”, etc. The first advantage of a codified modern code would be that we would have clarity about those terms.

I ought of course to say in passing, and it is important that the Committee appreciate, that the Bill of Rights is a statute. It may be a hallowed and venerable statute, but it is a statute. It is something that the courts have not hesitated to interpret, over the centuries actually, but certainly over the generations. Incidentally, that view, as I mention in my memorandum, has recently been restated by the Attorney-General, who, as Bill Cash knows, is the adviser to the House of Commons and Parliament, and has made it clear that the definition of privilege is a matter for the courts and not for Parliament. What is a matter for Parliament is the internal working—the exclusive cognisance for matters that go on within Parliament. There is nothing new about a statute. We already have a statute, and we already have the courts interpreting it.

Clarifying the terms of the Bill of Rights would actually make clearer what the boundaries are between Parliament and the courts. This is what the Australian Act does very well, as do other Acts. Since I am in South Africa, I have brought with me the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 2004, which is the Act in this country that regulates privilege. Incidentally, it has an extremely good definition, in section 1, of the precincts of the House. We are not even clear what the precincts are at Westminster.

That is the first bundle of reasons why I support codification. Many of these things were already referred to in your predecessor Committee, the 1998-99 Committee. The second thing is public understanding. I am sure that parliamentarians understand that we no longer live in an age of respect—for institutions, the professions or anything else—and the only way in which the public understands things is where these are clearly explained and they relate to functions. They will not respect things just because Parliament is a grand place. I think that relying on a statement in the Bill of Rights, 300 years of age, does not impress the public—that is my third point; nor does it impress the European Court of Human Rights.

I think I mention in my memorandum, which you will have before you, that when we dealt with the case of *A v. The UK Government* in 2002, counsel who represented the UK was very keen not to rely on the Bill of Rights. He said that the terms of the Bill of Rights were too ambiguous and that we need to rely on the argument that a modern Parliament cannot function without privilege.

The last area—I am sure, Chairman, you will wish to go into it a bit more—is the business of Select Committees and their powers, whether under the existing conventions and practices they really have teeth, and what both Houses—Select Committees are creatures of both Houses—can do about recalcitrant witnesses. I think I say somewhere in my memorandum that the notion of having people dragged before the Bar of the House in 2013 is unthinkable, so what can Parliament actually do about recalcitrant witnesses?

In essence, those are my points.

**Chair:** Thank you. Mr Jenkin, you wanted to ask about the principle of statute.

**Q62 Mr Jenkin:** On the principle of statute, I want to understand, because the alternative view is of course that as soon as you produce a new statute you are effectively issuing an invitation to the courts to become much more involved than they are currently, because the present Bill of Rights is regarded as of special constitutional status, which the courts have been historically reluctant to tangle with where Parliament is clear about its field of cognisance. Could we give a new Act, perhaps called a Bill of Rights Parliament Act—I think if we call it a privilege Act we will have too much explaining to do—the same sort of constitutional status, or will we effectively just lose the special status that the Bill of Rights has, however vague and imprecise it may be?

**Sir Malcolm Jack:** That is very good question indeed, and I will answer it in two parts. First, a new Act would not be putting aside the Bill of Rights. There would be a declaratory provision in the new statute on the Bill of Rights. That is what is done in the Australian Act; section 16(1), which deals with protection of parliamentary proceedings, states:

“For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying”.

In other words, there would be a declaration in any statute that the principles of the Bill of Rights would still be enshrined. What the Australian Act then goes on to do is to define the terms of the Bill of Rights. That is my first answer to your question.

My second answer is about what has loosely been termed judicial activism. I think that is what we are talking about—whether the courts would suddenly become interested in a new

statute. I do not think they would necessarily do so, and I have set out my reasons in my memorandum. In recent cases, such as *R v. Chaytor* and so on, the court judgments made it quite clear that the courts recognise the exclusive competence of Parliament, but at the same time, they have made it clear that they will continue to interpret privilege in the broader sense.

In a sense, I do not think that anything has been lost or gained. I understand the reason why you ask the question, but as I said in my opening, despite the venerability—if there is such a word—of the Bill of Rights, the courts have never hesitated to interpret it. The Attorney-General’s statement makes clear that they will continue to do so.

**Q63 Mr Cash:** Hello, Malcolm. I want to follow on from what Bernard Jenkin has said. Although I recognise that a new statutory statement of parliamentary privilege is said to have caused problems in relation to judicial interpretation and you disagree with it, I simply want to put this point to you. I now have in front of me pages 235 to 240 of the latest edition of “*Erskine May*”. You are reaching for it now. On page 235 you will see, as you wrote yourself—or somebody else wrote, and you did not excise it—that with respect to the question of judicial proceedings in Parliament and the judicial attention paid to that, it states, “comprehensive lines of decision have not emerged and indeed it has been concluded that an exhaustive definition could not be achieved”. That is the case of *Rost v. Edwards* 1990.

There is also the issue that arose in *Bradlaugh v. Gosset*. I want to make a point about the problem that you alluded to in terms of judicial activism. The fact is that judicial activism can be described as judicial creep. There is no doubt in relation to current developments. In chapter 10 of “*The Rule of Law*”—without going into detail—Lord Bingham compared sovereignty with the courts. There is an inclination in certain parts of the judiciary and indeed has been in the Supreme Court. Without any disrespect to Lady Hale and Lord Hope of Craighead, they were criticised by Lord Bingham in that famous chapter. Even though it is arguable that there should be, and the courts would want to draw, a proper demarcation line between their judicial jurisdiction and sovereignty, the problem is that the pressures exerted, for example, through the Human Rights Act and also the European convention and the Strasbourg court, give us more reason to be concerned that once they have started to move down—they already have, as in the Jackson hunting case, for example—we will end up by finding that we have opened a door, particularly because it is a modern enactment, and therefore they will say, as you say in your book, that we have to be fit for the 21st century. The problem you will have presented by having an Act of Parliament that is new and codified and deals with that, means there will be some suggestion that the sovereignty of Parliament in this context is indeed subject to judicial activism or creep, and that the courts are going to be more inclined—not less—to want to get their hands on it, even though they claim that they want to be fairly restrictive in maintaining a demarcation line.

In your opening remark, you said of that chapter on article 9, “comprehensive lines of decision have not emerged and indeed it has been concluded that an exhaustive definition could not be achieved.” In other words, in the case of *Rost v. Edwards*, there is the beginning and likely continuation of greater degrees of interpretation.

**Sir Malcolm Jack:** Thank you very much, Bill. It just goes to show you have to be very careful what you write in books. They can be read against you. In the case of *Rost*, I take the point that you are making. I think that the matters that you have referred to prove the

opposite of the need for a statute; it is creeping interpretation. You have already quoted a whole number of different judicial announcements here and there. The position that we are in without a statute, a new Act, is that these things float around, and they will continue to do so. The judges will not be stopped in proceeding to interpret privilege. As I said in the memorandum, the Attorney-General makes that perfectly clear. Clearly, there is a possibility, I agree, that with a new statute, the judiciary will be more interested, but one has to rely on some sense of comity between Parliament and the courts. I think that a clearer definition of the boundaries would be helpful rather than unhelpful.

**Chair:** I have to ask members to speed up a bit. We have allocated the questions, but we are running out of time. May I move on to Sir Menzies?

**Q64 Sir Menzies Campbell:** Sir Malcolm, if not codification, then why not resolutions of both Houses? You can express the resolution in terms much more understandable to the public, and you can tweak them in due course if you do not like the immediate effect. They keep the responsibility in-house, as it were. Why not two resolutions?

**Sir Malcolm Jack:** Thank you, Menzies. There are areas, I think, where you do not necessarily need to codify to make progress. I shall come to your general point in a moment. The two discrete areas where you might rely on the Houses having their own Standing Orders might be the right of reply—if it was thought to be a desirable thing—of private citizens who feel in one way or other defamed by words spoken in Parliament or in some other way disadvantaged. That could be done by a resolution from a Standing Order, and it so done in the Australian Commonwealth Parliament. In South Africa, it is embodied in the statute as well, section 25. That is one thing that could be done without statute.

The other area that could be investigated but would be difficult in practice is the matter of reference to injunctions in debates in the Houses. I think that you will go on to discuss that. A witness has some experience in relation to that, if I may put it that way, delicately. Those are things that could be done by resolution of the Houses. On the general point about whether the whole of modern privilege can be put on this basis, I would come back to the very careful and proper consideration given to this subject by the present Clerk of the House to the Liaison Committee. It is in the context of Select Committees, but nevertheless I think it applies to this general argument of codify or resolution. He outlined various scenarios: do nothing, resolutions or legislation. If there were to be Standing Orders I would certainly not put a lot of detail in them, because there would be arguments both inside and outside the House if there were detailed provisions of what must be done. The Speaker would be drawn into the argument. The problem about resolutions and Standing Orders is that they have no binding effect; they are merely expressions of opinion. They are opinions of Parliament and of course that is important—I hope that I am not sounding disrespectful in any way—but they have no binding effect on witnesses who refuse to cooperate. As I said earlier, we do not live in an age of respect any longer. You cannot rely on respect for parliamentary resolution; there must be something with a bit more teeth.

**Q65 Lord Shutt of Greetland:** Should the Act that you are suggesting provide for the possibility of privilege being waived in either civil or criminal proceedings? How would any such waiver work?

**Sir Malcolm Jack:** That is another interesting question. First, I would state that privileges belong to each House or to Parliament as a whole, and not to individual Members. I strongly disagree with the notion of individual Members being able to waive privilege. The

Committee will be aware of the background to the Defamation Act, and so on, where this was a possibility. Waiving privileges is done quite frequently by the House: in dealing with your lordships, the Commons sometimes waives its privilege in respect of amendments that come to your House. The normal way in which this would be done would be by resolution of the House, but the notion of privilege being waived—to call on, as it were, as a complete exercise—is not something I would agree with.

**Chair:** We now come to the question of freedom of speech.

**Q66 Baroness Stedman-Scott:** Recent developments have seen proceedings in Parliament used more regularly than in the past, without encroaching upon the protections provided by parliamentary privilege. Do you agree with that analysis, and in your view what use should courts be able to make of parliamentary proceedings? Is there sufficient legal awareness of parliamentary privilege, and would you support the reinstatement of a more formal process for notifying the two Houses or seeking their authorisation for the use of privileged material?

**Sir Malcolm Jack:** To pick up one of your latter points, the answer is no; parliamentary privilege is not well understood outside Westminster, and it is really rather important that it should be. Your witnesses last week touched on this subject of court proceedings and how far they were impinging on privilege, and David Howarth made some interesting categorisations in three areas. One was the *Pepper v. Hart* area, where, as the Committee knows, the courts can look at parliamentary proceedings for the purposes of resolving ambiguities of meaning in statute and helping them to understand exactly what they mean. The evidence that he and your legal witness gave was that the courts were becoming somewhat more restrained and careful about how *Pepper v. Hart* was being applied. I am sure that that is the case—they are much more expert in that subject than I am.

The second area that David Howarth mentioned—I think he had gone on the internet and found thousands of references to *Hansard* in court proceedings—

**Chair:** We have lost the link.

**Sir Malcolm Jack:** —and I think that is not an area that would particularly trouble me.

The third area, however, which comes to the core of your question, is where either through judicial review or in other cases parliamentary material is being used to advance arguments in the courts, and the merits of what is said in Parliament are being discussed in court. This is particularly the case in respect of Select Committee reports. I am trying to think back accurately, although it is rather difficult because I do not think we have kept statistics, but in the House of Commons, the Speaker is obliged to intervene in court proceedings—in your House it is the Clerk of the Parliaments who intervenes—to point out to the court that Article IX of the Bill of Rights has been contravened by the use of evidence in this or that case. During my time as Clerk of the House, those cases were increasing. I cannot give you figures, but your Clerks might be able to give you a better feeling of whether there are half a dozen or ten cases a Session, and I am sure that that information could be found.

However, it is a question of not only the numbers, but the seriousness of the fact that Article IX has been breached—and this is the cases that we know about. It is quite difficult to keep track of what is going on in the courts, and it may be that Article IX is being breached much more widely than that.

I am sorry that it is complicated, but my answer is in three sections. In *Pepper v. Hart*, yes, I am prepared to accept from your other witnesses that the courts have been more careful about this. Random mention of proceedings by citation does not seem to be a great problem. However, the third area of examination in the case of parliamentary proceedings is a serious problem. Of course, it is a problem that would be addressed in statute and it is addressed in section 16 of the Australian Parliamentary Privileges Act 1987, which prohibits the use of parliamentary proceedings in the courts.

**Chair:** Sir Malcolm, thank you. Before you go, could I mention that we lost you for about 10 or 15 seconds, so when we send you the transcript, you might have a gap to fill in, if that is all right.

Can we now move on to something you have already touched on: Select Committee powers, which I know that Lord Davies of Stamford and Bernard Jenkin want to ask about.

**Q67 Lord Davies of Stamford:** Good afternoon, Malcolm. It is nice to have you with us again.

Before I ask any questions, you referred to a South African parliamentary procedure Act, the existence of which I wasn't aware of and we don't have in our papers. Is there some way of getting it to us?

To come back to the important question I was about to ask, your memorandum makes it quite clear that we are very exposed indeed to the risk of having our bluff called in terms of the powers of Select Committees to subpoena witnesses. This could happen at any moment and the whole credibility of the Select Committee system—indeed Parliament—would be seriously damaged as a result. I think we all agree with that. There seem to be three possibilities, theoretically. Maybe there is a fourth or a fifth; if so, I would like to know what they are.

The three are: the status quo, which I have just described; secondly, what you seem to favour, which is a system of punishments set up by Parliament and operated within Parliament according to ECHR-compliant principles and so forth; and, thirdly, simply changing the criminal law to give statutory backing to the subpoena power of Select Committees, as happens in the United States. We have had evidence about the efficacy of the US system. They have punished 15 or 20 people in the last 50 years, and that seems to maintain the credibility of the system pretty effectively. I notice from your memorandum that you do not like that approach, although you do not deal with the specifics of the American system. Would you expand on your views?

**Sir Malcolm Jack:** I think you are absolutely right. One thing I would say—and I am sure that Members of both Houses appreciate this—is that a great deal of the prestige of the modern Parliament rests on the Select Committee system. It is widely appreciated by the public and by the media as well, which is quite surprising. It is one of the bits of Parliament that gets good coverage. It is important that the Select Committees appear to be credible, efficient and effective bodies. If they have witnesses before them who, for one reason or another, are evasive or do not answer what the Committee is trying to get at, that weakens the ability of Committees to do their job properly, and it weakens the effectiveness of Committees in the eyes of the public. That is why the public would be quite behind giving Committees more teeth.

You will have seen in my memorandum an example from—I think—the Treasury Committee. A principal witness in a recent inquiry—I will not go into which, but Members will know which inquiry I am talking about—fell well short of the standards that Parliament expects. In other words, a major inquiry by a prominent Committee of the House had a witness before it who was giving evidence that fell well short of the standard that Parliament expects, yet Parliament could apparently do nothing about it. The Committee could report—indeed it did report—the matter to the House, but, as I said, this is not an age in which people can be dragged before the Bar of the House. That is the crux of the problem with Select Committees.

You are quite right about the three ways, as it were. The Clerk of the House, in his memorandum to the Liaison Committee, which I hope the Joint Committee has, went through all this very carefully and paid attention to things such as proportionality, the need for fairness and so on. Nevertheless, we come back to the situation that our present conventions are simply not effective enough. They are not effective enough to give teeth to the Committees that need it which, as I said, I think the public would support.

The best way to do this is in a comprehensive Act, rather than your suggestion to embody it in a separate statute and to make it a criminal offence by a separate statute. We really have rather too much of this. The business of exploring discrete areas by separate statute has been going on for quite a long time, and you will be familiar with attempts by the Government to change the law on bribery in the Green Paper, which contains a considerable setting aside of Article IX on proceedings in Parliament being able to be used in certain cases before the court. I therefore do not think that piecemeal tinkering is the answer. This needs to be set out clearly in a modern Act, and we have a very good model in the Australian Act.

**Q68 Mr Jenkin:** I have a broad question. Speaking as a Select Committee Chairman, we need a knockout blow in extremis for a non-appearing witness, or a witness who we believe has lied to or misled a Committee. We have this curious Perjury Act, which I understand has been invoked only once in recent times and that was when the Clerk was sent scurrying away to find a Bible in the middle of a session, but I am not quite sure what it would have achieved. Does the Perjury Act already lead the courts to breach the Bill of Rights? I cannot see how we could prosecute someone for perjury in a Select Committee unless there was a process of looking at what was said and how what was said was being questioned by the Members of Parliament who were conducting the cross-examination.

**Sir Malcolm Jack:** That is getting into quite a technical area of law that might be better tackled by some other witness. However, the short answer is that the route of oaths does not work very well—it simply does not work. You are right, and this is what I mean about the piecemeal approach, because you can set aside bits of the Bill of Rights, and there are bits of the Bill of Rights in there, and, in the end, there will be nothing left anyway.

I think that Members of the Commons will think—I am sure that Members of the Lords will appreciate—that I have been a fairly stout defender of the privileges of Parliament. Some of you will remember the Parliamentary Standards Bill in 2009. I think that the other body that the Committee should be looking at, frankly, is the Executive. The Executive are very fond of coming up with piecemeal pieces of reform. This has been going on for some time. It is really by chance that we have some of these Executive-backed proposals, and the 2009 Act is a very good example.

**Q69 Mr Jenkin:** Is there in the end a halfway house where some of this would be resolved by Standing Orders and some of it would have to resort to statute? Is there a mixed approach?

**Sir Malcolm Jack:** Yes, I think there could be a mixed approach. As I said, for those discrete areas, there are things that the House could do internally.

**Chair:** A quick one from Mr Cash and then we have to move on.

**Q70 Mr Cash:** I am very taken with your wanting to demonstrate that whatever it is that happens as a result of our proceedings, it is relevant to the present day. Of course, the Bill of Rights itself was passed in 1689 to deal with the transition from the Stuarts to a new regime, so it was a practical piece of legislation. The point I am interested in, in relation to the Select Committee powers, is this: surely it is essential that we should be looking not for some fine judicial interpretation of the words that are used or the methods that are employed, but to get to the heart of it, rather like Congress does in the United States. I just want to ask you a general question about Select Committee powers. Surely the public would be much more impressed to know that we were getting to the heart of the matter, rather than that we were engaged in some form of judicial interpretation, or that whatever we did would be subject to it?

**Sir Malcolm Jack:** I completely agree with what you said about the Bill of Rights. I just can't resist reading briefly from the preamble to the Bill of Rights: "King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the...laws and liberties of this kingdom". I am sure that Bill will recognise those words.

The Bill of Rights was a political document of its time, but constitutional change is brought about only by political will. The notion that constitutional changes happen, as it were, because there are academic reasons for them to happen is a myth. All reforms have come about because of some political need. My argument to this Committee is that you have this political need now. I think that the public would be very sympathetic to the notion that Select Committees had teeth. I can understand what you are getting at, Bill, that it would be better just to go for the kill and not worry about the statute and all the rest of it. I think along the way and further down, that would be regretted. I think that this is the moment to go for a statute and put it there.

**Chair:** Thank you very much. I am afraid we are going to have to bring this session to an end because we have overrun by rather a long way and we have two more witnesses coming up this afternoon. On behalf of the whole Committee, thank you very much indeed, Sir Malcolm, for taking the time out to speak to us.

**Sir Malcolm Jack:** Thank you.



## John Hemming MP (QQ 71-94)

### Examination of Witness

*Witness:* **John Hemming MP** examined.

**Chair:** We are broadcasting.

**John Hemming:** I cannot mention the content or the words in the documents that I have just given you, Chair, but I can refer to them and then you can read them.

**Chair:** We will hang on to them for the time being. I need advice on this if we come to it.

**John Hemming:** Do you want to ask me some questions before that?

**Q71 Chair:** May I start with the first question? I think you had notice of our questions.

**John Hemming:** I have some idea.

**Chair:** Parliamentary privilege has been described as “the rights and immunities which the two Houses...and their members and officers possess to enable them to carry out their parliamentary functions effectively.” What powers do you consider necessary to carry out your role?

**John Hemming:** I think there are issues that exist within statute law and the Bill of Rights, but are not enforced, and that is where the difficulty lies. The first page of my document looks at the Bill of Rights. Article 5 is the right to petition. Article 13 states, “that for Redresse of all Grievances and for the amending strengthening and preserveing of the Lawes Parlyaments ought to be held frequently”. My biggest concern is that at times people are bullied into not talking to me about things. It happens with other Members of Parliament as well; pressure is put on people not to complain to their Member of Parliament.

If we go back in history, in 1624—page 2 of the document—there was a breach of privilege committed in respect of petitioners and others soliciting business before the House. Somebody wished to petition the House, and the House took action because people were stopping them doing so. On page 3 of the document, we have the row between the Hackney coachmen and the commissioner for Hackney coaches in 1696, and issues to do with interfering with the post. There is John Kelly’s petition in 1699, and Robert Swaine in 1689. The point is that in the past if somebody wanted to petition the House and somebody else was arresting or intimidating them, the House would treat that as a breach of privilege.

What is interesting, talking about the Commonwealth, is that on page 5, we have an extract from a report from the Victoria State Legislature in Australia in July 2006. Michael Leighton, who was a Member of that Legislature, referred a solicitor to the privileges committee because that solicitor threatened one of his constituents and said that if he talked about a certain issue in the House, the constituent would be done for defamation. The House found that in fact it was a breach of privilege and the solicitor concerned was in contempt of Parliament.

On the page after that I have *Rivlin v. Bilainkin*. That is obviously a key piece, because it looked at the question of to what extent parliamentary privilege existed for communications between constituents and Members. That particular judgment concluded that where there is no connection to a proceeding in Parliament, there is no privilege. I think people would accept that. However, an extract from the Neuberger Committee on

super-injunctions identified that where there is a connection to proceedings in Parliament, there is in fact privilege.

We have the Australian example from Victoria. We have the historical examples, which show that there is privilege where connected to Parliament, so if somebody wanted not only to talk to a Select Committee, but to present a parliamentary petition, that is a privileged process. That is not enforced.

I then look on page 7. You may want to delete it. I have mentioned this in the House, so it is not news, but page 7 is legally privileged. In practice, it was a situation where they attempted to imprison somebody for asking a question at a meeting in Parliament, and I was uncomfortable with that in terms of article 5.

Page 8, again, is legally privileged, so if you don't want to look at it, that's fair enough. There, I am concerned about one of my constituents who was, in my view, wrongly imprisoned through the Court of Protection, and also forcibly medicated. The council would not allow me to speak to her. Again, we are talking about a situation where I am trying to represent somebody who I think is being very badly treated, and Birmingham city council is saying, "You can't talk to her."

On the bottom of page 9—this has been in *The Sunday Times*, although it is legally privileged—is a court order aiming to stop people talking to Members of Parliament. On the top of page 10 is a court order. This one has not appeared in proceedings and I suggest that it should not, but it is one that should really be passed to the authorities. On the bottom of page 10 and the top of page 11, you have another constituent of mine who was initially wrongly imprisoned for a criminal offence. He then complained about the social workers, so they took legal action against him in the family courts. Again, they got him to agree not to talk to me on the threat that if he talked to me, he would have his child taken from him.

Those particular areas undermine democracy, because if you do not know what is going wrong, you cannot do anything about it. If we talk about the function of Parliament being the redress of all grievances, we need to know what is going on. In the common-law jurisdiction—I am not a great fan of having legislative change on this—the Victoria State Legislature does have Acts for privilege. Other Parliaments do actually enforce that and protect citizens who wish to complain to Members of Parliament. We have not been doing so, and that, I think, is a defect.

**Q72 Chair:** Thank you, Mr Hemming. I am going to have to take advice about the stuff that you have sent before I pass it around, because if I do pass it around, it becomes—

**John Hemming:** You don't have to publish it. That is the point.

**Chair:** I am afraid that the Lords Members have to go for a vote.

*Sitting suspended for a Division in the House of Lords.*

*On resuming—*

**Chair:** We can restart now. The Lords contingent is quorate. Mr Docherty, you were going to ask the next question.

**Q73 Thomas Docherty:** It has been suggested that I should draw attention to the fact that I am PPS to the shadow Leader of the House of Commons, in case that is a factor for consideration.

Mr Hemming, going back to your point about the intimidation and bullying either directly or indirectly of Members, you obviously have a fair deal of experience in this House of the use of privilege and the way there is occasionally some blow-back from people. If, for example, a developer—a hypothetical developer, obviously—were to say to a Member of Parliament, “If you highlight an issue I will, through legal processes, go after either a family member of yours, or constituents, or party members,” so, for argument’s sake, “I will try to sue your local Liberal Democrat party,” in your case, would you regard that, from your experience, as intimidation?

**John Hemming:** In the Withers case, which is on the parliamentary website, Withers were found to be in contempt of Parliament for threats they made against me. That was a straightforward contempt of Parliament, because they said they would sue me unless I agreed not to say things in Parliament; they did not understand anything about this particular aspect of law. That is all on the website, so there is no difficulty finding out further details about it.

I have been handed a letter that would cause me concern and that looks on the edge of a contempt of Parliament, because of its intimidatory nature. I refer hon. Members to two court cases which are quite interesting. One of them—Attorney General *v.* Times Newspapers Ltd of 1973, which is in “All England Law Reports” 54—is from the Court of Appeal. In it, Lord Denning said: “The publication in the newspapers is protected by law. Whatever comments are made in Parliament they can be reported in the newspapers without any fear of action for libel or proceedings for contempt of court.” That was a consideration, because this case was about contempt.

Although the decision on that case was changed in the House of Lords, it is important to note that it was changed on the basis that the proposed article by *The Sunday Times* was not actually linked to speeches in Parliament. Lord Reid’s judgment said: “Some reference was made to the debate in the House of Commons. It was not extensively referred to in argument. But so far as I have noticed there was little said in the House which could not have been said outside, if my view of the law is right.”

Now, I have been handed a letter which aims to stop somebody putting up outside Parliament what has been said in Parliament. I think that is on the edge of trying to control the publication of Parliament, which is Parliament’s only cognisance. It may be that that should be looked at further later.

I do worry when threats are used against democratic representatives, because our job is to speak out on behalf of our constituents without fear or favour and to say what we think is right. People may try to bully others with money, and while I am quite well off, so it is not such a big problem for me, it is very unfair for other people.

**Q74 Thomas Docherty:** Specifically, what would happen if they try to say that if you, as a Member of Parliament, exercise your constitutional privileges, they will go after somebody else?

**John Hemming:** That was exactly the case in Australia, in fact. That is on page 5 of my documents—I have the complete extract if anyone wants it. This is where you are going at somebody to punish an MP; it is undue influence on the MP, and that is very worrying.

**Q75 Thomas Docherty:** I do not want to get into the case of Mr Ward, who made some comments outside Parliament, but it reminded me that you might, for example, say something under privilege, and the developer or the person you said it against might write to Alistair Carmichael, as your Chief Whip, or to Mr Clegg, as your party leader, saying that if you did not stop saying these things in Parliament, they would expect disciplinary action to be taken against you. To what extent is that intimidation?

**John Hemming:** I think that falls into a different category. This was considered in a case that involved Austria in the European Court of Human Rights. There is a question as to the extent to which people should have some right to reply. Some of the Austrian Parliaments have a right to reply if people feel they have been defamed in parliamentary proceedings. Obviously, it is a contempt of Parliament intentionally to mislead the House, so if there is evidence that someone has done so, then that should be raised in some way. The logic of that is that it is raised through another Member of Parliament. As there are 650 Members of the House of Commons, you would not struggle to find somebody to raise the issue with, say, the Privileges Committee or the Standards Committee if someone has intentionally misled the House. There is a process for that.

There is an argument that there needs to be a process; it needs to be one that people understand, which is not to go to the Chief Whip. One thing people often do not understand is that freedom of speech is not absolute in Parliament; it is controlled by the Standards and Privileges Committees—historically, it was the Privileges Committee. I am not 100% certain where it is now with the separate Standards Committee and Privileges Committee. Parliament controls the speech in Parliament; it is not complete freedom of speech.

**Chair:** We are going to have to cut things short a bit, but Mrs Laing has a particularly important question to ask.

**Q76 Mrs Laing:** But a brief one.

Given that you have stated that Parliament needs to assert its privileges further, but that you do not consider that that should be done by means of codification, how do you believe that Parliament should assert its privileges?

**John Hemming:** There are cases that should have gone to the Privileges Committee that have not. Basically, those cases should go to the Privileges Committee.

**Q77 Mrs Laing:** So would that be Parliament asserting its privileges?

**John Hemming:** That would be Parliament asserting its privileges. If Parliament does not exercise its muscles, they do not disappear, they atrophy. If Parliament exercises its muscles again, then it can strengthen its muscles.

**Q78 Mrs Laing:** Which cases should have gone to the Privileges Committee?

**John Hemming:** For instance, I had a case with Jim Dobbin. Somebody had threatened a constituent of Jim Dobbin to stop him talking to him. Nadine Dorries told me about a case where a constituent was threatened to try to stop her from talking to her. It does not really matter which one is first; what matters is that we protect our constituents in their right to be able to complain.

**Q79 Mrs Laing:** Do you actually have evidence that could go before a Committee that a constituent of Jim Dobbin's wanted to tell him something and was prevented from doing so?

**John Hemming:** He was threatened.

**Q80 Mrs Laing:** I am sorry, this is a genuine question. I really do not quite understand what we are getting at. Who prevented him? They must have been pretty powerful.

**John Hemming:** It was a judge in that instance.

**Q81 Mrs Laing:** So the threat to which you refer was an officially issued threat by a court.

**John Hemming:** Effectively, yes.

**Q82 Mrs Laing:** So a court stopped a constituent from approaching a Member of Parliament, namely Jim Dobbin.

**John Hemming:** Correct. Over time, yes.

**Q83 Mrs Laing:** By what means? Forgive me, but there is no such thing as a threat by a judge. It must be a decision by the court; an order by the court.

**John Hemming:** In what I referred to earlier, I had a court order that instructed someone not to talk to me. More precisely, in the recitals it stated that that order would apply on the basis that my constituent had agreed not to talk to me. The law is complex, which is why I quoted some elements of the Neuberger committee, which said that when it comes to issues connected to proceedings, a court order that purports to do that cannot do that, but that is not something that people necessarily know. If they do not know that, then they are frightened that they may be imprisoned if they talk to their MP, and therefore they do not talk to the MP.

**Q84 Mrs Laing:** But what kind of court order would have a sanction of imprisonment for talking to an MP?

**John Hemming:** Because it is contempt of court if you break the court order, so it has a penal notice attached to it.

**Q85 Sir Menzies Campbell:** If I may say so, there is a remedy. You go to the court above and you have that order recalled, and if there is any question of the judge issuing a threat, then that is misfeasance. That is the sort of thing that ought to be reported, and the judge can be removed by resolutions of both Houses.

**John Hemming:** But these things are never as easy as they sound, because you have to somehow get pro bono legal assistance to take a case—

**Sir Menzies Campbell:** That is an entirely different matter.

**John Hemming:** Yes, I know, but it is a practical matter. At the end of the day, these are all practical matters. We are talking about ordinary citizens of ordinary means. You cannot—

**Q86 Sir Menzies Campbell:** Wait a minute. Just because there are difficulties for ordinary citizens, because of the absence of a comprehensive system of legal aid, that does not mean that you can substitute for that an extension of privilege.

**John Hemming:** I am not suggesting an extension of privilege.

**Mrs Laing:** But, Mr Hemming, you are.

**John Hemming:** No, I am not.

**Q87 Mrs Laing:** You were saying that Parliament ought to assert its privileges by means of the Privileges Committee—

**John Hemming:** Doing what it used to do.

**Mrs Laing:** —making an investigation into a case where, for example, a court order has stopped a person from speaking to his MP.

**John Hemming:** Or such similar situations, not necessarily—

**Mrs Laing:** But you were referring to a particular one.

**John Hemming:** Yes.

**Mrs Laing:** We cannot look at general assertions; we have to look at the facts.

**John Hemming:** I accept that.

**Q88 Lord Davies of Stamford:** Have you documented these cases in the document that the Chairman is going to distribute to us?

**John Hemming:** I have given some evidence of this in the document that I handed in earlier.

**Q89 Lord Davies of Stamford:** Were these cases drawn to the attention of the Speaker, raised on the Floor of the House or—

**John Hemming:** The process is that you draw them to the attention of the Speaker.

**Q90 Lord Davies of Stamford:** Was that done?

**John Hemming:** It was drawn to the attention of the Speaker, and the Speaker turned it down.

**Mrs Laing:** Turned down what?

**John Hemming:** Turned down the references.

**Q91 Lord Davies of Stamford:** And that is all in this document?

**John Hemming:** Not everything is in the document. I have documentary records for all of these. If anyone is interested in further information about this, I have a lot more information.

**Q92 Mrs Laing:** Can we ask—you may not be able to answer this—why a court decided to issue an order to stop someone speaking to a Member of Parliament?

**John Hemming:** That is an issue for the judgment of the court.

**Q93 Mrs Laing:** Exactly. But there must have been a judgment of a court, which is a public document.

**John Hemming:** Not if it is a secret judgment. If it is a secret judgment—

**Q94 Mrs Laing:** Is this a secret judgment?

**John Hemming:** I have the court order here. Basically, I have provided you with a court order with the words, “you must not talk to a Member of Parliament about this”.

**Chair:** I think we are going to have to—

**John Hemming:** You might want a private session about this some other time.

**Chair:** We might, but I think we are going to have to draw this to an end, because we have two more witnesses to come in just half an hour—or less, because I know that some Members want to go into the Chamber. Thank you very much, Mr Hemming.

*John Hemming:* Thank you for having me.

## Press Association and BBC Editorial Legal Department [Mike Dodd and Sarah McColl] (QQ 95-122)

### Examination of Witnesses

*Witnesses:* **Mike Dodd**, Legal Editor, Press Association, and **Sarah McColl**, Solicitor Advocate, BBC Editorial Legal Department, examined.

**Chair:** I have not allocated these questions, so perhaps somebody would like to kick off. We have not heard from you, Mr Hunt.

**Q95 Tristram Hunt:** May I begin with the issue of the reporting of what is said under privilege in Parliament and the legal consequences thereof? How do you regard the satisfactoriness or otherwise of the current situation?

**Mike Dodd:** I regard it as being unsatisfactory. The ordinary press and the media are in a position where, if an MP stands up and makes a defamatory statement in Parliament, we can report it because we are covered by at least qualified privilege, and in certain circumstances we might be covered by absolute privilege. However, if an MP stands up—or a peer in the House of Lords, for example—and names somebody who has obtained a privacy injunction or a gagging injunction against a newspaper or a group of protesters and has been anonymised, then the MP can name them in public, the Parliament channel can broadcast it and *Hansard* can publish it, but I have to go away and think very carefully about whether the news organisation for which I work will take the risk of facing an action for contempt of court.

There are other circumstances—for example, under the Official Secrets Act 1989, which was mentioned in the Nicholls Committee, and we also now have the Sexual Offences (Amendment) Act 1992 and section 13 of the Education Act 2011. The last two both specifically forbid the publication of information relating to specific individuals. In the first case, it is the victims of rape or other sexual offences, ranging right the way down to voyeurism. In the second case, it is the identities of teachers who are accused of abusing children in their care. The offence, as far as I understand it from the Act, is that if I publish information which identifies those individuals, I will be liable to criminal prosecution, possibly conviction, and a fine of, I think, up to £5,000 for each offence.

In the meantime, the information I might risk a criminal conviction for can appear in *Hansard* on the internet and on the Parliament channel, which would be broadcast again, and of course you could pick it up from the archives as well, which is rather odd. The reason I find this situation unsatisfactory is that in the end, your freedom of expression depends a great deal on my freedom of expression. If I don't have full freedom of expression, then you don't have full freedom of expression either.

**Q96 Tristram Hunt:** And how do you regard the old one-two manoeuvre whereby a media organisation goes up an MP to say what it wants to have said and has its coverage ready to run once the MP has used privilege? Because it happens so rarely, is that the lesser evil that you put up with relative to the greater virtue of the freedom?

**Mike Dodd:** That is a rather odd question, I have to say. You seem to suggest that the integrity of Members of Parliament is somewhat more easily available or flexible than most people might think.

**Tristram Hunt:** We have had specific examples of that happening.



**Mike Dodd:** I have heard of a couple of examples in which it might be thought that somebody had planted a question with an MP. In some circumstances it is a perfectly justifiable thing to do if it is the only way in which you can get the issue about which you are concerned out into the open and the public domain. Some of these issues do deserve to come out into the public domain.

**Q97 Tristram Hunt:** So the answer is that you are happy with that as a lesser evil for the greater freedom.

**Mike Dodd:** The reason you've got the privilege, surely, is so that you can bring things out into the public domain, bring them to public attention and question what is going on and what is being done by the Government, organisations, companies, social workers and all sorts of people. If you don't use it for that purpose, what's the point of having it?

**Sarah McColl:** One of the issues that the Committee is looking at is the way in which Parliament polices the use of privilege by its Members. That is obviously one check, and it is very important. But it is a bit artificial that, if that check is deemed to have been reached and the matter is raised on the Floor of the House and is then reported in *Hansard* and on live television, the extension of privilege should stop before news reports or pieces by broadcasters and the press. Realistically, that is the way that the electorate finds out what is happening in Parliament now, as opposed to *Hansard*. That is where we have a gap. Whereas the Parliamentary Papers Act 1840 was relevant at the time, because *Hansard* and extracts from *Hansard* were the way that people found out what was happening in Parliament, that is out of date now. The law has a gap, and the committee on super-injunctions concluded that there is this lacuna at the moment, whereby the Parliamentary Papers Act does not extend to media reports in terms of editorial content, and equally the Defamation Act doesn't cover any area other than defamation. That is the area that we think needs clarification.

**Q98 Tristram Hunt:** Is this partly a technological issue, given that *Hansard* is online within three hours, but the statutes we are dealing with are slightly old-media in their coverage of modern media?

**Sarah McColl:** I think they are. *Hansard* isn't the main route that most people would go to in order to find out what is being debated in Parliament now. If the media cannot report what is being said in Parliament, it almost adds a level of secrecy to proceedings, which I would have thought is undesirable if Parliament itself has decided that the matter is worthy of mention.

**Q99 Tristram Hunt:** One last question, and forgive my ignorance. With super-injunctions, what was the case? I know that our friend who has now left the room broke the super-injunction about the footballer for no obvious reason.

**Mike Dodd:** Are you referring to an anonymised injunction or a super-injunction?

**Tristram Hunt:** Tell me the difference.

**Mike Dodd:** An anonymised injunction is an injunction that says you cannot identify a person in relation to certain information. I think, for example, of the Ryan Giggs case. That was an anonymised injunction. A super-injunction is an injunction which says not merely that you cannot publish certain information and relate it to certain individuals, but that you cannot even say the order has been made.

**Sarah McColl:** You cannot say the matter has gone to the court.

**Q100 Tristram Hunt:** On the super-injunction, could an MP stand up in the Commons and say that there is an injunction on the issue and that it is wrong?

**Sarah McColl:** On the same basis, I think, that an MP could use privilege to breach any order. The question at the moment, because of this legal lacuna that we face, is, can we as media report that that has happened in the House? It puts us in a rather unenviable situation.

**Q101 Chair:** Are you worried that you can't?

**Sarah McColl:** We are worried that the position is not clarified.

**Q102 Tristram Hunt:** But it would be in *Hansard*.

**Sarah McColl:** It would be in *Hansard*, and it arguably could appear, for example, on the BBC Parliament channel, because that is a live feed of everything in Parliament.

**Q103 Chair:** Even if you report *Hansard* verbatim?

**Mike Dodd:** The difficulty is that reporting *Hansard* verbatim requires a wait of at least two hours before the first draft comes out, whereas we have customers at the other end of the line, or the video feed or whatever who have seen something on Parliament TV and want it now or five minutes ago. If I say, "We have got to wait until *Hansard* comes out," they will say, "Oh, hang on a minute." Suppose it happens at half-past nine at night, they will have to wait until half-past 11.

**Q104 Lord Davies of Stamford:** But if you do wait, you can publish? You are happy to publish? You feel you have sufficient protection?

**Mike Dodd:** I wouldn't actually be happy to publish too many extracts from *Hansard* because it is, with all due respect to the colleagues who work on it, appallingly boring. You may have to go through half an hour of speech to get to the two-minute nugget that you are actually looking for.

**Q105 Chair:** I can remember when *The Times* had a whole page of parliamentary proceedings—three quarters for the Commons and a quarter for the Lords.

**Mike Dodd:** I would remind you that the Press Association has an office in this building, in which we still have a number of staff permanently employed, reporting what goes on in Parliament. I am not sure if we are the only organisation, but we are just about the only main national one—there is possibly one other.

**Q106 Sir Menzies Campbell:** There is an answer to the question of using Parliament to refer to something that otherwise could not be referred to—a super-injunction—but it may not be a very good answer or a very complete one. It relies on the acceptance by the Member of Parliament of the sub judice rule and on the Chair being sufficiently alive to what is happening to intervene if there is any breach of the sub judice rule. If there is an injunction, that means the case is not yet finished, so technically it has independence before the court. It is therefore sub judice and should not be mentioned. You have to rely on the MP for that, but the Chair should stop any mention of it.

**Mike Dodd:** It might be the case, of course, that the situation has changed since Lord Neuberger's report on injunctions. It is now being made clear to all those who apply for orders that their claim will be expected to go to trial, which is thought to be the reason why a number of people have subsequently surrendered their injunctions or have no longer

sought to renew or enforce them. The issue of injunctions may well die down, following that report.

**Q107 Mr Cash:** Do you not think that it is absolutely essential that Members of Parliament retain the right to say whatever is necessary in pursuance of their freedom of speech—that really lies at the heart of this—but that their exercise of discretion in relation to any particular case is, effectively, a matter of parliamentary privilege or a sense of ethics? As a result, people should realise that the consequences of exercising that privilege irresponsibly would be unacceptable. Other than in that type of circumstances, it is absolutely essential for the sake of freedom of speech—particularly with the state getting so enormous these days and becoming such a leviathan—for Members of Parliament to speak out.

**Sarah McColl:** I would not like to say where it is appropriate to draw the line on Members' privilege; that is certainly a matter of the House and not for the media. Yes, I think privilege has to be protected by Parliament, but our key concern, assuming that Parliament is exercising privilege responsibly and drawing the boundaries where they should be drawn, is whether we are allowed to repeat the statements that have been made.

**Q108 Mr Cash:** Could I just follow that up? Do you not think that if a Member of Parliament abused that right of privilege and freedom of speech, it would be more likely than not that it would be Members of Parliament themselves who would criticise that Member of Parliament, in a way that perhaps does not apply quite so much in the media?

**Sarah McColl:** I think that as it stands at the moment, without legal protection for the media, the MP may well be criticised by other Members, but the media would be exposed to a legal threat. It seems unjust, in the circumstances, that we face a higher penalty than the person who considered the public interest in the first instance.

**Q109 Lord Davies of Stamford:** To come back to my earlier point, if all you do is repeat verbatim what is said in the House, you are safe. It is only when you want to get a catchy headline and summarise the thing for the benefit of your clients—sex it up and all the rest of it—that you are running the risk of losing the protection that you would have if you reported Parliament's proceedings straight.

**Sarah McColl:** But at the moment it is only a verbatim report of *Hansard*, as opposed to a fair and accurate report of a small part of the proceedings.

**Mike Dodd:** In addition, the Parliamentary Papers Act 1840 somewhat precedes the Human Rights Act and the European convention on human rights, which of course guarantees the media the right to freedom of expression and guarantees the public the right to freedom of expression as well, because it is a two-way right. You have the right to impart information and you have the right to receive information. There have been a number of judgments in the European Court at Strasbourg, whether or not you agree with all of them, that suggest that it is up to editors and journalists to decide how best to present the information they are trying to present to the public.

**Q110 Lord Davies of Stamford:** There is no jurisprudence along those lines in this country at present, is there?

**Mike Dodd:** I think you'll find a number of decisions that agree with it, yes—that it is not the job, for example, of judges to decide how editors should present stories, because editors are the ones who are in the business of trying to inform the public. Again, without wishing to be rude about *Hansard*, because it plays a very valuable role, you don't find people lining

up at the local newsagent's to buy it in the same numbers as they do when they go off to buy their "super soaraway Sun".

**Mr Cash:** They say the best way to keep a secret sometimes is to make a speech in the House of Commons.

**Q111 Baroness Healy of Primrose Hill:** The Press Association plays a really important role in terms of democracy, I think, but you state that reports of parliamentary proceedings should be given absolute immunity. Could you explain your reasons? Also, would absolute immunity not encourage media organisations to use Parliament as a way to breach court orders? That is something that we are concerned about as well.

**Mike Dodd:** Can I deal with the second part of your question first? You're rather suggesting that it is up to us to police the integrity of Members of Parliament, and I don't think that is our job at all. It is our job to report what goes on in Parliament. The reason we seek absolute immunity is to make sure that when we do report what is said—it is usually the things that are most interesting that are going to cause the problems—we do not run the risk of criminal prosecution, or of prosecution for contempt, for breaching any one of the three Acts I mentioned, or any future legislation that might come through, or for naming the individuals who were involved in injunctions.

I think the injunction risk is somewhat less important now than it was, say, a few months ago or a couple of years ago. Nevertheless, every now and again I get people ringing up; I get the staff from here ringing up, as happened with Lord Campbell-Savours when he named a woman he claimed was a serial liar who had made a number of untrue allegations of rape against innocent men. Question: can we name her? Has he committed an offence and would he have committed an offence if he had named this woman on the pavement outside the House? The answer is no, he wouldn't, because the offence is actually in publishing or broadcasting a report that contains material that identifies the individual. So he would not have committed an offence when he stood out on the pavement or when he stood up in the House of Lords.

Question: would we commit an offence if we named the woman in our report, and would we then be prosecuted for it or would the Attorney-General decide that no, it was not in the public interest to bring an action? All I am saying is that I don't think we should be faced with having to make the judgment as to whether or not the Attorney-General is suffering from apoplexy, indigestion or something else at the time he decides that this time, yes, he will bring an action, because if he does, the chilling effect on freedom of speech and reporting of Parliament, I think, will be quite strong. But there's no guarantee that he won't, and while he is left with that discretion, we are left with having to take that bet, and I don't think that is a reasonable place to be if you are merely trying to inform the public about what your public representatives are saying.

**Q112 Mr Jenkin:** I genuinely do not know what I think about this and I am listening very carefully. Forgive me if I ask some fairly pointed questions. It is not that we expect you to be responsible for policing the behaviour of Members of Parliament, but among 650 Members of Parliament there are bound to be one or two susceptible individuals. It is not acceptable, is it, for there to be a means of circumventing legitimate injunctions and for a journalist to procure a Member of Parliament to breach the injunction under right of privilege so that you can run the story? That is not ethical behaviour, is it?

**Mike Dodd:** It depends. I would not say it is not ethical behaviour. Would you say it is not ethical behaviour for an aggrieved citizen who is the subject of an injunction to ask his MP to do the same thing?

**Mr Jenkin:** That is a different matter.

**Mike Dodd:** All these things, as they say in the courts, are fact-specific.

**Q113 Mr Jenkin:** But there is a difference between a Member actually raising something in Parliament and getting something done about it, and enabling a tabloid newspaper to splash it all over the front page and make money out of the story. That seems to be different. I am sorry, I am putting it aggressively.

**Mike Dodd:** That's all right. I am quite happy with it, but I don't agree with you because if you are saying it is wrong for a journalist to take an issue to an MP and ask him to raise it in public, you are also suggesting that it is wrong for any aggrieved constituent to raise an issue.

**Mr Jenkin:** No, I think you are putting words into my mouth.

**Mike Dodd:** Well no, I am not. All I am doing is reading the situation. If you say that A goes to an MP and says, "I would like you to raise this issue in Parliament", is it important that A is a journalist or a constituent or a business man with a vested interest—

**Mr Jenkin:** It depends what the journalist's motive is.

**Mike Dodd:** Precisely.

**Q114 Mr Jenkin:** It depends whether the journalist's motive is to rectify the wrong or to get a good scoop which is good for his career in journalism.

**Mike Dodd:** I have not known in any recent cases that people have done it because they are just after a scoop. Apart from all else, once the MP stands up and says the thing in Parliament, his scoop has gone. The whole point about a scoop is that it is exclusive. If you stand up in a House with 650 Members and with TV cameras and microphones all over the place, you cannot say, "This is reportable only by such and such a newspaper."

**Q115 Mr Jenkin:** You are quite right, but it may be a complicated and obscure matter that a journalist knows all about and knows how to make all the pieces into a story when everyone else is saying, "I wonder what all that was about." We have seen such examples.

I will leave the matter there, but you can understand that there is a legitimate concern. I am open-minded about it, and I do not pretend to have decided about it, but I am concerned about there being a blank cheque situation where anything fed to a Member of Parliament, however scurrilous and outrageous, is then fair game among the media just because it was said in Parliament. That seems to me the object of having some restrictions, although I appreciate that you need to know exactly where you are, and that the ambiguity of your position is most uncomfortable.

**Mike Dodd:** I have to respond. You seem to be suggesting that Members of Parliament and peers are so innocent and naïve that they will swallow any load of tosh hook, line and sinker, especially if they know it comes from a journalist. I do not think that is true. I also do not think that you would find many journalists who would try to do it, unless they genuinely believe they are dealing with an issue that is a matter of serious public interest.

**Q116 Lord Davies of Stamford:** I don't think that is true either, and I hope that Mr Jenkin is acting as devil's advocate. It is obviously important that someone puts that question, because there could be a perception that that risk exists. My view is that we have this

privilege because it is considered to be in the public interest that elected representatives and members of the House of Lords have this special freedom of speech to use in the public interest, and it is our duty to use it very sparingly, with great consideration, and responsibly. If we do not do that, and we are perceived by our colleagues as using that right frivolously or unreasonably, we are subject to the internal disciplines of Parliament—the two Privileges Committees in the two Houses. Those disciplines should be taken very seriously.

We must have that right and, equally, you must have the right to reproduce what we say. That probably means the totality of what we say on that particular subject, and it probably won't be more than a few sentences. But I don't think you should have the right to make your own summary of it, as I have just explained, for journalistic purposes. The big difference is that we are considered in this matter to be acting only in the public interest, and I trust that that is always the case—there have been, of course, occasional exceptions to this, which are very regrettable, and people involved in them should be very seriously sanctioned. It would obviously be deeply scandalous if a journalist were to corrupt a politician for the purposes that Bernard is suggesting, and I hope that both parties to the corrupt act would end up going to jail for a very long time if that ever happened. We act only in the public interest, but you, quite reasonably, have a commercial interest. You have to sell your stories; that is a different priority that you are bound to have. Your clients, the actual newspapers, are bound to have a commercial agenda. We do not have a commercial agenda, and we do not have a personal agenda. We must have only a public interest agenda when we use parliamentary privilege.

That is how I understand the system to work, and if it works like that, I am very happy with it. That means that if a journalist comes to me as a Member of Parliament or a Member of the House of Lords and says, “This is something that in the public interest you ought to reveal. It is quite scandalous. It has been hushed up. Nobody knows about this, and people should surely know about it,” I have got to think carefully about whether I accept that argument. It does not matter whether a journalist, a constituent—if I am a Member of the House of Commons—or any other citizen brings it to me. I have got to go through the same mental process before I decide whether it is in the public interest to say that. That is how I understand the system.

**Mike Dodd:** I quite agree with every word you have said.

**Sarah McColl:** I think that is where we place our reliance, though. That is partly our point. That test is very high.

**Chair:** We are running out of time. Lord Bew wants to ask a question next, which is relevant to all this.

**Q117 Lord Bew:** The Nicholls Committee argued that there should be a modernisation of the Parliamentary Papers Act 1840, which is the foundation of a lot of the issues we have just been talking about. The Committee said that it should be replaced by a modern statute in more “transparent and accessible” language. Do you agree? What, if anything, needs to be clarified? For example, there was some argument at the time of the *Guardian* Trafigura case, where Carter-Ruck made a case under the 1840 Act that suggested that its meaning was not clear.

**Sarah McColl:** There are two specific areas that have been brought up in the Green Paper as suggestions for clarification. One is the explicit inclusion of broadcasters to catch up with the modern age, which, coming from the BBC, I would agree with. The other is the

shift of the burden of proof of malice, which is out of kilter with the common law in any other area. We would obviously agree with those changes. We would argue that the issue of the lacuna, which we have been discussing, in the current law and the grey area of the common law could be clarified within the same changes to the Act. Of course, it is for Parliament to legislate as it wishes, but I do not see that there is any necessity for a new Act, although I think the current one needs reform.

**Q118 Chair:** There is a defence of good faith—using something in good faith—isn't there?

**Sarah McColl:** There is, but the Act specifically only covers verbatim reports authorised by the House and verbatim extracts from *Hansard*, so we have this issue with editorial content. Thinking of news bulletins in the BBC, we do not have the luxury of being able to have a half-hour programme on every topic that is raised in the House. It has to be edited, practically, within certain bounds, and we try to do that fairly and accurately. I think the Act needs to acknowledge that and make the position clearer.

**Q119 Mr Cash:** On the question of disapplication of freedom of speech, do you think there is a case for giving each House the power to waive privilege to allow proceedings to be used in civil cases such as defamation, or to allow inquiries to use evidence given in proceedings? Could you explain why you think that might have a chilling effect? What effect would it have on the reporting of those proceedings?

**Sarah McColl:** In the MLA's submission we said that we think this is quite a dangerous suggestion in terms of undermining privilege. If the House were able to disapply privilege retrospectively, we would not be able to make a risk assessment on reporting events at the time that they were published. If we knew that six months down the line the House might disapply privilege, we would be liable to court proceedings. We would have to assess every story on the possible legal risk if privilege did not apply, which would put us in a worse position than we are in at the moment, particularly in terms of defamation.

**Q120 Mr Cash:** Can I ask a general question arising out of that? We have been discussing privilege much in the context of article IX of the Bill of Rights of 1689. There is a question, which has been discussed repeatedly, about whether that is out of date, and whether we should have a modern, 21st-century version of it to put it in a statute and codify it. That is something that we will have to decide. But looking back to the days when I was studying history—once upon a time—and to John Wilkes and the whole of the development of freedom of speech and subsequently *Hansard*, and taking it right the way through the 19th century, I ask myself whether in the pursuit of freedom of speech in the press the same kind of criteria have continued to be applied as we are seeking to examine in relation to freedom of speech in Parliament. In other words, do you think that the commercialisation of the press, and, heavens above, the press certainly was not a—what's the word?—wilting violet—

**Sir Menzies Campbell:** Shrinking.

**Mr Cash:** A shrinking violet in the 17th and 18th century. Nonetheless, they were directing freedom of speech to try to ensure that there was not tyranny by the monarch and by the court in those days. I just wonder if you have any general thoughts about the comparison between freedom of speech for the purposes of the press in that context and freedom of speech in Parliament, and where you see the balance lying. Do you think that perhaps the press have changed the rules a bit?

**Mike Dodd:** Well, the press has changed, yes. We have gone from *Hansard*. We have gone from a four-page *Times* set in six-point type that carried great slabs of what was in *Hansard*

or huge slabs of verbatim parliamentary debates. We have moved advertising off the front page. We have seen huge numbers of papers grow, bloom, do very well and then suddenly disappear; a large number have disappeared in my working lifetime, since 1967 when I first started on the local paper. But what has happened in the meantime is that the computer has been developed, the mobile phone has been developed, the television has been developed and the internet has been developed, and I think that there is as much news coverage going on but it has just moved to a different medium; it is arriving in your house in a different way.

**Q121 Mr Cash:** But is it used for the same purpose as was originally understood by the expression “freedom of speech” in the media, that Lord Davies referred to and Mr Jenkin referred to in the context of Parliament as a matter of public interest?

**Mike Dodd:** Yes, I would say so, because that is one reason why there is so much reporting of what goes on in politics, not only of what goes on the House of Lords and the House of Commons, but also of what goes on in politics, what is going on in the Cabinet and what various Government Ministries are doing, because these are matters of public interest and the public want to know about them.

**Q122 Mr Cash:** But are the words “in the public interest” the same, necessarily, as what is of interest to the public?

**Mike Dodd:** An awful lot of the time, yes. I’m afraid I don’t disagree with judges who like to draw the fine distinction between what is in the public interest and what interests the public.

**Chair:** I will have to bring everything to a sudden end, I’m afraid. There is a big vote in the Commons.



## MONDAY 11 FEBRUARY 2013

Members present:

Lord Brabazon of Tara (Chair)  
 Lord Bew  
 Sir Menzies Campbell  
 Mr William Cash  
 Lord Davies of Stamford  
 Baroness Healy of Primrose Hill  
 Mr Bernard Jenkin  
 Mrs Eleanor Laing  
 Baroness Stedman-Scott

### Clerk of the New Zealand Parliament [Mary Harris] (QQ 123-158)

#### Examination of Witness

*Witnesses:* **Mary Harris**, Clerk of the New Zealand Parliament, examined.

*This evidence was taken by video conference.*

**Chair:** Thank you for agreeing to appear before this Committee today. I know that it is a pretty inhospitable hour in New Zealand, but I am not quite sure what the exact time is.

**Mary Harris:** It is not too bad. It is 8.30 in the morning.

**Q123 Chair:** That is not so bad. Thank you for coming in and for sending in your memorandum and various other interesting things.

Unlike Australia, you have not comprehensively codified parliamentary privilege in statutory form. Why do you think that is? Added to that, your response to the Cabinet Office highlights areas of uncertainty, such as the broadcasting of proceedings, and the repetition of statements made in debates outside the House where the House has recommended legislation. What are the pros and cons of legislation in discrete areas as opposed to comprehensive codification?

**Mary Harris:** In New Zealand, we have been traditionally very cautious about legislating in any way for Parliament or parliamentary proceedings, because of concerns about unsettling the balance between the judicial and legislative branches of Government. Legislating effectively invites the courts to intervene in parliamentary proceedings. We may be influenced by the fact that we do not have a written constitution, so we do not have a legislative framework for that relationship, and we rely very heavily on constitutional conventions. That gives us flexibility but it also has risks and it requires a really good understanding and respect of the relationship between the two branches of Government. It has been referred to as a sort of *détente* between Parliament and the courts. There has to be understanding, potentially communication and an agreement not to transgress on each other's patches, so to speak.

There is not a lot of enthusiasm in New Zealand for a written constitution, although we have a low-key constitutional review going on at the moment. That is not particularly

driven from the perspective of Parliament or parliamentary privileges; it is more to do with the position of the treaty of Waitangi in New Zealand's constitutional arrangements, which is quite a separate issue for us.

I suppose that until now the risks of legislating have probably outweighed what might be the advantages. However, in recent times there has been a little bit of a build-up of risks, particularly around the impact of technology on the publishing of proceedings. The protections that exist for publishing were written in the 1990s and they are, so to speak, very last century—they do not encompass new technologies—so we feel that we need to do something about that. Now, uncertainty has developed, particularly through the Leigh case, but also in *Jennings v. Buchanan*, about the definition of proceedings in Parliament and how far freedom of speech really goes. Until now, we have taken a cautious approach to legislating for Parliament.

**Q124 Mr Jenkin:** Hello. I am Bernard Jenkin, a Conservative Member of Parliament in the House of Commons. Good evening—or rather, good morning.

**Mary Harris:** Good morning.

**Mr Jenkin:** We understand that you have quite extensive Standing Orders dealing with the whole question of privilege at some length. Will you just describe those to us and how they act as an alternative to legislation? This is something we are discussing, and we have champions on both sides of this argument in this Committee.

**Mary Harris:** The Standing Orders set out the application of privilege. Privilege is based in the law in New Zealand. The Legislature Act 1908 establishes the privileges by reference to the privileges enjoyed by the House of Commons in 1865. It is a very general way of establishing the privileges, but the extent and scope of privilege is a matter for the law. The Standing Orders deal with the application.

In the mid-1990s, there was a desire to make contempt more transparent, so the Standing Orders now set out a general definition of contempt, what the House might treat as a contempt and then quite a range of examples, so that people who are interacting with Parliament know the risks, know where the boundaries are. That is important for Members as well. It is an attempt to do away with some of the mystery about parliamentary privilege, I suppose, and be a bit more open about the way in which the House applies the privilege of free speech and the privilege of exclusive cognisance and set out for Members and members of the public what contempts might be. It is not an exhaustive list but it is quite a long list of examples that are set out in Standing Order 407.

**Q125 Mr Jenkin:** That is very helpful; thank you very much. You talked about a *détente* between the courts and Parliament. Do the Standing Orders effectively determine the terms of that *détente*, and is there a risk that the courts are always going to test those Standing Orders if they have gone too far or they think that they are impinging on some rights of subjects that are set down in legislation?

**Mary Harris:** The Standing Orders do, to an extent, set out the nature of that kind of relationship or *détente*. Free speech obviously allows Members to say whatever they want in Parliament, but our Standing Order 112 restricts that to a certain extent in relation to matters that are before the courts and in relation to court orders. It gives the Speaker a discretion to exercise and it requires Members to notify the Speaker if they are thinking, in particular, of breaching a court order, but also if they are thinking of discussing matters that are currently under adjudication in the courts. So although free speech is recognised,

the House itself has placed some limits around what Members can do in terms of matters that are currently before the courts and matters that are subject to a court order. The House has played its part in that détente by establishing some rules for Members, and the Speaker, in “Speakers’ Rulings”, has frequently cautioned Members to use free speech responsibly in respect of matters that are before the courts so as to respect the roles of the two branches of Government.

**Q126 Mr Cash:** I am Bill Cash, Conservative Member of Parliament for Stone and former shadow Attorney-General. On the question of Standing Orders, I have been glancing at them, particularly with reference to chapter 8 under the heading “Parliamentary privilege”. I am just glancing at them to see whether there is any reference to the opportunity, which we would have here, to take expert advice from, shall we say, a very senior Queen’s Counsel, former judge, Law Lord or whatever with respect to the question of privilege if it was to occur. Would the New Zealand Standing Orders in general give such authority to have such an expert adviser?

**Mary Harris:** There is no specific authority, but in a general sense, certainly the Privileges Committee, like any other Select Committee, has, when it is considering an issue, the power to call any advisers that it wants. It does get senior legal academics in particular to assist it and has had lawyers from Crown Law, some of whom are senior QCs, assisting it when it is considering these issues. If the Speaker were to intervene in a case in the courts, the Speaker would be represented by a senior counsel. Our Attorney-General would not always, but sometimes, be involved in those cases. Certainly, in probably the most famous case—the *Prebble v. Television New Zealand* case—he was involved in London, at the Privy Council.

**Q127 Mr Cash:** You also had the case, in August 2011, of the Attorney-General and *Gow v. Leigh*.

**Mary Harris:** Yes. In that case, the Speaker intervened at the Supreme Court—we usually leave any intervention to the last stage; we do not intervene in more minor cases. The Speaker was represented by a senior counsel from our Crown Law Office—the Solicitor-General’s office. The Attorney-General did not represent the Speaker in that case, because he was a party to the case.

**Q128 Mr Cash:** My last point is simply to add that, as in so many matters relating to New Zealand, including your banking regulations, you seem, without a written constitution, to get things so right. There is an enormous amount for us to learn from your experience, particularly with regard to the extent to which you set out your parliamentary privilege in the Standing Orders themselves.

**Mary Harris:** I guess we are quite pragmatic about things. Not having a written constitution, as you will know, gives flexibility, but it requires a certain understanding. We have had over 150 years developing those understandings between the three branches of Government, but we have to continually work, here at Parliament, on maintaining the independence of the legislative branch. Respecting parliamentary privilege and making sure that it is not under attack is part of that, because parliamentary privilege is fundamental to the independence of Parliament.

**Q129 Sir Menzies Campbell:** Good morning. I am Menzies Campbell, a Member of the House of Commons. I am interested in two things: first, whether rulings by the Speaker are thought to establish a system of precedent and, therefore, if the Speaker decides an issue in

one direction, whether that would be thought to be binding on him or her in another, similar situation. The second point that intrigues me is the degree of activism on the part of the Speaker, who might intervene in litigation, which is something we would regard as alien to our system. Are there any complaints about the Speaker's activism? Is it generally accepted, or do people wonder whether he or she is getting into the cockpit of litigation and whether that prejudices independence?

**Mary Harris:** There aren't any complaints that I am aware of. You might need to ask some of our more senior judges about that, although they have not expressed complaints to me. Their views, particularly around what happened in the Leigh case, concern trying to achieve more certainty; that is what they are seeking, and legislation is probably the way to do it.

In terms of Speaker's rulings, the Speaker rules where the Standing Orders are not conclusive on something, and those rulings are recorded. They do set something of a precedent, but obviously, Standing Orders change over time. We review our Standing Orders every three years—every term of Parliament, that is. We compile the Speaker's rulings into volumes, we go through them every three years and we will leave some out when they have perhaps served their useful life or things have moved on. But the Speaker's rulings do set some precedents for our future Speakers.

**Q130 Sir Menzies Campbell:** I am interested in the notion that there is a regular review of Standing Orders. Is that provided for by the Standing Orders themselves, or has it just become a convention?

**Mary Harris:** It is recorded in the Standing Orders now. It was by way of convention, but now the Standing Orders set up the Standing Orders Committee for each Parliament. One of its functions is to review the operation of the Standing Orders through each Parliament.

**Q131 Baroness Stedman-Scott:** Hello. I am Lady Stedman-Scott, a Conservative Peer in the House of Lords. It would be helpful if you could share with us how well you think the term "proceedings" is understood in Parliament and the New Zealand courts. Your submission to the Cabinet Office notes that the definition of proceedings in Parliament in the Australian Parliamentary Privileges Act 1987 has usually been accepted in New Zealand. Are there exceptions to this, and do you see a benefit in enshrining such a definition in domestic law? Finally, to what extent are the views of the House of Representatives taken into account by the courts in interpreting the scope of article 9, and how does the House express its views?

**Mary Harris:** The scope of parliamentary proceedings is probably not understood all that well. It is something that Members need to think about. We define proceedings in Parliament in New Zealand on an Australian basis, and deliberately quite narrowly. What goes with proceedings in Parliament are certain immunities and powers. We try to limit the extent to which those immunities and powers affect other individual rights. Parliamentary proceedings are the things directly connected with the business of the House. We are quite clear in New Zealand—although not everybody understands it—that it does not include all the activities of Members. Parliamentary administration, caucus meetings and activities of Members in their constituencies are not proceedings in Parliament, by and large. It is a term that is not well understood, and it therefore needs defining in New Zealand law.

You might expect the courts to understand it, but in the paper I prepared on the Green Paper I alluded to a few of the differences in judgment about what a proceeding in Parliament is. The courts have interpreted it in various ways. That is another reason why it needs greater definition in New Zealand law. The Erin Leigh case has ignited this desire for legislation—it has, to a certain extent, taken a view contrary to the Australian definition, which, since the *Prebble v. TVNZ* case of the 1980s, has been pretty well accepted.

The nature of the view that the Supreme Court took in Leigh restricts what a proceeding in Parliament is to a degree that I feel will affect the way the House operates, in particular in its accountability function and Question Time. It also has the potential to affect other business off the Floor of the House. I think Members who interact with the public and want to be freely and frankly briefed by people who are perhaps making complaints to our Regulations Review Committee, and Members who deal with the promoters of local or private Bills, are at risk from the Leigh judgment. More and more, proceedings in Parliament are not necessarily just what happens in Parliament—in the House or in Select Committees. Those things mean that we have probably reached a point where a definition in New Zealand law would be helpful. Does that answer all of your questions?

**Baroness Stedman-Scott:** I think so. Thank you.

**Q132 Baroness Healy of Primrose Hill:** Good morning. I am Lady Healy, a Labour peer. To return to the case of *Gow v. Leigh*, which I read with interest, we understand that the court held that a briefing given to a Minister is not protected by absolute privilege. Would you outline your sense of the implications of that case and, in particular, the distinction between absolute and qualified privilege in so far as it applies to such a briefing? What possible remedies are available to the House in respect of that judgment?

**Mary Harris:** The impact of the Leigh judgment is first and foremost for Ministers and the way in which they are briefed by their officials. It will have a chilling effect on the way in which officials think about what they can say to a Minister in briefings. In the past, these have been considered to be so closely connected to the process of answering a question in the House to be a proceeding of Parliament. It has a chilling effect there.

You asked what can be done about that. I think that most people in New Zealand would agree that legislation is the way to deal with defining proceedings in Parliament, to give certainty for judges in the courts and to protect the operation of the House. In Leigh, the court tended to rely on the necessity test: what is necessary for the House to operate. We have never accepted that as the test. We feel that privilege is there to enable the House to operate. If you took the necessity test to the nth degree you would end up having only what was considered in 1865 to be necessary. It would put at risk developments in parliamentary practice over the past 100-and-some years.

We have said there is risk in applying the necessity test in the way it was applied in Leigh. We feel that in legislation we may be able to produce a purpose statement of some sort that would capture the idea of privilege being an enabler for the House, rather than just those things that are absolutely necessary at any point in time for the House to operate. For the House to remain relevant it has to change over time.

**Q133 Chair:** Do you think there will be legislation in New Zealand soon on this? Is that what you are implying?

**Mary Harris:** I think there is a greater chance of it now. Over the past 20 years there have been two Bills. One Bill was recommended to the House by the Standing Orders Committee and another Bill was introduced, but neither went anywhere. The Privileges Committee has also recommended legislation to deal with the effective repetition problem from *Jennings v. Buchanan*, and some of the problems around protection for the broadcasts of Parliament, but nothing has happened.

There is now a bringing together of all of that and a much greater will to update our legislation. The enactment that sets out privilege dates from 1908, so it is over 100 years old, and a lot of that has been repealed now. There is a need to update that and bring together a number of other disparate pieces of legislation into a Parliament Act or Parliamentary Privileges Act. I think there is sufficient momentum now for that to get a place on the Government's legislative programme and be advanced. I think it will wait for the Privileges Committee to report, so it is likely that a Bill might be introduced later this year.

There has been a reluctance to legislate because of misunderstandings around what parliamentary privilege is. The public see it as Members legislating perks for themselves. It is misunderstood. Particularly in election years, Members generally are not keen to be seen to be touching that sort of thing. Timing is quite important. We are in the mid year of a term now, so now is possibly the best time to launch into it.

**Chair:** *Jennings v. Buchanan*.

**Q134 Lord Davies of Stamford:** Before I get on to that, Chairman, I wonder if I might follow up what has been said about *Gow v. Leigh* and the implications of that. This is a very revealing and interesting conversation.

Let me just say that my name is Quentin Davies. I am a Labour Member of the House of Lords. This is a very interesting discussion because I think up to now most of us have had the feeling that Australia went the route of legislation, defining privilege in statute law, and New Zealand had deliberately avoided that and, as you have just described, allowed privilege to be defined by Standing Orders or Speaker's rulings. The obvious danger with the latter course is that the courts interpret their role as enforcing the law. If something is not the law, they are likely to say, "We don't have to enforce this. We can take our own view of the merits of this. We can get into the substance of it and give our own rulings." So you don't know quite where you are.

What I think you are telling us this afternoon is that although it is true that Australia has legislated, New Zealand is actually likely to do so. So you feel that the model of simply relying on Standing Orders and Speaker's rulings has not proved sufficiently viable, and there is a consensus that this needs to be changed. Is that right?

**Mary Harris:** I don't think it is quite as clear-cut as that, because we have always had legislation in New Zealand that establishes parliamentary privilege. The Legislature Act 1908 defines parliamentary privilege as being the privileges enjoyed by the House of Commons in 1865, so there has always been a statutory base. It is not quite all or nothing.

We always accept that the extent and scope of privilege is a matter for the courts. If a new privilege were to be found, it would be a matter to be confirmed by the courts or in legislation. If privilege is to be waived, it cannot be done by resolution of the House; it has

to be done in legislation. We have always had that kind of statutory base for privilege in New Zealand. The administration of privilege is a matter for the Standing Orders, which is where we have spelled out what a contempt is, because it is for the House to determine in any particular situation whether there has been a contempt and to determine what to do by way of punishing for contempt. That is on the basis of the privilege of the power to punish for contempt, which is established in law via our various statutory bases.

So it is not quite as clear-cut, but we have got to the point that the Australians perhaps got to in the 1980s with the Murphy case, where the courts had taken a direction that was starting to impinge potentially on the way the House might operate and, therefore, at the very least proceedings in Parliament need to be defined. We certainly would not go down the track of codification; we would probably keep a general definition of privilege by reference to the House of Commons, along with setting out the purpose of privilege, which helps with interpretation. We would then define proceedings in Parliament and deal with one or two other smaller matters relating to broadcasting, so it is not going to be an extensive codification. The codification of contempt in particular will remain with the Standing Orders because it is a matter about the operation of the House. Does that answer the question?

**Q135 Lord Davies of Stamford:** Yes, I think it sheds a lot of light on the question, for which I am sure we are all very grateful.

I will now take up the situation created by *Jennings v. Buchanan*, which is alarming because it appears to be the case now that although statements made in the Chamber of the House of Lords or the House of Commons are privileged, not only if you repeat them verbatim outside but even if you just refer to them by saying, “Yes, I stand by my statement in the House,” you no longer have privilege and it is to be regarded by the courts as a separate restatement of the original remarks. If those remarks are defamatory or libellous, the Member can be sued. Has that judgment had any effect in New Zealand? Have you had cases of Members being sued for defamation in such circumstances? Are you aware of an inhibiting effect? Have there been situations when parliamentarians have been, say, interviewed on the television about some statement they have made and they have to say, “Can’t talk about that at all” because they are afraid of some legal consequences if they do?

**Mary Harris:** I think it has had the effect of making Members more cautious, so it has had a bit of a chilling effect. There haven’t been any cases directly similar to *Jennings v. Buchanan*, but that is quite possibly because Members have been more cautious. That is the reason why the Privileges Committee, when it examined the final judgments in *Jennings v. Buchanan*, came to the conclusion that legislation was required to overturn the judgment concerning effective repetition because it is potentially inhibiting public discussion of what goes on in Parliament. Members will always need to be careful, because their statements outside the House will never be absolutely protected, but a reference to them or “I stand by them, and I do not resile from them,” if there is legislation in New Zealand, ought not to cause members any problem.

**Q136 Lord Davies of Stamford:** So if you do legislate generally on parliamentary privilege, you are likely to change or clarify the law so as to provide protection for statements of that kind. Is that right?

**Mary Harris:** I think so, yes.

**Q137 Lord Davies of Stamford:** You will try and protect statements along the lines of, “I merely repeat what I said in the House”—that sort of thing.

**Mary Harris:** “I don’t resile from what I said. I stand by what I said”—those sorts of things.

**Q138 Mr Cash:** Standing Order 408 states that “permission of the House is not required for reference to be made to proceedings in Parliament in any proceedings before a court...subject always to article 9 of section 1 of the Bill of Rights 1688, which prohibits the impeaching or calling into question in a court of such proceedings”. To what extent do you feel that proceedings in Parliament are referred to in court? Do you feel that the prohibition on impeaching or questioning proceedings is well understood and adhered to?

**Mary Harris:** I did touch on this slightly before. The number of cases in the courts that touch on proceedings is not high, but there are some, and I have made reference to some of them in my comments on the Green Paper. To a certain extent, they demonstrate that perhaps the nature of proceedings in Parliament is not well understood, because there are some almost conflicting judgments among those around parliamentary proceedings, such as whether or not the Clerk presenting a Bill for Royal Assent is a proceeding in Parliament. That has come into question and there have been different judgments on that. Actions have also been taken around the requirement on the New Zealand Attorney-General to present statements to the House where Bills are not consistent with our Bill of Rights. That is something that members of the public have taken actions to the courts on, and the courts have come up with some rather inconsistent judgments about the extent to which they involve proceedings in Parliament. So that does lead to the view that perhaps proceedings in Parliament are not as well understood by the courts as they should be. That is backed up by what judges have told me—that they do feel that there is a need for greater certainty around that area. Is there anything else further in that question?

**Q139 Mr Cash:** I would just note that under Standing Order 408(2) there is, as it were, the proviso: “Nothing in paragraph (1)” —that subject to the Standing Order “permission of the House is not required for reference to be made to proceedings in Parliament in any proceedings before a court”—“is intended to derogate from the operation of article 9”. So for practical purposes, that is the crunch point, is it not? Article 9 is regarded as special, almost inviolate, and that when it comes to judging the boundary of the jurisdiction of the court and its interpretation of matters relating to proceedings in Parliament, article 9 stands at the back of that, and the court is effectively being told by Standing Orders that it is not meant to venture very far down that route. Would that be fair?

**Mary Harris:** That is behind it. Previously, people could seek permission to make reference, really for statutory interpretation, I suppose—where they might be making reference to something perhaps that a Minister said in a speech on a Bill, or they may be using parliamentary proceedings to prove a fact, that someone was present at a Select Committee meeting, for instance, at a time when someone is suggesting that they were somewhere else. Proceedings can be used in evidence in certain ways, but, as you say—article 9 kicks in and prevents any questioning of that proceeding. It can be used as evidence of a fact that something happened or something was said, but not to question it any further than that. There is an element, I suppose, of an indication to the courts that proceedings may be used in interpretation or to prove a fact, but there is a limit. There is a bar over which you cannot go, down the road of questioning what those proceedings actually meant.



**Q140 Mr Cash:** That is really why I want to ask one last question on this, which is to go back to the origins of the Bill of Rights in the modern context. Back in the days of the 1680s, they were putting down a marker between the role of the monarchy and the consequences of the so-called Glorious Revolution and so on. They were saying, “There are things that are now going to be done and said in Parliament and we are not going to have the King telling us that we cannot discuss these matters.” Effectively, it was the fundamental question of freedom of speech in Parliament, and I would contend—I hope you might agree—that that still remains the most fundamental question. I hope that you may be able to give me an affirmative answer to that, which is that at the end of the day this is about saying, “You can look at interpretation if you like, but for heaven’s sake do not start, justices or the Supreme Court or whoever, to arrogate to yourselves the right to investigate the manner in which freedom of speech is exercised in the House of Commons.”

**Mary Harris:** That’s right, and that is there in the Standing Orders. The Bill of Rights is also enacted in New Zealand law through our Imperial Laws Application Act 1988, so the 1688 Bill of Rights is part of New Zealand law as well. That is a direction to the courts through the law. The Standing Orders are not the only place where it is. You are right: freedom of speech is fundamental to the independence of Parliament and the Bill of Rights is a marker in the sand over which the courts should not transgress.

**Q141 Mrs Laing:** Good morning. I am Eleanor Laing, a Conservative Member of Parliament. May we turn to the powers of the House to punish contempt? We understand that Standing Orders 406 and 407 set out the House’s understanding of what constitutes a contempt of Parliament, and that at the same time, only the House has the power to punish for contempt. How can the House of Representatives punish contempts by non-Members of the House?

**Mary Harris:** Well, the New Zealand House in recent times has fined a non-Member. We have exercised the power to fine. A chief executive of our television broadcasting corporation came before a Select Committee and made a number of allegations against board members. Subsequently, he was effectively dismissed. He was put on gardening leave on the basis of the evidence that he gave to a Select Committee. That is clearly a contempt in terms of our Standing Orders. It was investigated by the Privileges Committee and they found TVNZ to be in contempt. Television New Zealand was fined—not a huge amount; \$1,000 from memory—and the fine was paid. So we still possess the power to fine non-Members.

The other punishment that has been handed out—not particularly recently, but in the last 20 years—is banning persons from the parliamentary precincts. A courier company was banned from the precincts because they were found to be in contempt, because they would not provide evidence to the Privileges Committee in a particular case. That had a significant impact on the business of that courier and they eventually went out of business. There are powers there that can be used to deal with individuals.

**Q142 Mrs Laing:** It would appear that the second example that you have given would have far more effect than the first example of fining such a small amount to a large company. But presumably that was just to make the point?

**Mary Harris:** Yes, it was really. I think the previous time a fine was handed out was 100 years earlier, when the President of the Bank of New Zealand was fined £500, which at that

time was a lot of money. But yes, it was more to make the point than to be a financial penalty.

**Q143 Mrs Laing:** Was he personally fined, or was the company fined for his action?

**Mary Harris:** It was the company, because the chief executive was the person who was disadvantaged. So TVNZ, the company, was fined.

**Q144 Mrs Laing:** In that situation, do you know whether individuals have a right of appeal?

**Mary Harris:** No. The Privileges Committee has to operate in a way that is fair. Where it makes a report that has adverse findings for any individual or company, it has to give those findings to the company, receive feedback and consider that. It reports to the House, and it is the House that finally decides on the penalty, but ultimately there is no appeal against the House's decision.

**Q145 Mrs Laing:** So the courts have no say in this; the House's decision is absolutely final and there is no appeal according to domestic human rights legislation, for example, if it were alleged that the House had not carried out its quasi-judicial function correctly?

**Mary Harris:** Because the Bill of Rights protects the House in that respect, you cannot question the proceedings of the House, so the courts have no role, nor does our Human Rights Commission or any of the other bodies of that nature.

**Mrs Laing:** That is a very good answer. Thank you very much.

**Q146 Mr Jenkin:** Three very brief questions. When there is a breach of privilege in our system, it has to be debated on the Floor of the House before it is referred to the Committee of privileges, but that does not happen in your system because the Speaker acts in a more quasi-judicial capacity. Is that correct?

**Mary Harris:** That's right. A matter of privilege has to be raised in writing with the Speaker. The Speaker considers it and may hear from the person against whom the allegation is made—whatever it may be—and then decides whether a question of privilege is involved and whether it should be referred to the Privileges Committee. If there is a question of privilege involved, the Speaker will inform the House and it will go directly to the Privileges Committee, and there is no debate in the House until the Committee reports.

**Q147 Mr Jenkin:** Because in our system, as soon as it becomes debated in the House of Commons, it inevitably becomes rather political, which devalues the more judicial nature of breach of privilege in your system. Do you think that that is a fair comment to make?

**Mary Harris:** I think it is. On occasions, the Privileges Committee has divided on political lines, and sometimes you could say that matters of privilege have been raised for political purposes; where matters are raised about individual Members and their expenses or pecuniary interests returns close to elections, you can look behind that and wonder what the political motivation is, and that has happened in New Zealand. But, generally speaking, the Privileges Committee tries to operate on a non-partisan basis and tries to retain the same membership through any particular inquiry; Members who might have been involved in some way in the case will stand aside. So there is an attempt to be non-partisan, but politics do enter into it from time to time.

**Q148 Mr Jenkin:** Thank you. My second question is: what are the actual mechanics of issuing a fine or, indeed, a summons in order to get someone to give evidence to a

Committee of Parliament? Presumably, somebody has to issue some kind of a warrant. How does that work?

**Mary Harris:** The Serjeant-at-Arms will issue a summons on behalf of the Speaker. Except for the Privileges Committee, which has the power to issue a summons itself, all of our Select Committees apply to the Speaker for a summons to be issued; the Serjeant-at-Arms then issues a warrant, on behalf of the Speaker, for people to appear or to provide papers and information.

**Q149 Mr Jenkin:** So what happens if that warrant is just ignored? What then?

**Mary Harris:** Well, that can be a problem. If a member of the public were to do that, that could potentially become a contempt; it would be defying an order of the House. That would be the way in which it would be dealt with. What it means is that Committees have to be very responsible about the way in which they think about the need for a summons, because you don't want the House looking like a toothless tiger, so to speak.

**Q150 Mr Jenkin:** If there is a contempt and then you apply a fine, what happens if the person does not pay the fine? What happens then?

**Mary Harris:** I suppose, ultimately, the power to imprison probably still exists, but it has never been used in New Zealand. So you could ultimately remove someone's liberty. But that is going a long way.

**Q151 Mr Jenkin:** But surely the courts at that stage would begin to say, "Hang on just a minute. You cannot imprison somebody and take away their liberty on the say-so of some parliamentary Committee."

**Mary Harris:** To me, it wouldn't get that far. There would be a political solution to it.

**Q152 Mr Jenkin:** So there would be a classic fudge.

**Mary Harris:** Yes, probably. We have not got to that point because Committees have been cautious and sensible about summoning. By and large, people want to come to Committees. It is not usual for a summons to be issued. People want to come to Committees.

**Q153 Mr Jenkin:** I appreciate that; but ultimately, you do not have the American congressional authority to put in train a process that could actually imprison or substantially fine an individual. You do not have that. It exists in theory.

**Mary Harris:** . The process here does not operate in quite the same way. The power to fine exists; potentially, the power to imprison probably exists, but the likelihood of that being used is very slight. I think it is to do with the way in which New Zealand operates. Convention is very important, so we are careful about the way in which we use those powers, so that we do not get into a situation where they are going to be defied.

**Q154 Chair:** But you did mention earlier that a couple of organisations had been fined. They did pay, did they?

**Mary Harris:** They did, but that is twice in 150-odd years.

**Q155 Sir Menzies Campbell:** I wonder if you could help me with reconciling two provisions in chapter 8. I am looking at Standing Order 399(4), which reads: "A matter of privilege relating to the conduct of strangers present may be raised forthwith in the House and dealt with in such way as the Speaker determines." On the face of it, that gives the Speaker the opportunity for what one might describe in another context as summary

justice; but then if one looks at Standing Order 400, that says: “An allegation of breach of privilege or of contempt must be formulated as precisely as possible so as to give any person against whom it is made a full opportunity to respond to it.” On the face of it, the power of the Speaker to deal with it in such a way as he determines might be thought to be contradictory of the provision in Standing Order 400 that a person against whom an allegation is made is entitled to a full opportunity to respond. Has that issue ever arisen in practice?

**Mary Harris:** Not that I am aware. Standing Order 399(4) exists, really, to deal only with grave disorder in the Strangers Gallery. So it just gives the Speaker some additional powers to order strangers to withdraw or whatever is required to deal with complete disorder in the galleries. We do have disorder in the galleries periodically, but it is not dealt with in that way.

**Sir Menzies Campbell:** We know the feeling.

**Mary Harris:** Of course. The Speaker deals with it more in terms of the powers that he has here under the Trespass Act 1980. If people are grossly disorderly and disrupt the proceedings, they are usually dealt with by security quite quickly—they will be trespassed. So Standing Order 399(4) is not really in use; effectively, there are other ways of dealing with strangers who disrupt the House.

**Q156 Sir Menzies Campbell:** Could I ask you about paragraph (c) of Standing Order 407? The beginning of Standing Order 407 reads: “Without limiting the generality of Standing Order 406, the House may treat as a contempt any of the following”, and paragraph (c) says: “serving legal process or causing legal process to be served within the parliamentary precincts, without the authority of the House or the Speaker, on any day on which the House sits or a committee meets”. Would that apply not just to civil proceedings, but to criminal proceedings? That is, could an indictment, for example, be sought to be served on a Member by seeking the authority of the House or the Speaker to do so? Does it apply to both civil and criminal proceedings?

**Mary Harris:** Yes. The rationale behind it is that a Member’s first duty is to the House, so they should not be distracted in their duties in the House by the business of the courts. However, recognising that Members are not above the law, there is a process of approval that operates, so that legal process can be served when the House is sitting if Members wish it and the Speaker is prepared to give authority.

**Q157 Mr Cash:** Just a few practical examples with respect to the point that Sir Ming just raised regarding the conduct of strangers: we had an example where, in relation to the issue of hunting, a number of young men dashed into the Chamber—you may or may not have read about it—and caused a bit of havoc and had to be hauled off by the Officers of the House. There was another example of people abseiling down, which led to the setting up of glass barriers in front of the Public Gallery. Those are examples of where such disruption has actually happened; I do not know whether any such thing has happened in New Zealand.

The other thing I wanted to mention is that in my room in the House I have an 18th-century print of a man who is standing at the Bar of the House in front of the Speaker being required to explain himself in terms of some contempt that, no doubt, he was alleged to have committed. The last time that I can recall something similar, or that I am aware of, was when a journalist by the name of John Junor was summoned for having made some offensive remarks—I suppose it was alleged—and he was made to kneel and apologise.

I do not suppose any such things have happened in New Zealand, but maybe they have. Can you give us any practical examples of where these matters have actually arisen in the past?

**Mary Harris:** We have had examples quite recently of people trying to jump over the barriers in the Gallery on to the Floor of the House. Fortunately, security was able to restrain them at the last minute. That was dealt with under the trespass laws. It was one of the people who often come to Parliament, who, I suppose we say, are part of the rich tapestry of life, so they are dealt with reasonably sympathetically.

There was an organised thing many years ago, when someone else abseiled in and came down close to a Member. They were actually prosecuted, so the Serjeant-at-Arms and the Clerk at the time had to give evidence in that case, because it was seen as a criminal act in the same way that a private prosecution has been taken against a Member for fighting in the lobbies. We have had some incidents like that.

In terms of people appearing at the Bar of the House, generally speaking, where a member of the public has to answer to something, it would happen before a Select Committee, particularly the Privileges Committee. Back in earlier times, I think it was 1896 when the President of the Bank of New Zealand was eventually fined for defying the House and not giving information about the amounts of money that various people had in their accounts that Members wanted, there was a debate and he was called to the Bar of the House and appeared to answer questions at the Bar of the House, but I do not think it has happened subsequent to that.

**Q158 Mr Cash:** Just lastly, there is, I think, a cell at the bottom of Big Ben or around there—I have never actually been into it or seen it—

**Sir Menzies Campbell:** There is plenty of time.

**Mr Cash:** Menzies has just reminded me that there is plenty of time. Having said that, is there such an arrangement in the New Zealand Parliament?

**Mary Harris:** No, we do not have any cells here. Exactly what happened with the President of the Bank of New Zealand I do not know, but he did appear when he was ordered to appear by the House and answered questions, but he would not give the personal information that the Members required and was therefore found to be in contempt and fined. I think attitudes to privacy of information are different now, so that is unlikely to happen now.

**Chair:** Unless anybody has any quick questions, as it is gone half-past 7 with us, I thank you very much indeed for a most interesting evidence session, from which we have learned a great deal. Thank you for coming—or appearing.

## Clerk of the Australian Senate and Clerk of the Australian House of Representatives [Rosemary Laing and Bernard Wright] (QQ 159-190)

### Examination of Witnesses

*Witnesses:* **Rosemary Laing**, Clerk of the Australian Senate and **Bernard Wright**, Clerk of the Australian House of Representatives, examined.

*This evidence was taken by video conference.*

**Chair:** Good morning. Mr Wright and Rosemary Laing, thank you very much for appearing before us. I do not know what time it is with you.

**Rosemary Laing:** Half-past 7 in the morning.

**Chair:** I am sorry to have got you up so early. It is half-past 8 in the evening here. Thank you for appearing at such an unsociable hour. I think you know exactly what we are on about—the Green Paper on parliamentary privilege—so we will kick off with questions from our Members. By the way, I am Lord Brabazon, Chairman of the Committee, and I will ask all other Members to identify themselves as they ask their questions.

**Q159 Sir Menzies Campbell:** My name is Menzies Campbell, and I am a Member of the House of Commons, although if I was a Member of the Australian House I would be called “Men-zies”, but that is another matter. We are wrestling with the question whether privilege should be put on a statutory basis. In Australia, you have done that by virtue of the Parliamentary Privileges Act 1987. Would you identify any disadvantages that might have flowed from that? To what extent have courts, at federal or state level, felt able to intervene in matters that, without the statute, would ordinarily have been thought to be matters for the respective legislative Houses?

**Bernard Wright:** We have not seen disadvantages as a result of the statute. We have not seen it provoke action in court to intervene in parliamentary matters. On the contrary, we think that it has been helpful in a few ways. Sir Menzies, I do not know whether you would like me to go into those.

**Q160 Sir Menzies Campbell:** Yes, please. Would you mind illuminating that for us?

**Bernard Wright:** I would say that the Act has been helpful in three ways. In relation, first, to immunities, the Parliament was able, through the Act, to specify the terms of the immunities it felt were important—principally the immunity, or the privilege, of freedom of speech. So, first, it was helpful in respect of parliamentary immunities.

Secondly, the Act has been helpful in relation to the ability to deal with contempts. There were some gaps, especially in relation to penalties. There was a lot of doubt as to whether the Houses of the Parliament had the power or the authority to impose fines. Because of that doubt, it was very unlikely—it would have been very risky—for either House to impose a fine. The Act solved that problem and set a test for a finding of contempt, so it was helpful in that way.

Thirdly, the Act has been helpful in that it set down in clear and accessible form provisions that are important to the Houses of Parliament and to the people who are interested in them, such as Committee witnesses. So, the Act is helpful in those ways. We have not seen negative features to date.

**Q161 Mr Cash:** Of course, you have a written constitution in Australia, as compared to New Zealand, and we have just been talking to the Clerk of the New Zealand Parliament. You are not unused to the idea of judicial interpretation of your constitutional arrangements, and I wondered whether that might make it easier for you to accept the idea of judges being engaged in interpreting questions of privilege, unlike in the United Kingdom or, for that matter, New Zealand.

**Bernard Wright:** That is an interesting point, Mr Cash. It is true that, unlike in the UK, there is not a doctrine of parliamentary sovereignty here.

**Q162 Mr Cash:** Unlike Professor Goldsworthy, of course.

**Bernard Wright:** I beg your pardon?

**Mr Cash:** I just mentioned Professor Goldsworthy, who is the authority on parliamentary sovereignty. He is an Australian professor. I am sure you know who I mean.

**Bernard Wright:** Ah, yes. The Federal Parliament was commenced in 1901. In 1903, the Federal High Court was created, and, since then, it has spent a great deal of time making decisions about the validity or otherwise of laws passed by the Commonwealth Parliament. So there is a very different historical setting in that regard. The court has never commented, really, on the ordinary internal workings of Parliament, but it has a long tradition of looking at the product of the Parliament—the laws passed—and at whether they were within the powers given to the Parliament by the federal constitution.

**Q163 Lord Bew:** This is also a question under the general heading of the value of codification and modernisation. Section 16 of the 1987 Act provides a definition of the term “proceedings in Parliament” contained in article 9 of the Bill of Rights of 1689. Has that definition proved valuable in clarifying what activities are now covered by privilege, and are there still uncertainties which end up in court cases?

**Bernard Wright:** We think it has been helpful in setting out the actions that are covered by absolute privilege, by the famous term. That is subsection (2), so it spells out what the term is intended to cover. Secondly, it has been helpful in setting out what the immunity means: in other words, what cannot be done and what impeaching and questioning means, in subsection (3). Yes, we think it has been helpful in those ways.

It still falls to the courts, when cases come before them, to make decisions about what the provisions mean in any particular situation. They still have to interpret and apply the provisions; possibly, though, because of the Act, within a narrower spectrum. It is probably helpful for the courts and for Parliament in giving a little more predictability when matters of this kind go before a court.

**Q164 Chair:** Dr Laing, is there anything you would like to add? Feel free to come in.

**Rosemary Laing:** Not at this stage, Chair, but I certainly will.

**Q165 Mr Cash:** May I just ask you a question on that? The fact that you are there as Clerk of the Australian Senate strikes me as quite interesting in the context of our proceedings here. We are considering the question of privilege, and we have representatives from the House of Lords and the House of Commons on this Joint Committee, but most of the questions that crop up are matters pertaining to the House of Commons. In fact, I am struggling a bit to think of any question that has come up so far in relation to the House of

Lords. I am wondering whether your sense that this is perhaps more a matter at this stage for the House of Representatives has some bearing on the fact that most of the cases crop up in the House of Representatives. Would that be fair or not?

**Rosemary Laing:** No, not at all. You mentioned that we have a written constitution. That constitution gives to both Australian Houses the powers of the House of Commons, so both the Australian Senate and the House of Representatives have House of Commons powers. A great many issues of privilege arise in the Senate. It might be stretching it a little to say so, but the practice has developed slightly more in the Senate, in terms of resolutions and the accumulation of cases of inquiries into contempt. Bernard and I have a little agreement between us about perhaps answering different questions.

**Q166 Chair:** May I just say to Mr Cash and Dr Laing that a lot of these issues affect the House of Lords just as much as the House of Commons? We have had a case of *Jennings v. Buchanan* around the place; we have also had difficulty getting witnesses to appear before Select Committees, both of which are important issues of privilege. They affect our House just as much as yours, Mr Cash.

**Mr Cash:** Yes indeed, my Lord Chairman.

**Q167 Mr Jenkin:** My name is Bernard Jenkin; I am a Conservative Member of Parliament of the House of Commons. Could you explain to us what powers the Australian Parliament has when it makes a finding of contempt and, in particular, what punishments are available to you and how those punishments are carried out?

**Bernard Wright:** Each House has great powers to punish contempts—to make a finding that a contempt has been committed and to punish it—subject, since 1987, to a test set down in section 4 of the Act, which is, if you like, a threshold test: “Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member’s duties as a member.”

That threshold test was put in the Act to help to ensure that the Houses did not worry about more trifling matters. There had been a little history of that in early times in the House of Representatives in particular, more than in the Senate, so part of the reforms that were made in 1987 was the insertion of that provision, but apart from that, the Houses have great freedom in punishing contempts. The Act does not include any listing of offences. On the question of penalties, either House or each House can impose a penalty of imprisonment of six months or a fine of \$5,000 in the case of a natural person or \$25,000 in the case of a corporation.

**Rosemary Laing:** They are penalties that have never been imposed since the passage of the Act. Neither House has found it necessary to apply either of those penalties. At most, the Senate has delivered a reprimand.

**Q168 Mr Jenkin:** If you got to the point at which one of your Houses was seeking to apply one of those punishments, how would it work? What would stop somebody going off to a court and saying, “I’m being punished for an offence that doesn’t exist; it’s just a committee in the House that has decided this”? What would happen if they called your bluff?

**Rosemary Laing:** There is provision in the 1987 Act for limited judicial review of the ultimate penalty of imprisoning somebody, so if a House decided to imprison a person for



contempt, the Presiding Officer would sign a warrant committing the person to custody. The provisions of the Act require the warrant to state the basis of the imprisonment. It was contemplated that there would be limited judicial review of that part of the process only—that if a person was subject to a term of imprisonment, they would have judicial review of the terms of the committal and that the court would review, according to the threshold test in the Act, whether the act that they had been committed for met the test of contempt. But this is all hypothetical for us, because it has not happened.

**Q169 Mr Jenkin:** This is always the interesting thing, isn't it? It strikes me that the term "limited judicial review" sounds like an oxymoron, because once the courts have got their teeth into something, they generally make a meal of it. Also, once something was subject to judicial review, wouldn't the court want to look at how the warrant was made and what proceedings in Parliament took place to give authority to the warrant, and therefore wouldn't proceedings in Parliament become subject to the judicial review?

**Rosemary Laing:** That is possibly the case. We have yet to test it, but certainly counsel for the Presiding Officers would be arguing very strongly to keep the court in its place—the place envisaged by the terms of the 1987 Act, which is limited.

**Q170 Mr Jenkin:** This is very interesting, because whether you have Standing Orders like New Zealand or an Act like Australia, it doesn't seem to make any difference. If the courts want to go there, they'll go there.

**Rosemary Laing:** I am not sure that I have an answer to that. Do you, Bernard?

**Bernard Wright:** Only on one occasion has either House of the Federal Parliament imprisoned anyone, and that was in 1955. The action was appealed to the High Court, which upheld the historic interpretation that if the warrant for committal did not go into particulars but simply recited that the person had been sentenced to prison for a contempt then the court could not look behind the terms of the warrant—it could not review the decision of the House. I think the doctrine had been that if the warrant gave particulars, it could have been subject to review, so the provision inserted in 1987 was simply, if you like, to articulate that inherited provision. There has not been any sign here that courts would want look at internal actions or internal provisions or at Standing Orders, resolutions or acts done pursuant to them. There have been some signs in some courts of a very great willingness to push things back to the Parliament and to say, "Not matters for us, matters for Parliament." I think I understand the thought behind your question, and the apprehension perhaps. All we would say is that here it is still a theoretical matter rather than something we have seen any evidence of.

**Rosemary Laing:** Section 16 of the Act also has had the effect of setting out boundaries for the courts. It provides a very clear description of what proceedings in Parliament are, and it has had the effect of drawing quite clear lines.

**Q171 Mr Cash:** Taking up what Mr Jenkin said, at one time I was shadow Attorney-General and I have taken a great interest in some of the case law arising when the courts have, in the United Kingdom, begun to look at the role of Parliament. You may well be familiar with Lord Bingham's book, chapter 10 of which deals with the question of the sovereignty of Parliament, in his chapter on the rule of law. There have been distinct moves by certain Supreme Court judges, mentioned by Lord Bingham in that chapter, which he quite severely criticised for seeking to over-extend—as he would put it—their assertion that there was something intrinsic in the courts that would give them the capacity to invade, if not to override, the sovereignty of Parliament. I also mention Professor Goldsworthy

because both Goldsworthy and Bingham were obviously in some form of understanding with one another, and I think each quotes the other in their books and assessments.

I wondered whether this is something that you have been coming across in Australia, because you did say that they tried to draw the boundaries. We had much the same from the Clerk of the New Zealand Parliament just now, that there is an understanding in the unwritten constitution of New Zealand that the boundary is there and it is set. We have a similar thing, along the lines of the late Lord Bingham here in the UK, but the question is whether in relation to your written constitution—to go back to my very first question—you are perhaps finding that there is more of a tendency to move down in the direction of challenging the sovereignty of the Australian House of Representatives and Senate. Is something like that occurring in your jurisdiction, in your jurisprudence?

**Bernard Wright:** We have not seen that. There is this history of looking at the product of the Parliament—at the laws that have been passed—to find out whether, in fact, they were within the federal sphere of responsibility, and lots of decisions have been given that certain Acts, or parts of Acts, were beyond the power. But we would see such decisions—decades of them—not as intrusions into the parliamentary sphere, but as the High Court exercising its role in interpreting the constitution, which, if you like, is a compact between the founding colonies—the founding states.

If I could respond, also, on the theoretical point of the Act, we would not want to give the impression that, here in the 1980s, it was a decision of whether it was just a good thing or a bad thing to have an Act specifying privilege. There had been an inquiry which recommended certain reforms that could only be achieved by statutory enactment, such as a definition of proceedings. But the real trigger for the introduction of the Act was court decisions in New South Wales in the 1980s, where a High Court judge was on trial and where the New South Wales courts, in two decisions, allowed witnesses who had given evidence to two Senate Committees on the same subject—the courts allowed article 9 to be read down to allow the witnesses to be cross-examined severely about their parliamentary evidence.

It was concern about what the courts had allowed in New South Wales that was really the political and practical trigger to the 1987 Act. It was to reverse those decisions. That is what the terms of subsection (3) are all about; they are trying to say what is prohibited by article 9. That was Parliament's response to the court decisions.

**Q172 Mr Jenkin:** With regard to question 13, presumably, to deter the courts from becoming involved in decisions of either House, either House has to demonstrate that there has been a fair trial, a due process, which obviates the need for the courts to intervene. How is this done?

**Rosemary Laing:** It is done by resolution in both Houses. Both Houses have quite a—one could say sophisticated—clear code for how their Privileges Committees will go about inquiring into matters of contempt. In the case of the Senate resolution, its Privileges Committee is required to, effectively, afford natural justice to the parties. There is a great deal of consideration given to ensuring that everybody is informed of what everybody else is saying or submitting. There are requirements for people to be informed in writing of the nature of the allegations against them and the particulars of any evidence that has been

furnished. There is a process of forensically examining this evidence, ensuring that when written submissions are made or oral evidence is given, there is an opportunity for responses and cross-examination of the different parties.

**Q173 Mr Jenkin:** Is this set down in the statute or in Standing Orders, or is it just in procedure?

**Rosemary Laing:** In resolutions.

**Q174 Mr Jenkin:** In resolutions. So it is done by Standing Orders.

**Rosemary Laing:** Resolutions which have the status of Standing Orders. Our resolutions are about to turn 25 this month. Privilege resolution 2 is for the Senate, and there is an equivalent resolution for the House.

**Q175 Mr Jenkin:** That is helpful. So the effect of your Privilege Act is to exclude the courts from this area, and then the procedures are defined in your resolutions?

**Rosemary Laing:** Yes, I think that is a fair assessment.

**Q176 Lord Davies of Stamford:** Quentin Davies. I am a Labour Member of the House of Lords. I have only three questions. I regard the Australian Act, which is 25 years old, as rather a pioneering measure. It is certainly a possible model for us, and it is important that we look at it carefully and understand exactly how it works.

There seem to me to be two potentially problematic aspects to the Act that I want to raise with you; those are my first two questions. The first is on the risk of having a judicial review once the Australian Parliament has condemned someone to a term of imprisonment. It seems to me to be something of a nightmare. I think I am right in saying that that provision is not anywhere in the Act. The Act does not state that someone who has been convicted of contempt and sent to prison by Parliament has a right to judicial review, but what I think you are telling us is that in practice, the courts are likely to give such a person a judicial review. Is that right?

**Rosemary Laing:** I think that is right. It stems from the Browne-Fitzpatrick case in the 1950s. Because the warrant for committal was in general terms and did not contain particulars, I think the feeling in the drafting of the Act was that there should be a provision for the court to review the basis of the committal.

**Q177 Lord Davies of Stamford:** Where is that provision in the text of the Act? I cannot find it.

**Rosemary Laing:** Section 9, “Resolutions and warrants for committal”, provides: “Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence.”

**Q178 Lord Davies of Stamford:** I see. There was no reference to a judicial review, but you are telling me that the reason for section 9 is to protect Parliament against the danger of a judicial review. Is that right? The warrant committing the person to custody shall set out particulars of the matters determined by the House. So the House actually wants to encourage judicial review? Is that the idea ?

**Rosemary Laing:** In the extreme case where the House imprisons somebody, yes, the possibility of judicial review is conceded. Then there is the threshold test in section 4 of the Act for the essential element of an offence. So it is expected that with a judicial review—

**Q179 Lord Davies of Stamford:** This is something which I had not appreciated. The Australian Parliament, in passing the 1987 Act, deliberately provided for and intended to provide for the possibility—indeed, the likelihood, or probably the inevitability—of a judicial review in the event that they sent anybody to prison. They did not say specifically on the face of the Act that a judicial review may take place, but they provided the two bases on which they expected the courts would grant judicial review in those particular circumstances. Is that right?

**Rosemary Laing:** That is correct. I think they did their best to limit the scope of the review.

**Q180 Lord Davies of Stamford:** Right. Parliament could have done the exact reverse. Since it was happy with the jurisprudence going back to 1955, which protected Parliament against judicial reviews, the 1987 Act could have reinforced that position. Instead, Parliament decided to surrender that position and open the way to judicial reviews in future. *[Interruption.]* Sorry, Mr Wright, did you want to say something about that? I think we have agreed, have we not, on our view of the situation?

**Bernard Wright:** Yes. If it would help, the context was that during the review that had taken place here in the 1980s, there was quite a push to remove the ability to punish or deal with contempt from the Parliament entirely. Part of the recommendations from the review committee were that the penal jurisdiction should be retained within each House, but reforms to give particular rights—careful rights—to witnesses and to recognise the seriousness of Privileges Committee inquiries and the seriousness of decisions to impose penalties for contempt were all part of the justification that Parliament should retain the penal jurisdiction. This limited review was part of that package.

**Q181 Lord Davies of Stamford:** I see. The other aspect of the Act as I read it that seems problematic from our point of view—at least in my eyes—is section 16(3)(c), which states, “drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.” That would seem to exclude the courts using what is said in Parliament to interpret a statute. That, as you probably know, has been a fairly regular practice in this country for the last 20 years, since the *Pepper v. Hart* decision. That is now part of the way that the law is interpreted by the courts and it is accepted well both by Parliament and the general public, but it would seem that the effect of that section would be to make that impossible in Australia. Is that right?

**Rosemary Laing:** No, it is not, Lord Davies. If you read further down into subsection (5), you will see that the interpretation of an Act is an exception to the application of that provision. We have, in the Acts Interpretation Act 1901, a provision permitting courts to use extrinsic materials for the purposes of resolving any ambiguity in the meaning of a statute, and that is confirmed in section 16(5).

**Q182 Lord Davies of Stamford:** That is helpful, thank you. My third question relates to *Jennings v. Buchanan*. You are familiar with this judgment at the Privy Council and I take it that it applies to Australia. Is it something that concerns you? Is it something that has already given rise to private proceedings being taken against a Member of either Chamber of the Australian Parliament that would not otherwise have been possible previously? Has it had an inhibiting effect on parliamentarians? Are they seriously worried now that they

cannot even give a straight answer to the question, “Do you still stand by your statement in the House of such and such a day?”?

**Rosemary Laing:** I think I might try to answer that set of questions. The case was certainly of concern to Australian parliamentarians and Australian Attorneys-General. The Senate Privileges Committee presented an advisory report in 2008—we call the phenomenon “effective repetition”—and the Committee’s 134th report goes into the situation in some detail.

We have had one case in similar circumstances, which I think predates the *Jennings v. Buchanan* case, where the Queensland Supreme Court felt that it had to read down section 16(3) of the 1987 Act in order to allow parliamentary proceedings to be used in a defamation action. That case was appealed, but it did not get to the High Court because the matter was settled. So we do have this little uncertainty.

The Senate Committee was of the view that, generally, section 16 was robust enough to withstand such cases, but if it transpired that more of these cases were taken, the Committee came up with some drafting instructions for a slight improvement to section 16, should it prove necessary in practice. We have not had any further cases of that kind, but we take great care to warn our Members about the possibility of a *Jennings v. Buchanan*-type action and urge them to be careful about what they say outside of the proceedings in Parliament.

**Q183 Lord Davies of Stamford:** I think our concern here—it is certainly my concern—is that any parliamentarian must expect to be in a position when he is asked questions about what he says in Parliament. He is there to speak in the public interest on the behalf of his constituents and to go back to his constituents and answer questions about what he has said and done and how he has voted. If a parliamentarian cannot say, “I stand by that particular statement,” without being prosecuted, that drives a coach and horses through the concept of protection against defamation and freedom of speech in Parliament. That is where I come from in this, and I think you are telling me that there are exactly those concerns in the two Houses of the Australian Parliament and that there is a possibility that Parliament may want to strengthen the 1987 Act to provide that protection and, in effect, to override the *Jennings v. Buchanan* decision.

**Rosemary Laing:** Yes, that is a possibility if we have further cases of that nature which result in an unfortunate effect.

**Q184 Baroness Healy of Primrose Hill:** Good morning. I am a Labour peer. Moving on to reporting proceedings in Parliament, do you believe that there is a case for giving reports of parliamentary proceedings absolute immunity? If not, how should such immunity be qualified? Also, what is the position of broadcasts of parliamentary proceedings in Australia?

**Rosemary Laing:** If I may start with the second question first, the broadcasting of parliamentary proceedings, if it is ordered by a House or Committee, is covered by absolute privilege, but of course we do not tend to order the broadcasting of proceedings; we permit them. Permission to broadcast comes with various conditions. Television and radio and other media vehicles are permitted to broadcast the proceedings and to broadcast excerpts of the proceedings, but there are conditions on the broadcast.

In the Parliamentary Privileges Act, there is a defence of qualified privilege in any defamation action. Generally, where the broadcasting is permitted, there are conditions, and in any use of the broadcast proceedings there is a defence of qualified privilege, and our view is that there is no reason to alter that. There was one incident where legislation proposed that absolute privilege be given in certain circumstances, but neither House supported the provisions and they were removed.

**Q185 Mrs Laing:** I am a Member of the House of Commons. One thing that we are considering in the Government's Green Paper is the case for restricting freedom of speech in Parliament in both civil and criminal cases. Is freedom of speech restricted in that way in Australia?

**Rosemary Laing:** No, I don't think so. I think it is a slippery slope.

**Mrs Laing:** I appreciate it is not a clear question.

**Rosemary Laing:** Yes. Certainly when the Parliamentary Privileges Act was debated, consideration was given to the rights of the defendant in a criminal trial. There was a thought that an exception could perhaps be made for witnesses who had given evidence to Committees to be then cross-examined on that evidence for the purpose of questioning their credibility. For example, if they had given inconsistent prior statements to a Committee, perhaps a defendant in a criminal trial should have the right to use that to highlight the issues about the witness's credibility. But on further examination, during the debate, it was concluded that once you opened that Pandora's Box, you really could not avoid questioning proceedings in Parliament, which was the very thing that you were trying to establish by passing that particular Act, so that idea was abandoned.

The only place where proceedings in Parliament can be used in the purpose of a trial is for offences against the Parliamentary Privileges Act itself or against an Act establishing in a parliamentary Committee. There is a toe in the door in that respect, but it is limited to those particular offences relating to the Parliament's own affairs.

**Q186 Mrs Laing:** So the argument has been considered for allowing parliamentary proceedings to be used as evidence in criminal trials, and you have come to the conclusion that it should be allowed only where the matters being examined are parliamentary proceedings themselves. Is that roughly it?

**Rosemary Laing:** Yes, in effect that is roughly true. There are a couple of offences in the Parliamentary Privileges Act of imposing a penalty on a witness and unauthorised disclosure of in camera evidence, and of course the parliamentary proceedings can be used in the prosecution of those offences.

**Q187 Mrs Laing:** By what mechanism can that be allowed?

**Rosemary Laing:** It is by the terms of the statute.

**Q188 Mrs Laing:** I see. Mr Wright?

**Rosemary Laing:** Section 16 (6) is the reference to look at.

**Mrs Laing:** Thank you.

**Bernard Wright:** Mrs Laing, despite the fact that the 1987 Act has got those two offence provisions for interfering with witnesses and threatening witnesses and making that a crime, and also the offence of unauthorised disclosure of in camera evidence, there has not been any prosecution. There have been lots of concerns on each side of the building about such problems, but without hesitation those matters have been dealt with through the

traditional process of reference to the Committee of Privileges. Although those statutory provisions have been available, both the Senate and the House and their Committees have preferred to deal with the matters internally, and we think that that is certainly likely to continue for a very long time. We do not see the likelihood at all of those statutory provisions ever being used.

**Rosemary Laing:** Nor are we sure how we would use them.

**Q189 Mrs Laing:** That is helpful. So are there particular offences where freedom of speech should be specifically protected or specifically disapplied?

**Rosemary Laing:** I am not sure that we have a view on that. We have seen the Green Paper and the proposals to disapply freedom of speech in a range of areas, but it seems to me that coralling the courts from interfering in proceedings in Parliament is a very difficult matter. The more offences you have where freedom of speech is disapplied, surely the risk to the concept in total—

**Mrs Laing:** And you have not tried to do it.

**Q190 Chair:** Are we thinking about naming people in injunctions?

**Mrs Laing:** That is one of the aspects—naming people in injunctions.

**Rosemary Laing:** That is not something that we have had experience of here to the extent that you have over there. I cannot think of a single example here in recent years where that has occurred, so it is not an issue for us.

**Mrs Laing:** Thank you very much.

**Chair:** Has anyone else got any questions for our witnesses? No? Then may I thank both witnesses for appearing before us and getting up at such an early hour? It is now quite late for us, but thank you very much indeed for coming, both of you.

**Rosemary Laing:** Thank you.

**Bernard Wright:** It is our pleasure. Thank you.

**TUESDAY 12 FEBRUARY 2013**

Members present:

Lord Brabazon of Tara (Chair)  
 Lord Bew  
 Sir Menzies Campbell  
 Mr William Cash  
 Lord Davies of Stamford  
 Baroness Healy of Primrose Hill  
 Tristram Hunt  
 Mr Bernard Jenkin  
 Mrs Eleanor Laing  
 Baroness Stedman-Scott

**Clerk of the Parliaments, Speaker's Counsel, Counsel to the Chairman of Committees and Clerk of the House of Commons [David Beamish, Michael Carpenter, Peter Milledge and Sir Robert Rogers KCB] (QQ 191-237)**

**Examination of the witnesses**

*Witnesses:* **David Beamish**, Clerk of the Parliaments, **Michael Carpenter**, Speaker's Counsel, **Peter Milledge**, Counsel to the Chairman of Committees and **Sir Robert Rogers KCB**, Clerk of the House of Commons, examined.

**Chair:** Good afternoon, gentlemen. Thank you very much for coming. I am sorry that we have kept you waiting so long, but that is the problem of having to get a quorum, which we have only just got. Thank you very much also for your very good papers. If we may, we will get straight on with questions, of which I think you have had notice.

**Q191 Mr Jenkin:** On the question of exclusive cognisance, *R v. Chaytor* addressed that question with what many of us would regard as an unnecessary and otiose test. However, what should fall within the exclusive cognisance of Parliament and why can't we make a list?

**Sir Robert Rogers:** Well, my Lord Chairman, I think Mr Jenkin is absolutely right that the judgment in *Chaytor* came, as I said in my paper, as absolutely no surprise to anybody here, or certainly to very few here, because it reflected our understanding of what exclusive cognisance is and the fact that the parliamentary precincts are no haven for criminal wrongdoing. To answer your question directly, Mr Jenkin, it is broadly anything that is necessary to the operation of the two Houses or the way in which the Houses operate. However, the difficulty of defining what should be part of exclusive cognisance and what should not is at the heart of the question of whether to codify in legislation. It is very difficult to have a shopping list that meets every possible development or eventuality.

**David Beamish:** In general, I think I agree with everything that Robert has just said. You can attempt to list. I happen to have in front of me what Lord Rodger of Earlsferry said in *Chaytor*, where he referred to core activities of Members of the House and gave some examples, including, for example, their rights to debate, to speak, to vote, to give notice of a



motion, to present a petition, to serve on a Committee and to present a report to the House. Plainly, one problem with a list is that what Parliament does evolves and you need to adapt. On the whole, I would say that you can identify it when you see it.

**Sir Robert Rogers:** May I give you an example to follow up on that? It is very clear that what each House does in passing a Bill, for example, falls within exclusive cognisance as to whether everything is done properly. However, let me give you a hard case, as it might be, that an all-party parliamentary group with a bare quorum of enthusiasts invites Abu Qatada to come and deliver some address in a Committee Room in one House or the other, and let us say that that attendance is commensurate or consistent with his licence obligations. There is an absolute outcry from Members on all sides and the Speaker—let me assume now that it is on Commons premises—forbids the meeting taking place. Now, it could well be that, under the new definition of exclusive cognisance, proceedings were immediately taken against the Speaker. Parliament is a public authority. It is a Committee Room to which the public have access. There are perhaps all sorts of questions about free speech and his right under the Convention to express himself. That is the sort of hard case that would be difficult to foresee in compiling the shopping list and it might be just the sort of thing that would fall between the floorboards.

**Q192 Mr Jenkin:** But interestingly, a shopping list was begun in the Chaytor judgment. That suggests that if we do not make our own shopping list, the courts will make one for us. Is that what we want?

**Sir Robert Rogers:** It is certainly not what we want. I am looking at David here to see whether he agrees, but I think that was an illustrative list, produced in the context of the court arriving at what most people thought was a very obvious and expected conclusion. It was not, as it were, an exploratory list.

**Q193 Mr Jenkin:** In the final analysis, is it for the courts or for Parliament to determine what is in our exclusive cognisance?

**Sir Robert Rogers:** It is for the courts, but this has not been something that has given us a problem, Michael, has it?

**Michael Carpenter:** No. That has been the law since *Stockdale v. Hansard*. You are talking about the boundaries of the law: the common law, as it were—the law applicable to everybody—and the law of Parliament on the other hand.

**Q194 Mr Jenkin:** We heard from the New Zealanders yesterday that there is a *détente*—is that the correct word?—between the courts and the New Zealand Parliament. It would seem to me, Mr Carpenter, that you are suggesting that such a *détente* exists between Parliament and our courts in terms of what is exclusive cognisance. But we have not tested that very much, have we? That is the problem. We are going to come to questions about Committee summonses and Committee contempts, and things like that, later on. We have not tested this ground seriously.

**Michael Carpenter:** Well, my Lord Chairman, not since the 19th century. There is a comity operating between the legislature on the one hand and the judiciary on the other and that is necessary for the functioning of the constitution, such as we have one.

**Sir Robert Rogers:** I think I would be cautious about transferring an experience or relationship between Parliament and the judiciary from one jurisdiction to another. In paragraphs 10 to 14 of my memorandum, I set out why I think there would be areas of considerable hazard were we to legislate to define the boundaries in the way that you are exploring.

**Q195 Mr Jenkin:** I am not suggesting that we do legislate. I am suggesting that Parliament is a little bit more definitive than we currently are, because the ambiguity plays into the hands of courts that might find it convenient or expedient, on a case-by-case basis, to limit that cognisance on the basis of cases that come before them.

**Sir Robert Rogers:** Are you moving towards a declaratory resolution or something of that sort?

**Mr Jenkin:** Yes.

**David Beamish:** If I could come back to your original question, you cannot escape the fact that the courts make the decision, because that is how points of law are settled—by going to court. One of the doctrines that the courts apply is that Acts of Parliament are sovereign and trump everything else, so at least if something is an Act and is clearly drafted you can be confident that the courts will do what you want, but I do not think that there is any easy way out; it is a matter of balance. The Nicholls Committee concluded that comprehensive codification might be the answer. Robert takes a different view.

I think you need to have some kind of détente with the courts. You are hearing evidence in due course from at least one senior judge, and that might be something that you could usefully discuss.

**Q196 Mr Jenkin:** My very last question: isn't a détente between the courts and Parliament going to rely on—putting it bluntly—a kind of system of deterrence? Occupation being nine points of the 10 points necessary, we should demonstrate where we think the line is, therefore strengthening our position, rather than leaving the thing totally ambiguous and waiting for case law to erode our cognisance.

**David Beamish:** I have sometimes seen it as, I hope, being more like symbiosis than deterrence; that is to say that we have the understanding that we have sub judice rules so that we keep out of the courts' area and in comity they do the same to us. Mostly it works, but Robert may have a less sanguine view.

**Sir Robert Rogers:** Certainly, there is a lively understanding that tanks should not be on anybody else's lawn, and our relationship is such as to make that unlikely. When I became Clerk, one of the things that I wanted to do, and since have done, was to establish informal contacts with the senior judiciary. It is clear to me that at the highest levels of the judiciary there is an extremely lively understanding of our position; not an intrusive position, but an understanding of the different roles of Parliament and the courts. That is an extremely positive development that works to everyone's advantage. I would not go along with the phrase "totally ambiguous" that you used a moment ago. I would acknowledge some grey areas at the edges, but to say that there is total ambiguity about the position I think is greatly to overstate it.

**Q197 Chair:** May I add to that last question? You say you have had discussions with the senior judiciary about all this. Do you think that that has gone down to the lower levels of the judiciary, or do you think that there could be problem down there?

**Sir Robert Rogers:** I think, my Lord Chairman, that I can with absolute propriety sidestep that question and suggest that, when the Lord Chief Justice is able to appear before you, that is a question that he might address himself.

**Chair:** We will ask the Lord Chief Justice, absolutely.

**Q198 Mr Cash:** Several points arise out of this very interesting exchange. One is that, when something is sub judice, it is a matter of fact. The Clerks actually turn around and

immediately know that somebody is about to trespass, because they can tell that that is what is going to happen. That is emphatically not the same with the question of a kind of trade-off with the courts engaging in the interpretation of words. I cannot think of anything more inappropriate than to make a comparison between those two circumstances. There is no dispute when there is a question of whether or not something is sub judice, because it is a fact. The other is allowing the courts into a whole arena of interpretation. That is just one thought that I would like you to follow up.

The second thought is that I am not terribly taken with this description of core political activities, or whatever the words were that were used. Could you repeat them please? Somebody was being quoted—you were not actually saying that that is what it should be, Mr Beamish, you were quoting somebody else.

**David Beamish:** I was quoting Lord Rodger in his judgment in the Chaytor case.

**Q199 Mr Cash:** What were the words?

**David Beamish:** He referred to the “core activities of Members of the House which the privilege of exclusive cognizance exists to protect”. He then went on to elaborate by saying, “their right, for example”—so it is not a complete list; it is just to give the flavour—“to debate, to speak, to vote, to give notice of a motion, to present a petition, to serve on a committee, and to present a report to the House.” So not the catering, but I thought Robert’s example of a hard case was a very good example of one that needs to be inside the definition rather than out.

**Q200 Mr Cash:** Exactly. It is for that reason that I want to make the following observation, on which I would be grateful if you could comment. I would have thought that the test would have been on the pursuance of parliamentary functions, because the list is not exhaustive and cannot be. However, if it is done within the context of the pursuance of parliamentary functions, the question arises—for example, in relation to other documents that fly around the House of Commons—are you or are you not doing something in the pursuance of your parliamentary functions? It crops up quite a lot. So with great respect to Lord Rodgers, I am not entirely convinced that his description, which opens the door to a list of things, is really appropriate, if I may say, because some things of the kind that he referred to would be regarded as on the outer edges of the boundary, as it were.

However, as a matter of fact, I seem to remember that there was a case—you made reference to Abu Qatada as hypothesis or speculation—was it not Wilders? He came into the House of Commons and there was a big kerfuffle.

**Mr Jenkin:** Iraqi supergun?

**Chair:** He came to the House of Lords—Lord Pearson of Rannoch invited him.

**Mr Cash:** Right. Now, I am not entirely sure how that resolved itself, but it had some characteristics of the kind you were mentioning. I wonder whether somebody might just throw their mind back to that, because it is another example. What was the outcome of that particular incident?

**Chair:** I cannot remember. It was Black Rod’s responsibility. David, you may remember that we allowed the meeting to take place, but not within the Palace. We allowed it to take place within Millbank House.

**Mr Cash:** The point I want to make is that the idea that it should be subject to some form of judicial investigation and judgment makes me feel that the example given by Robert Rogers is analogous to this. If it were put into the framework of a court judgment, I think we would be in all sorts of difficulties. I can think of all kinds of all-party parliamentary

groups who may or may not induce meetings with people who some people would think are undesirable and others would not. That is the very essence of freedom of speech. There are all kinds of circumstances where some people are described as racist, but are actually expressing a point of view that is within the framework of the law.

**Sir Robert Rogers:** My Lord Chairman, if I may, as Mr Cash invites us, comment on that proposition, the first point I would make is as I set out in paragraphs 10 to 14 of my paper, on which I was advised by no less an authority than the current editor of *Craies on Legislation* which I think I spotted in Mr Cash's hand as he came into the Committee Room. Certainly, I would say that the list Lord Rodger of Earlsferry quoted in that judgment was a very limited list, but there are other things, which actually gives you an example of the practical difficulties. As Members around the room will know, we always advise Members that a press conference, although about something that is the result of a proceeding and a report made to the House—certainly covered by the definition—is not itself privileged. There are other activities, such as the work of all-party parliamentary groups, which many might think are in direct pursuance of a parliamentary role, which are also not privileged, but there are things not on Lord Rodger's list that certainly are. That makes the point, which you may want to come on to later when we come to codification—

**Q201 Lord Davies of Stamford:** Such as what?

**Sir Robert Rogers:** I was just about to give an example: a Select Committee going on a visit to see some pretty dodgy people. The Committee staff have prepared a brief which is explicit about the dodginess of certain individuals. That is something which Committees did not do a very few years ago, or did not do very much, but now it is absolutely standard practice—sorry, not seeing dodgy people, but having a brief prepared for what may be quite a high profile and exposed visit. That is something that a relatively short time ago would not have come within anybody's definition of something directly part of parliamentary proceedings, but now it is. I suggest that that illustrates the hazard of—certainly through statute, but perhaps also through the resolution route, although that is more flexible and can be amended—freezing parliamentary practice at a certain time. Thereafter, there is a risk of regretting it at leisure.

**Q202 Mr Cash:** One last point on that: I was rather intrigued by our discussions with the New Zealand Clerk yesterday—a fascinating discussion—and also the papers presented, which included a list of things that were within the purview of the Standing Orders, which themselves dealt with the sorts of things that were inside and outside parliamentary privilege for the purposes of the Standing Orders. I am not suggesting that I have a clear view as to what the conclusion to be drawn from that is, but it struck me that it was a pretty good attempt, if not an effective attempt, to put in writing a lot of things that could be put in Standing Orders, but would not be put in legislation without hazard. You are familiar with them, I am sure.

**Sir Robert Rogers:** I am, indeed.

**Mr Cash:** There we are. That was just a thought. If you have any observations on that, I would be interested to hear them.

**Q203 Chair:** Can I ask one other supplementary on the first question? The Green Paper questions whether some existing privileges, such as freedom from arrest in civil matters, exemption from attending court as a witness and a ban on the service of court documents in the precincts on a sitting day, should remain. What is your view? If such privileges were deemed to be unnecessary, how could they be abolished?

**Sir Robert Rogers:** My view on that, my Lord Chairman, is in paragraphs 45 to 49 of my paper. I think that freedom of arrest in civil matters has not been of practical significance since 1870. I think the witness point is easily dealt with, and service on sitting days might be regarded, given the effectiveness of the postal system, as simply a platform for publicity. The way to do it is by legislation, but I would suggest very narrowly drawn and with a narrow, long title, so that it did not become a vehicle for some of things which perhaps I would prefer not to see in legislation. David, is that—

**David Beamish:** I agree with all that, apart from possibly the last bit, where I would say, “Better not to do anything, given that the issues are not a big deal, than to open up the risk.”

Perhaps I can come back on Mr Cash’s first question, which somehow got swallowed up in the second, so we did not answer it. He was challenging what he called a comparison between sub judice and judicial involvement in exclusive cognisance. I was not making a comparison. I was just making the point that I think that the two sides understand the relationship and respect each other’s position. The judges cannot avoid making decisions on the extent of exclusive cognisance, but I think they recognise that if they move the line, so that they get more involved in parliamentary proceedings, this will hurt the relationship which, on the whole, works well. But that is perhaps another thing to take up with the Lord Chief Justice.

**Mr Cash:** The Joint Committee on Parliamentary Privilege in 1999 recommended that the term “proceedings in Parliament” should be defined in statute. It offered a model that came from section 16 of the Australian Parliamentary Privileges Act 1987, which we discussed with the Clerks of the two Houses in Australia last night. The Government’s Green Paper argues that the current understanding of the term is, in their terms, “satisfactory” and opposes legislation. What is your view?

**Sir Robert Rogers:** Again, if I may refer you to paragraphs 9 to 17 of my memorandum. I understand the motivation of those who would like to see codification. I can only admire their optimism. Freezing proceedings in Parliament when Parliament is an organically developing entity has some hazards, and it may also result in the borders being drawn in a way where the margin of appreciation, as it were, is to the disadvantage of Parliament. And there is the broader question of the attraction for examination and interpretation, perhaps in ways which would not be altogether welcome, of a shiny new statute replacing what may be an untidy but is a pretty well understood group of concepts.

**David Beamish:** This is perhaps one area where I am a little bit less troubled than Robert is, as I hope appears from my paper, mainly because I think I am bit less sanguine than he is about the present situation, again, as appears from my paper.

Of course, comprehensive codification was the conclusion of the Nicholls Committee some years ago, but this is perhaps rather academic, because the Green Paper rather dismisses comprehensive codification, and I do not think anyone is going for it. Although I recognise all the risks Robert describes, it perhaps has some benefits compared with piecemeal legislation in certain areas. Particularly now we have got the Human Rights Act and the European Convention and the possibility of cases going to Strasbourg, it may be that a well-drafted statute could be better than Robert gives it credit for, particularly bearing in mind that the Australian experience seems to have been reasonably positive, but I am not sure it is a big deal, because I do not think many people want to go that way.

**Q204 Mr Cash:** I am very glad to hear that, I must say. But having said that, in the context of Australia, which we discussed with the Australians yesterday, of course they have a constitution, which makes something of distinction between ourselves and them. The New Zealanders, on the other hand, were much clearer about the desirability of keeping things out of the courts, partly on the basis that they do not have a constitution. They were much nearer to us in that context and that approach.

One of the things you touched on just now is also very important. Australia does not have a European dimension, and that is another factor. In fact, I was looking at *Craies on Legislation* a little earlier. If I may refer to it briefly, there is on page 856 an interesting quote—a short sentence—dealing with *Pepper v. Hart*: “There is some authority for the suggestion that the rule in *Pepper v. Hart* should be applied particularly generously when construing legislation designed to implement a European obligation.” I thought that was a rather interesting comment. Really, we are in a different situation to all the other analogies—whether it is Canada, Australia, New Zealand, and so on—because of that question. It is not just EU legislation under the European Communities Act 1972, sections 2 and 3, which invoke the possibility of the courts taking even the Supreme Court to the European Court of Justice, but there is also the context of the European convention on human rights and the Human Rights Act. There are some interesting remarks in *Craies* about that too, which I will not go into now. Of course, it is true that the idea of our not being able to take the appropriate action in disallowing or disapplying human rights legislation is distinguishable from the European Union, but that is a separate subject for a separate day.

**Sir Robert Rogers:** I have to admit that that particular page of *Craies* escaped my attention, but if I could mention the Canadian jurisdiction; I do not know whether you had the opportunity to speak to my Canadian opposite number, but I think you will find that she has some interesting views about codification and its hazards.

I do not know whether you would like to pursue *Pepper v. Hart*. We can certainly bring in our lawyer colleagues if you would like to.

**Chair:** Do you want to pursue that?

**Q205 Mr Cash:** Yes, I do actually. I would like to hear what Michael Carpenter and Peter Milledge think.

**Michael Carpenter:** I think Daniel Greenberg, writing that page, said that certain authorities suggest that *Pepper v. Hart* can be looked at more widely. I do not think he is adopting that view for a minute, and personally I think it is wrong, because the rule of construction about European Union matters is that you interpret the measure to give effect—*effet utile*—to the European measure, and I cannot see that debates in Parliament will help the court at all on that; it is quite unlike legislation that has a purely domestic origin. I think that it is not right to say that *Pepper v. Hart* should be read more widely in that context.

**Q206 Mr Cash:** I was merely quoting from the book. Just for the record, it is the case of *Three Rivers District Council and others v. the Bank of England 1996*.

**Michael Carpenter:** That was a case about misfeasance in public office and access to legal advice.

**Q207 Mr Cash:** I am glad to have got that out of the way.

**Michael Carpenter:** I think the suggestion is wrong, actually.

**Q208 Chair:** Can I come on to another of the questions under this section? We have heard concerns expressed about what is and is not protected by article 9. You cited the judgment in *Rost v. Edwards*, in which the Register of Members' Interests was deemed not to be privileged. A recent case in New Zealand, *Gow v. Leigh*, questions the status of briefings supplied by officials to Ministers in order to answer parliamentary questions. How should Parliament address issues that arise as a result of the evolving judicial interpretation of article 9?

**Sir Robert Rogers:** I do not think the judgment in *Rost* indicates a trend. I think it was a one-off and, if I may say so, an error, which was criticised by the superior court. Michael, may I bring you in?

**Michael Carpenter:** I had the misfortune of being in the *Rost v. Edwards* case, because I was advising the Solicitor-General at the time, and I can tell you that it was a chapter of accidents. We were left with a judgment that I think was not fully or properly argued before the court, because there were problems about our appearing, and also both parties decided not to pursue an appeal, so there was no locus for the Law Officers to intervene at a higher stage. As the Clerk of the House has said, the rightness of *Rost v. Edwards* has been doubted. It was doubted in *Chaytor*, for example.

I am bound to say that I do think the *Gow v. Leigh* case was wrongly decided. It misunderstood the judgment of the Canadian Supreme Court in a case called *Vaid* on which it sought to rely. The New Zealand court was wrestling with the question of whether a privilege was necessary or not, but *Vaid* was about the conditions of staff and the internal organisation of the Canadian House of Commons and the issue there was: was that privilege established in 1868? Clearly it was not, because staff were not employed then—there was not really a doctrine of law relating to the employment of staff. What was certainly established in 1868 was the freedom of speech and that transferred over to Canada, and also to New Zealand as it stood in 1864. My view is that the case was wrongly decided.

It is clear that the freedom of speech is a necessary privilege for any legislature. The court should have looked at the fact that the briefing that was supplied to a Minister formed part of the proceedings in the House and therefore should have been privileged. In other words, the necessity for the privilege was already established in this country in the 16th century. There are serious doubts about the rightness of that judgment, if I may humbly and respectfully say so.

**Q209 Chair:** So we need not do anything about it?

**David Beamish:** It does not really answer the question of what Parliament can do about it. I fear that the answer is that there isn't a lot that we can do, but this might be another one to raise with the Lord Chief Justice.

**Michael Carpenter:** It is certainly not the law in this country.

**Q210 Mr Cash:** The Green Paper specifically states: "Recent developments have seen proceedings in Parliament used in court more regularly than in the past without encroaching upon the protections provided by parliamentary privilege." Do you agree with that analysis? What use do you think the courts would be able to make of parliamentary proceedings?

**David Beamish:** My immediate answer is no; perhaps they are cases that are out of line with the majority, but there have been one or two that have seemed to encroach. My paper mentions the Pelling case, the one to do with the police's Olympic headquarters, and the Age UK case, which is another where, in my view, the courts have been a little, dare I say, cavalier in using parliamentary material in a way that some of us thought that they would not.

**Peter Milledge:** I thought the Pelling case was a particularly remarkable example, involving a challenge to a legislative reform order. The order had been through three parliamentary Committees, one in the House of Commons and two in the House of Lords. When the House authorities knew about the case, before it was heard, at the preparation stage, we were successful in persuading the parties not to rely on proceedings in their written submissions and, indeed, in the oral submissions; but when we saw the judgment, we saw that the judge had herself relied on proceedings. Just to read a few dozen words from the judgment: "While one witness was misled by the consultation document and thus did not raise the issue of alternative sites, it is to be observed that the differences were noted by the House of Lords Committee, and while it expressed surprise that there was no further consultation, it concluded on balance that there was sufficient information for consultees to respond. Accordingly, in my judgment it is not arguable that the Secretary of State acted unlawfully." One can detect a sort of cause and effect in that particular extract from the judgment.

**Sir Robert Rogers:** We have some recent experience to share with you, my Lord Chairman. May I bring in Michael Carpenter?

**Michael Carpenter:** I would not accept the analysis that this is an increasing trend and that there is more and more trouble; I think rather to the contrary.

My Lord Chairman, you have mentioned the lower judiciary. We had a recent case before the Information Tribunal, which is at a fairly low level; the case was concerned with freedom of information and the question of whether information should be disclosed. In this case, the information was legally professionally privileged material—the instructions to parliamentary counsel on a Bill. The whole point that the applicant was making was that legal professional privilege should be overridden because, he said, the information provided evidence that the Minister had misled Parliament in presenting the Bill. The Information Tribunal made it quite clear that it was not going to go into the question at all as to whether a Minister misled Parliament; it was entirely a matter for Parliament. Of course, with that, his whole case for trying to seek disclosure notwithstanding legal professional privilege just collapsed. That was the decisive point: they decided that they would not allow the courts to be drawn into the question of even considering the possibility that a Minister might have misled Parliament.

**Mrs Laing:** I am not sure that this is on exactly this subject, but it is at least tangential. May I try, Lord Chairman?

**Chair:** You may try.

**Q211 Mrs Laing:** Thank you. To explore further what we have been saying about the relationship between the executive, the legislature and the judiciary in terms of privilege, and the possibility of having what Sir Robert referred to as a shiny new statute, some of you may remember the discussions we had in the Joint Committee on the Draft House of Lords Reform Bill about the justiciability—Mr Hunt is excited at this prospect—of a certain code or piece of legislation, and so on.



**Tristram Hunt:** I am still in trauma.

**Mrs Laing:** What we discussed then—this may be relevant, which is why I have a genuine question—was the possibility of putting into statute, on the face of a Bill, in primary legislation, the relationship between the two Houses of Parliament. One of the arguments put forward against such legislation was that the matter would then become justiciable, and the courts would be the final arbiter and wielder of power as to the resolution of any disagreement between the House of Lords and the House of Commons. Likewise, if the matter of parliamentary privilege was put into legislation, would the same arguments apply that the courts would then be the final arbiter, and not Parliament itself?

**Sir Robert Rogers:** I believe, my Lord Chairman, that Mrs Laing asked me that question when I appeared before that Joint Committee.

**Mrs Laing:** I think I did, Sir Robert, and I think that you gave me a good answer, which is why I am asking it again.

**Sir Robert Rogers:** I think the answer today is very similar. Of course, as we have been discussing, it is in the last resort for the courts to decide these matters, because article 9 is a statute; it is a matter of law. My concern on that occasion was about putting something that is absolutely for Parliament, within Parliament and undoubtedly within the shared exclusive cognisance of the two Houses, into statute and making it susceptible to judicial interpretation and decision. The problems, or the challenges, that your Committee is facing are of a rather similar sort.

**David Beamish:** I would support that. The difference between the two cases is that if you keep out of statute the relationship between the Houses, there is no way it gets to the courts. With some of these issues of parliamentary privilege, as we have seen from the example, we cannot avoid the risk of them coming before the court.

**Q212 Mr Cash:** Reference has just been made to the question of misleading Parliament. I would like you to comment on something that struck me, which is that, under the ministerial code, misleading parliament is of course a ministerial offence. Can you see any context in which this issue, although it is a ministerial code, not a parliamentary code and it relates to what goes on in Parliament because it is a misleading of Parliament, would itself be drawn into this net?

**Sir Robert Rogers:** You need to make a distinction between who is alleged to be misleading Parliament. If it is a Minister or indeed any Member, speaking from the Commons perspective, I would say that is so firmly in the middle of exclusive cognisance that you wouldn't be going anywhere near the courts, because you would require to adduce proceedings from the word go. If it is a witness in front of a Select Committee, that brings us into another area which perhaps, my Lord Chairman, you might want to come to a little later.

**Q213 Mr Cash:** Okay. To move on, do you think the term “questioning” should be interpreted in the context of article 9, and do you think the courts are interpreting it appropriately at present?

**Sir Robert Rogers:** I defer to Michael Carpenter on this.

**Michael Carpenter:** I think by and large they are. The classic exposition of the position was by Lord Browne-Wilkinson in the *Prebble v. Television New Zealand Ltd* case, when he was summarising the effect—actually, the expressed words—of the Australian statute, which he said reflected the principles of article 9. He said that “it is not lawful” to question or rely “on the truth, motive, intention or good faith of anything forming part

of...proceedings in Parliament...otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or...drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings”.

There is a sort of analogy with the use of hearsay statements in criminal proceedings, because a hearsay statement is not generally admissible as evidence of the truth of its contents, but it is admissible to show that a statement was made. For example, let us suppose that a Member is charged with an offence—with committing a murder in Preston—and he is able to adduce evidence of proceedings in Parliament, *Hansard* or what have you, to show that he was in the House at the time and therefore could not have been in Preston. That is an example of a permissible use of the parliamentary record to prove a fact—the occurrence of an event or the saying of words. What you cannot do is to adduce the content of the material to call into question its truth. You cannot advance it as being true, because then you would put the other side in the unfair position of having to challenge that and then being immediately drawn into questioning proceedings in Parliament. The distinction is subtle, but I think it is well understood, certainly at the senior level of the judiciary and, when it is properly argued, at all levels.

**Q214 Mr Cash:** What mischief, if any, in your opinion, results in the courts questioning parliamentary proceedings?

**Michael Carpenter:** Simply, they are being drawn into political questions. They immediately put their own judicial impartiality in issue if they start doing that. They start assuming the function of another branch of the state—they start assuming a legislative/political function—just as there are problems when a Select Committee, if I may speak of the House of Commons, engages in a lengthy discussion of the rights and duties of a third party and seeks to make determinations about that, and is therefore intruding on the judicial domain. Each side, in a spirit of comity, needs to stick to its constitutional functions.

**David Beamish:** I would add to that that it will inhibit parliamentarians in the way they behave if they think that what they say may be used in the courts in a way that doesn't happen now.

**Q215 Mr Cash:** What you are saying is very consistent with what I have in front of me. On page 167 of “The Rule of Law”, in the chapter entitled “The Rule of Law and the Sovereignty of Parliament”, is the late Lord Bingham’s clear statement about the respective roles of judges and of Parliament. He says: “To my mind, it has been convincingly shown that the principle of parliamentary sovereignty has been recognized as fundamental in this country not because the judges invented it but because it has for centuries been accepted as such by judges and others officially concerned in the operation of our constitutional system. The judges did not by themselves establish the principle and they cannot, by themselves, change it.” He goes on to quote Professor Goldsworthy, whom he regards as magisterial in this context.

Basically, all these things do fit into a kind of matrix. There is a division of opinion, there is a boundary, but for practical purposes the courts, on present reckoning, irrespective of Jackson etc., are now much clearer, from what you are saying and the informal discussions you have had, about their tendency to move into the arena of parliamentary sovereignty; and that, for practical purposes, the argument is moving progressively towards a clearer

understanding of where that boundary is, in favour of not interfering in parliamentary proceedings.

**Sir Robert Rogers:** It is my recollection that in *Jackson*, as Mr Cash has mentioned it, that Sir Sydney Kentridge was extremely careful to address himself to the validity of the Act that had resulted from proceedings and kept well away from the actual transaction of those proceedings.

**Mr Cash:** South African judge.

**Sir Robert Rogers:** That is quite a good example of the benign handling of a problem of that sort.

**Chair:** We are running a bit behind time. We must finish this evidence session, I think, by 20 to 7 at the latest, because the Commons has a vote at 7, I understand, so we are going to have to speed up a little if we can. Could we try to keep the answers as brief as is compatible with the content?

**Sir Robert Rogers:** Certainly, my Lord Chairman.

**Q216 Baroness Healy of Primrose Hill:** Would you support the reinstatement of a more formal process for notifying the two Houses or, indeed, seeking their authorisation for the use of privileged material?

**Sir Robert Rogers:** No, I would not. In asking for or seeking the authorisation of one House or the other, you have a Catch-22, because there is a great risk that you start to debate the merits of the matter when actually the question to be decided is the authorisation for the use of proceedings.

**Q217 Chair:** The Green Paper includes clauses disapplying the immunity conferred by article 9 on proceedings in Parliament in criminal cases. Is there an argument for allowing parliamentary proceedings to be used as evidence in criminal proceedings?

**David Beamish:** I can give a fairly short and clear no, I think, on this. Paragraphs 15 to 17 of my paper make the point that the cases would be few and far between and the inhibiting effect on proceedings in Parliament would be disproportionate.

**Sir Robert Rogers:** I would follow that, my Lord Chairman: my answer would be no; I think the hazards would be huge. Michael, you have most tellingly described it by saying that every speech would be, as it were, given under caution. I don't know whether you want to add to that.

**Michael Carpenter:** Yes, it would put every Member, in effect, under caution—seriously. If the statement were to be used against the Member in criminal proceedings, it is in law a confession. Now, there would be a serious issue about whether that confession was even admissible, because no caution would have been administered. Therefore, it seems to me you maximise the chilling effect for no possible gain: you put every Member under this cloud, that anything he might say might be used in the future in respect of an offence which is not yet clearly defined, and you never know what the charge is until the indictment is referred. At least in criminal proceedings, you are given an indication of what the police are investigating, but with this scheme, you would not even know that—and five years later, your speech is dug up and used against you or someone else. So this is inevitably going to have a serious chilling effect.

**Sir Robert Rogers:** You have a unanimous no from us.

**Chair:** It sounds like a unanimous no.

**Q218 Lord Bew:** This goes back to the Neil Hamilton case. Is there a case for giving each House the power to waive article 9 to allow proceedings to be used in civil cases, such as

defamation, or to allow inquiries to use evidence given in proceedings? It might save time if you give an answer—you have already given one in your paper—on what you think the proper fate of section 13 of the Defamation Act 1966 is, because that is closely related to the first part of my question. That might be quite helpful, Sir Robert.

**Sir Robert Rogers:** Again, to be short: repeal it without replacement.

**David Beamish:** I would agree with that and associate myself with paragraphs 28 to 30 of Robert's paper.

**Q219 Mr Jenkin:** We all know where we are, which is that Select Committees, in theory, have the power to summon persons and papers and to pursue those who appear and either do not tell the truth or tell falsehoods; but we are rather wary about exercising these powers, because it might turn out that we do not have them—indeed, some would go further and say that we do not have them at all. What should we do?

**Sir Robert Rogers:** I began the paper that I submitted to the Liaison Committee with a Shakespearean quote, as Mr Jenkin will remember. I perhaps ought to have added another one to it: "I will do such things—What they are, yet I know not; but they shall be the terrors of the earth<sup>1</sup>." The difficulty is that we have extensive internal proceedings—I am speaking now from the House of Commons perspective—including reference, in an extreme case, to the Committee of Privileges and a decision by the House. The issue then is set out in a single sentence in paragraph 61 of my paper: "and then what?"

If we go into the area of a statutory regime, all the problems listed in paragraphs 75 to 80 of that paper come into play. Let us say that there are two areas in which the powers of Parliament need to be deployed. In the first instance, it may be summoning a witness to appear. If there is a statutory regime, then at some point—I am aware that in other jurisdictions, there is a different way of tackling this, but I doubt whether there is a different way in the UK jurisdiction—a court is going to have to satisfy itself of the rightness and appropriateness of that summons. Was the witness "pertinent", to use the word used in the United States in similar circumstances, to the inquiry? Was the witness given enough notice, enough alternative days, a choice of people to accompany or somebody to sit beside them and advise? All of those matters might fall to decision by the court if there were a statutory framework for this.

Turning to the other area, of giving false or misleading evidence, I can see that a court—you might well want to pursue this with the Lord Chief Justice when he attends this Committee—would certainly want to satisfy itself that the witness was given enough time to answer, that the question was clear, that there was no badgering, that the questioning was not moving round the Committee so quickly that the witness was put at a disadvantage, that the witness had the opportunity to refer to papers and that the witness had the opportunity to take advice from advisers sitting alongside, perhaps. All those things seem to me to go to settling the question of fairness.

If a Select Committee were happy about a court perhaps wanting to see a DVD of proceedings in order to decide whether it was reasonable to punish somebody for giving false or misleading evidence—I am stating quite an extreme example now, but nevertheless that seems to me to be the logical extension of where we might go—it is very important, I suggest, to keep all this within proportion. Although we have had some recent high-profile

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1 *King Lear*, Act 2, Scene 4.

cases—just a few—Select Committees are not primarily agents for rooting out wrongdoing. Their constitutional role—this goes back to the relationship between organs of the state—is surely to call the Government to account and to analyse issues of public policy.

In the Commons over the years, we have had thousands and thousands of Select Committee inquiries and tens of thousands of witnesses in which absolutely no problem has arisen. I do not say that when a Select Committee finds itself in difficulty, it should not have effective recourse to means of getting out of that difficulty. I would ask the Committee only to put the stated problem in a very broad context.

**David Beamish:** All I need add is that, in principle, the position is pretty much identical in the Lords, but it has been less of an issue. Even more so, Lords Committees are doing inquiries into subjects and on the whole, if witnesses are so unwilling to come that they resist coming, one is not going to get very useful evidence out of them. As Robert says, most of the time, it works fine and even more so in the Lords.

**Sir Robert Rogers:** I think Michael has an example of where there is a positive advantage to the present system.

**Michael Carpenter:** The United States has a statutory regime, with legislation introduced in 1857, and of course they find that all the constitutional guarantees will apply, because the statute institutes a criminal offence, so that is why you get witnesses “taking the Fifth”, for example, and pleading a privilege against self-incrimination. If you were to introduce a statutory regime into this country, I think it is extremely unlikely that the legislation would be construed so as to require the production of, for example, material that was subject to legal professional privilege or that tended to incriminate the person giving the evidence. The present state of the law, because the matter is privileged, is that Committees can put that question. Indeed, in the phone hacking inquiry there was some very relevant material that was legally privileged, and the irony was that the Culture, Media and Sport Committee had that material, but the Leveson inquiry could not look at it and use it, because its own powers were limited by section 22 of the Inquiries Act, which prevented it from asking for material that could not be disclosed in civil proceedings. There are therefore dangers of going down the statutory route.

**Q220 Lord Davies of Stamford:** The problem I have here, Chairman, is that our witnesses are saying that there is not too much of a problem. Most of the time—the vast majority of the time—it all works fine. There would not be many occasions when we needed to take action against people who were dishonest or refused to turn up to Select Committees, and there would be great problems for legislating, but I have to say that I do not share the impression of the extent to which there is a problem, or otherwise.

Select Committees have been playing an increasingly important part in parliamentary and, indeed, our national life over the past few years, and I greatly welcome that. There have been some very high-profile cases quite recently, and it seems to me that tendency is likely to continue. We have had a situation in which one American industrialist refused to appear before a Select Committee. I think that, subsequently, the Select Committee decided not to pursue the inquiry, so I am not sure that that ever came to a confrontation. We have had other distinguished press barons, as we all know, fairly recently who have agreed to come before Select Committees, but everybody thought at the time that that decision was a bit touch and go.

Our witnesses today may not know that we had evidence before us from a leading QC in this field who said that he would advise clients who were in any way in a difficult situation not to come before a Select Committee, because there was absolutely no downside in refusing to turn up and no advantage whatever for his client, potentially, in actually turning up, so it did not make any sense to turn up. I find that logic very compelling.

I fear that if we just decide that it is not much of a problem, or it is all too difficult so let's forget about it, let's postpone it again, as has happened in the past, colleagues will turn round to us in a very short time frame, in a matter of years, perhaps months, and say, "My goodness, the Committee did not do its job properly. We really need some sort of powers, because we have been shown to be naked." It would be a terrible day for Parliament if somebody showed two fingers to a Select Committee, got clean away with it and went away laughing, as he or she would no doubt do in such circumstances, and that example was then followed by others.

The American system seems to work quite well. It does not carry with it the hazards that the Australian system has, which is that Parliament itself would be required to take the measures to impose a fine or sentence of imprisonment. I can see all sorts of legal difficulties by Parliament constituting itself into a court. The American system is such that the whole matter is handed over to the criminal legal system, and we have evidence that that has occurred on 15 or 20 occasions. Penalties have been imposed and that has been quite enough to maintain the credibility of the system. No sane person thinks of rejecting a subpoena for a Congressional Committee, not even Americans. Anybody who might one day want to gain a jurisdiction or do business there turns up, and no sane lawyer would advise them to do otherwise.

**Sir Robert Rogers:** I am aware of evidence to you from a most distinguished lawyer, and if I were his client I might well take his advice. I am not sure that in this case it would be necessarily the right advice. I will come back to that, if I may. It is not that I say that there is not a problem; it is that I ask you to consider whether a supposed answer to a perceived problem is proportionate and whether it will result in unintended consequences that will be regretted at leisure.

Let us take the example you have just posited where a witness simply showed two fingers and said "I am not turning up," and it took six months through the courts to get that witness to turn up. By then the Select Committee inquiry would probably be over. That is an additional difficulty about getting what you want.

**Q221 Lord Davies of Stamford:** I know, but the integrity of the system would have been sustained and people would not in future be so inclined to refuse to turn up.

**Sir Robert Rogers:** That would be rather a pyrrhic victory.

The second point that I would make is that—this goes back to the point I made a moment ago about the constitutional position of Select Committees—at its heart this is a political process. I remember very well being one of the Clerks to an inquiry that took place, heaven help me, in 1973-74, which was about wages paid by British companies in South Africa. The Committee asked for evidence from about 200 chairmen and chief executives. They were incredibly exposed; nobody wanted to comply; very few wanted to co-operate with the inquiry; many were outside the jurisdiction; and the clincher was that not co-operating

with the Committee carried a very much higher political penalty than co-operating with the Committee.

In a sense, I have tried to address that in the memorandum that I submitted to the Liaison Committee, which is that there are punishments other than fining and imprisoning that are great mind concentrators for the people in public office and public positions, who are very often the people whom Select Committees cross swords with. If you were to have, let us say, a means whereby the House of Commons resolved that Mr X was not fit to hold public office or be a director of a company, it would not have legal effect, because the relevant statutes were not being engaged, but its moral effect would be hugely powerful.

**Q222 Lord Davies of Stamford:** So you suggest—

**Chair:** If you could be quick.

**Lord Davies of Stamford:** I will be very quick indeed compared with some questions that have already been asked.

You are saying that there is a problem, and the solution is the one you have set out in your paper, and that requires a resolution by the House of Commons or the House of Lords setting up these proposed penalties, so that they can subsequently be used by the Committee of Privileges. Is that right?

**Sir Robert Rogers:** I suggest that they would be used by the House after the Committee of Privileges route. If I could make it absolutely clear, there is a problem in some narrow circumstances. It is by no means an overwhelming problem, and I do not believe it is an obstacle to the Select Committee system in the House of Commons doing its job over a huge range of subjects and inquiries. It is simply an option if it is decided not to go down the route of having a statute with the pains and penalties that would attach to that.

**Q223 Lord Davies of Stamford:** In practical terms, what action needs to be taken before the event arises that challenges the credibility of either House? That is to say, do we need to say in this Committee, were we to go down that route, that we are not advising against a statutory solution, but that we think the two Houses of Parliament should take powers to provide that resolution, or do we simply leave it open to the two Chambers to respond as and when there is a challenge of that kind?

**Sir Robert Rogers:** I think, my Lord Chairman, that that would be very much a matter for you to decide. I observe only that the resolution route is at hand.

**Q224 Lord Davies of Stamford:** Do we need to take these powers in advance?

**Sir Robert Rogers:** There are no powers that need to be taken. We are talking about a moral sanction that would be expressed by Parliament. Parliament, as the high court of Parliament, would be exercising a very powerful moral authority over the behaviour and, subsequently, the reputation of someone who had crossed it or abused it.

**Q225 Mr Jenkin:** So what you are saying, Sir Robert, is that we need to dispense with this rather precious and perhaps outdated notion that the sovereignty of Parliament is somehow diminished and that the aura of the power of Parliament is diminished because we cannot fine or imprison people any more, or chop off their heads. You also accept that “Erskine May” is very thin on the consequences of a contempt, and we could, by adopting Standing Orders, set this out in much more detail, much as we have seen in the New Zealand Parliament. That would clarify and demonstrate Parliament’s intent and give

confidence to Select Committee Chairmen like myself when we say to a witness, “You do realise that we can insist that you intend.” I have had those informal conversations, and they do have an effect, but I want to be able to demonstrate by our Standing Orders that there is a bit more of an effect, rather than the rather flimsy words in “Erskine May” at the moment.

**Sir Robert Rogers:** Certainly, chopping off heads would give rise to a European Court of Human Rights consideration. Yes, I agree with what Mr Jenkin is saying. It is important not to pretend that that is a simulacrum of what legislation would do for you. It is a different process, and it would not substitute in the minds of many for legislation, but it would set it out—here we go back to the political role and the moral effect—by saying, “This is what will happen,” and it would give clarity to the process. That could be done, of course, without any legislation at all.

**Q226 Chair:** Can we move on to the last item, which is the reporting of parliamentary proceedings? The Joint Committee on the Draft Defamation Bill recommended that there should be “a clear and unfettered right to report on what is said in Parliament and with the protection of absolute privilege for any such report which is fair and accurate.”

**David Beamish:** Shall I go first on this one? My first word is no. It would be rather dangerous, in that it would encourage the media to have a field day if they can get things said in Parliament and then repeat them irresponsibly. It is right that privilege is not absolute.

**Sir Robert Rogers:** I would agree with that, but perhaps Michael would like to add something.

**Michael Carpenter:** I think a similar point arose in the Joint Committee on Privacy and Injunctions, which drew attention to the danger that Members would be used as a channel, wittingly or unwittingly, for the creation of a record that could then be published with impunity. The consequence of absolute privilege is that a person who knew a statement was untrue could secure its wide publication with no consequences attaching to him, and that cannot be right.

**Q227 Tristram Hunt:** We put all those points to the Press Association lawyers and the media lawyers last week in terms of the interrelationship between politicians and the media, and they said that we were being very unfair on our colleagues, who are very high-minded individuals and would never fall for this kind of action, but the history here over the last 30 or 40 years suggests otherwise.

**Michael Carpenter:** A long time ago, I was a pupil in a defamation chambers, and the head of chambers told me what his eight-year-old daughter said to him, which was, “Dad, you can’t read all that’s true in the newspapers.” I do think, with respect, that the law is rightly balanced at the moment. The privilege is a qualified one: it gives a considerable amount of protection, but it is then defeated by malice; in other words, believing it is untrue, not believing that is true, or not caring whether it is true or not. And you have to also bear in mind that, if you have an absolute privilege, you will have to justify that at some point under article 8 of the European Convention, because you will have created a system whereby people’s reputations could be trashed by the making of untrue statements and there would be no domestic remedy.

**Q228 Tristram Hunt:** Have we had any tension between article 8 and privilege thus far?



**Michael Carpenter:** Not that I am aware of, because of course the privilege is qualified, and certainly within proceedings in Parliament, there is a high value attached to freedom of speech within Parliament. Therefore, people say things that may not be true; they do not know that they are untrue, but, in the cut and thrust of debate, things are said that cannot be proved with the same degree of specificity that you would require in a libel trial. But the European Court accepts that; that is part of the democratic process.

**Sir Robert Rogers:** Could I just make the point in a different way about proportion? The vast majority of all those involved personify sanctity and I accept that, but it would take only a few bad cases to be a reputational disaster right across the board.

**Q229 Lord Davies of Stamford:** You have been very clear in your answers on this, as with other matters, so thank you very much; but while we are on absolute privilege, are there other areas where the distinction between absolute and qualified privilege ought to be altered? For example, a question to a Minister in the House is privileged—no question about that—but a letter to a Minister is not. There may be cases when you do not have an opportunity to ask a question, or not sufficiently rapidly, and you feel that you ought to write because it is an important matter. You ought not to be inhibited, in my view, in doing so. So are there other areas where this distinction needs to be looked at again?

**Sir Robert Rogers:** If we are to revisit the principles in the *Strauss* case, it might be something that we could expand on better in a memorandum to you.

**Q230 Lord Davies of Stamford:** For the purposes of the discussion this afternoon, could you give me an answer to my question? Are there other areas of privilege where the distinction between absolute and qualified ought to be looked at again?

**Michael Carpenter:** Absolute privilege is a matter relating to proceedings in Parliament. It is proceedings in Parliament that are absolutely privileged.

**Q231 Lord Davies of Stamford:** Is that adequate? Take my example: do you think that we ought to be happy with the situation in which I write a letter on what I regard as an urgent matter of national interest to a Minister because I cannot get in to Question Time as sufficiently rapidly as I think necessary and that is not privileged and then somebody can sue me for defamation?

**Michael Carpenter:** It doesn't form part of the—

**Q232 Lord Davies of Stamford:** No, it doesn't, but is that a satisfactory state of affairs? Are you happy with parliamentarians being under that kind of restraint?

**Michael Carpenter:** In those circumstances, you have qualified privilege, which is considerable protection.

**Q233 Lord Davies of Stamford:** I know that. We agree that absolute privilege is necessary in asking questions, but why would it not be necessary in writing a letter?

**Michael Carpenter:** Because it is not part of the proceedings in Parliament. It is a question of the definition of proceedings in Parliament, and proceedings in Parliament are collective, not individual.

**Q234 Tristram Hunt:** Can I just come back briefly on something we discussed last week? In terms of both anonymity injunctions, where the person is anonymous, and super-

injunctions, where you are not allowed to mention whether the injunction exists at all, do we need some clarity on parliamentary privilege for that?

**Sir Robert Rogers:** I don't believe so. That is a rather different thing. That brings sharply into focus the question of comity between Parliament and the courts, which was something that the Joint Committee on Privacy and Injunctions explored in some detail. In my evidence to that Joint Committee, I suggested something akin to the sub judice rule, which would put a weapon in the hands of the Chair in cases where Members, for whatever reason, used the protection of privilege to break some court prohibition. I think, however, that that is more about the way one handles proceedings that are already covered by absolute privilege than bringing in any question of qualified privilege, because the difficulty of the comity between the courts and Parliament arises only in proceedings that are already absolutely privileged.

**Q235 Tristram Hunt:** I only mention it because it was certainly an area of concern for the lawyers we spoke to last week—relative parliamentary rights—it will be in *Hansard*; it will be on television; they cannot report it.

**Sir Robert Rogers:** Yes.

**Q236 Sir Menzies Campbell:** On the question of whether letters should be entitled to be regarded as privileged, I wonder if I can make a distinction and ask if you would accept it. You can ask a written question, even if you cannot ask a normal one; you can ask the Speaker for an urgent question, even if you cannot get in at the particular time you want to; and, of course, the point of order, as you well know, Sir Robert, is frequently used as a device for raising matter that might not otherwise be entitled to be part of a question. If you write a letter, then there are two things: first, you have the opportunity of considering its terms, rather than the spontaneity of the Chamber; but, secondly, any question you ask orally has got to be in accordance with the rules of order, whereas a letter does not need to adhere to these rules. If you take all of these and put them to one side, it seems to me that they make quite a formidable set of arguments against a notion that letters should be entitled to privilege. Do you agree?

**Sir Robert Rogers:** Good heavens, a bogus point of order, what will we have next!

I agree with that proposition, with one rider. It seems to me that it is reasonable to regard as privileged matters that are in direct contemplation of a proceeding in Parliament. If a Member gives to a Minister an amendment that he is planning to put down and says, "Is this"—as it were—"consonant with the approach you are adopting?" that seems to me to be more than arguably absolutely privileged. If it is a letter about some general issue of policy or politics, I do not see that there is the same argument. I would say to Lord Davies, who asked if it was right for Parliament to be put under such a constraint, I do not believe, given the definition of parliamentary proceedings, that it is Parliament that is put under a constraint, but there are of course such constraints on the individual actions of Members as individuals outside proceedings.

**Chair:** I am going to have to bring—

**Mr Jenkin:** May I ask an urgent question, please?

**Chair:** Is it not a question that could be put in writing?

**Q237 Mr Jenkin:** You judge from the question, Chair. Has the Damian Green affair left any scar on parliamentary privilege that we need to address? You may want to think about that and write to us if there is no time.

**Sir Robert Rogers:** We don't think so, but we will reflect.

**Chair:** Thank you very much indeed for coming. I am sorry, first, that we started late, but we also asked you for much more time—

**Lord Davies of Stamford:** May I ask one more question?

**Chair:** No, Lord Davies, I am sorry, we must have some time to deal with the next paper. If you have any questions, put them in writing. And they won't be privileged. *[Interruption.]* They will be privileged. Thank you very much indeed for coming.

**Sir Robert Rogers:** Thank you very much for your courtesy, my Lord Chairman, and if there are any further questions, we will of course do our best to answer them.

**TUESDAY 5 MARCH 2013**

Members present:

Lord Brabazon of Tara (Chair)  
 Lord Bew  
 Sir Menzies Campbell  
 Mr William Cash  
 Lord Davies of Stamford  
 Thomas Docherty  
 Baroness Healy of Primrose Hill  
 Tristram Hunt  
 Mr Bernard Jenkin  
 Mrs Eleanor Laing  
 Baroness Stedman-Scott

**Lord Chief Justice of England and Wales and Lord Justice of Appeal  
 [Lord Judge and Lord Justice Beatson] (QQ 238-286)**

**Examination of witnesses**

*Witnesses:* Lord Judge, the right hon. the Lord Chief Justice of England and Wales, and the right hon. the Lord Justice Beatson, examined.

**Q238 Chair:** Lord Judge, thank you very much indeed for coming. Lord Justice Beatson, thank you very much for coming as well. Let us kick straight off; I think you have an idea of what we will ask.

Is the current mix of statute, common law and case law sufficiently clear to enable the judiciary to arbitrate on the extent of parliamentary privilege?

**Lord Judge:** The short answer is yes. Do you mind if I go back a little to explain that answer? We can get awfully carried away about privilege, unsurprisingly in this building bearing in mind the 17th century struggles when there had to be privileges because we had a rather dictatorial monarch. Nowadays, we say “privileged class”. We talk about privilege in a way that isolates people and gives them a very special position. To that extent, “privilege” is not the right word.

We are actually talking about the conditions that enable Parliament to do its job properly—that is what we are actually about. They enable the operation to work and, in my view—I do not know whether Lord Justice Beatson shares it or not—it is for Parliament to decide how they need to operate to perform their own functions. “Privilege” is a good word. It represents long struggles and it represents people in the Tower and so on, but it is not “privilege” in the now common way in which the word is used, but how we—the parliamentarians—perform our constitutional responsibility. If you examine it like that, I do not think there is any difficulty at all. That is my answer.

**Q239 Lord Bew:** The Nicholls Committee recommended a comprehensive Parliamentary Privileges Act—a modernisation of the language around the 1840 Act, for example—following the model of the Australian Parliamentary Privileges Act 1987. Do you have a view on the benefits or the risks of that type of approach?

**Lord Judge:** There are potential disadvantages, and I am not sure that the advantages would be very great. Parliament has to decide whether it has sufficient privilege to be able to conduct its business in the way that Parliament wishes. If you have reservations about that, you have to produce a system that enables you to have the conditions under which you can perform your responsibilities properly. If you had no real reservations about it, I would not go down a legislative route that defined, semi-defined, sub-divided, allowed for, or exercised this and that, because you would end up in interminable discussions, and, in court, interminable arguments, about what that really meant. Unless you are dissatisfied with the way in which your privileges operate, I would leave this well alone. That is my view.

**Chair:** That is very clear.

**Lord Justice Beatson:** Can I just add a footnote? I agree with that. The disadvantage of legislation is that you would then need to have a programme to update it to reflect developments. We have had lots of discussion about the impact of the development of the internet and social media. If the common-law system were working well and within a sufficient boundary of certainty, it allows for the gradual evolution to meet changing needs of the two Houses.

**Q240 Mrs Laing:** It is wonderful to have matters put so succinctly.

Exploring this a little further, there has been an area of uncertainty since the Graham-Campbell case in the 1930s as to the applicability of legislation to Parliament without express provision to that effect. In this context, do you consider that that continues to be a problem? What would be the best way to resolve the uncertainty?

**Lord Judge:** It is a wonderful system that we have, isn't it, that means a decision in the divisional court—not anything like the highest court in the land—about selling alcohol in the House without a licence in 1934 is considered to be decisive? For a start, I do not think it would be. If the issue ever arose—it is difficult to see how it might, but it might—the case would certainly have to go to the Supreme Court for decision. We need just to stand back from this. Can Parliament perform its functions if every statute applies to Parliament unless Parliament says it cannot? Or can Parliament perform its functions if no statute applies to Parliament unless Parliament says it does? Once you introduce saying that it does or does not apply, from then on, if you do not say it, the opposite will count.

**Mrs Laing:** Yes.

**Lord Judge:** If, on day one, you say, “This Act applies to Parliament,” and, on day two, you do not say anything about it, it will be assumed that it does not apply to Parliament. And the other way round: if, on day one, you say, “This Act does not apply to Parliament,” and, the next time, you leave it silent, somebody will say, “Well, they didn't say the Act didn't apply to Parliament. Last time, they said it didn't. This time, it looks as though it must.”

**Q241 Mrs Laing:** Do you mean it is better not to say anything at all?

**Lord Judge:** I think you then have to examine the context of your privileges and conditions, as I call them for the purposes of this meeting. Do you want to be outside the ordinary laws that govern the people for whom you are legislating? That is a policy decision for Parliament to make; it is not for anybody else, obviously. But let us take, for the sake of argument, health and safety. In the Royal Courts of Justice, we have to make sure the carpets are laid properly, and so on and so forth. Does Parliament think that should apply to Parliament or not? I am not going to dream for a moment of saying what I think about it, but that is the decision you have to make: do you want to be treated differently for any

purpose that does not directly impinge on your ability to perform your functions? I say “your”, but, in a couple of months’ time, I will be sitting round one of these tables. But that, I think, is the decision that that has to be made. I do not think that guessing at what the court might do following the alcohol licence or non-licence case in 1934 would be determinative of anything.

**Q242 Mrs Laing:** So do you mean that the uncertainty that came from that case is only perceived, and that, in practice, there is not really an uncertainty?

**Lord Judge:** I do not think there is very much difficulty about it.

**Q243 Mr Jenkin:** I don’t quite understand this, but that is perhaps because I am a bearer of too little brain. If I am not incorrect, there are already statutes that are specifically not applied to Parliament.

**Chair:** There are others which are.

**Mr Jenkin:** So we have already muddied the waters in this respect. In any case, article 9 itself is a statute, albeit of special significance. I do not understand this lovely and very comforting mantra you are offering us. I do not feel it resolves the ambiguities we are seeking to resolve.

**Lord Judge:** I’m sorry. What I am saying is: you have to decide whether or not Acts of Parliament should automatically apply, or always apply unless you say otherwise. That is a decision Parliament has to make. If I may say so, it has to ask itself the question: what enables us to perform our functions? Is that to have an Act normally apply unless we say otherwise, or the other way round?

**Q244 Mr Jenkin:** We really want to have the discretion to adapt our exclusive cognisance as circumstances change.

**Lord Judge:** Absolutely.

**Mr Jenkin:** But it feels to a parliamentarian that, as expectations outside have changed, our discretions have become more limited. I will come to what I am particularly talking about later.

**Lord Judge:** Every institution is in the same position on that. The world changes, and Parliament is serving the world today and the judiciary is serving the world today. There is no avoiding changed attitudes outside the institutions that we are talking about.

**Q245 Mr Jenkin:** But, bluntly, the judges appear to be the winners, and Parliament appears to be the loser.

**Lord Judge:** I have never seen it like that. I am really sorry, but I really don’t. Judges get involved only when there is an issue about the extent to which the privilege applies. Let’s take the great case of Chaytor. It is difficult, but the judges decided that if parliamentarians falsified their expenses, that was something that could be prosecuted in the court. I am not suggesting for one moment that you would contemplate it, but you could pass an Act of Parliament saying that Members of Parliament may cheat about their expenses. I choose a ridiculous example to make the point that, ultimately, you decide.

**Q246 Mr Jenkin:** I am sorry if this is out of order, but how much are the judges in that case interpreting what most parliamentarians would regard to be a reasonable interpretation of exclusive cognisance?

**Lord Judge:** When the issue arises, the court has to decide what the scope of the privilege is. You can then say: “We don’t agree with the way the courts decided the scope of the

privilege in this particular instance and we will legislate accordingly.” But it has been well established for a very long time indeed that if parliamentary privilege arises for consideration, the courts decide the scope of it. I want to say this because I happen to believe it very strongly: ultimately it is Parliament that is sovereign. You have to decide; you can decide as you see fit. If you think that, for the purposes of performing your functions, you wish to have this particular privilege or condition underpinning the work you do, you are entitled to pass an Act accordingly.

**Q247 Mr Jenkin:** My Lord Chairman, forgive me if I ask one further question. We are trapped in an oxymoron: what is in our exclusive cognisance as a result of the status quo is unchallengeable by the courts or anyone seeking to use the courts. As soon as we legislate to extend our exclusive cognisance, we are inviting the courts to adjudicate on that question because of statute. Is there any other way we can protect our exclusive cognisance without having to resort to legislation?

**Lord Judge:** I don’t think there is.

**Mr Jenkin:** I beg your pardon; I’m trespassing on someone’s question.

**Q248 Baroness Healy of Primrose Hill:** It has been suggested that, as an alternative to legislation, the two Houses might adopt resolutions setting out their understanding of the scope and effect of parliamentary privilege. Would such resolutions be helpful to the judiciary?

**Lord Judge:** They would be helpful, but I have to be a little sensitive here because there has been quite a lot of debate about a resolution by both Houses on a different issue in recent times which has hit the newspaper headlines. The reality is that a resolution of both Houses does not change the law—it can’t. So if both Houses pass a resolution but decide that they are not going to pass an enactment, the law does not change. If there were a resolution by both Houses in the field of parliamentary privilege saying, “This is how we would like to—we must—conduct our business and it is necessary for our business,” I think it would be pretty astonishing if the court said, “Well, so what?” But there might be some right in someone else—a right vested in them by statute—that would overbear the resolution. However, if it is just a matter of interpreting privilege, I have no doubt whatever that if a resolution of both Houses said, “This is how we want to do our business; this is the appropriate way and we need it for this reason,” the courts would be extremely reluctant to interfere. You would not interfere unless you thought it was contrary to law.

**Lord Justice Beatson:** May I add a footnote to that? In the Chaytor case, what Lord Phillips said in either the Supreme Court or the House of Lords—wherever he said it—was that if Parliament has expressed a view, the courts would pay very careful regard to it and would accord it a lot of respect.

**Lord Judge:** But if I may say so, I emphasise that my answer relates to a resolution about the privileges of Parliament. I am not making any broader concession than that in relation to other matters.

**Q249 Mr Cash:** Lord Browne-Wilkinson observed in *Prebble* that “the courts and Parliament are both astute to recognise their constitutional roles”. Do you think this still holds good today, and what is your understanding of those constitutional roles? In the light of what you have already said, it may be that you have quite a short answer to that question. However, I would like to throw in one other factor: the accession of the ECHR and the ECJ. There is the question of whether there is some overarching problem, which you may or may not see as a real one, in that where the issue of human rights is folded into

the European Court of Justice in Luxembourg, the constitutional role could get a little bit—shall we say—confused. Where would that put the courts in relation to the constitutional role as you have described it, which is admirably in line with what Lord Bingham suggested in his famous chapter 12 of *The Rule of Law*? Could you perhaps explain?

**Lord Judge:** I personally do not think that there is any difficulty about Parliament and the courts respecting each other's roles. I am not aware of any difficulty, and I think the issues that you are examining are very rare so far as the courts are concerned. Let's just think about this for a minute. Magistrates, district judges, tribunal judges and circuit judges, who do the overwhelming bulk of cases, never have to engage with these issues. Occasionally a High Court judge does in relation to—usually—administrative issues, and very occasionally the Court of Appeal or Supreme Court, but it is in fact very, very rare.

You are responsible for making the law. That is the beginning and the end of it as far as I am concerned. We have to decide what you have made of the law, and sometimes that is not as clear as it was. If you do not mind me saying so, sometimes the legislation is on the opaque side. We are entitled to—and nobody has suggested otherwise—look at the legislative process when the language is opaque in order to try to discover what it was that Parliament was legislating for and intending to achieve. Day by day, I do not think there is any problem. If I may raise a problem that I have found, I think that when Members of Parliament choose to exercise their right to speak freely in the House to break court injunctions identifying people, that creates a problem. However, Parliament has its own rules, and if Members of Parliament obey Parliament's rules, there is not a problem. In truth, apart from odd moments when things might appear to get rather tense, I do not myself think that there is any difficulty in both parts of the constitution recognising their different functions.

**Q250 Mr Cash:** But to answer the question I put regarding the intrusion into this of the European Court of Justice, if a person raised an issue in litigation in a court lower than the Supreme Court, the question would of course be open as to whether there was an issue over the human rights convention. The accession of the ECHR and the European Court of Justice is in the process of being bedded down. Can you see a situation where the effect of those factors could lead to a point where it would be incumbent under section 3 of the European Communities Act 1972 for a reference to be made to the European Court itself, which would override the Supreme Court? You see what I am getting it.

**Lord Judge:** I do. I may regret these words, but I really do not see that being a problem.

**Mr Cash:** Excellent.

**Lord Judge:** I just don't think that the two impinge on each other. I do not see legislation that falls within the ambit of the European Communities Act, and therefore binds everybody in sight, or the decisions of Luxembourg that bind everybody in sight, actually presenting a problem. I think that with issues such as the witness who will not come forward, which I know you have been discussing, or the witness who comes forward and we then think is telling lies, and so on, the ordinary principles of the common law will apply perfectly well, long before you get anywhere near either European Court.

**Q251 Mr Cash:** Thank you very much. Could you give some indication as to what process is in place to ensure that judges throughout the court system are aware of the issue of parliamentary privilege?



**Lord Judge:** Very little, because it very rarely arises. As I said, I went through all the courts in front and I really cannot imagine it ever arising. In the higher courts, the administrative court and the Court of Appeal in particular, on the whole we pick it up when the issues arises. There are times when it is not picked up—I am perfectly happy to accept that. However, I do not think that, day in and day out, anybody has ever sought to look at these issues to question or impeach in some way the language used by Members of either House. Occasionally there is a debate about what somebody meant, and whether somebody was right, but if that happens, it is an error; it is of no relevance. I myself think that a debate anywhere other than in the House itself—that is among members of the Select Committee—is not admissible. However, if it is admitted when it should not have been, it is not going to set a precedent for anything, because the principle is that it should not have been admitted and there was an oversight,

Because these issues have been raised with me, and I have been raising them with the Clerk and so on, we are going to have a seminar on 4 July to which they are coming to tell us what the position is. I can perhaps bore you by referring to the consolidated criminal practice direction and Court of Appeal procedures. I will read the Court of Appeal one out to you: “This direction concerns both final and interlocutory hearings in which any party intends to refer to reports of parliamentary proceedings as reported in the *Official Report* of either House. No other report of parliamentary proceedings is to be cited.” That is stated in the context of any argument arising in relation to *Pepper v. Hart*. We envisage—and it is the same in crime—that you look at *Pepper v. Hart* to see the purpose of legislation that is opaque. Other than that, it does not apply, and you should not be referring to it. If you do, it is a mistake.

**Mr Cash:** Thank you very much.

**Q252 Lord Davies of Stamford:** Lord Chief Justice, can I take you up immediately on that particular point which is a matter of some concern to me? I think the relevant judgment is Lord Justice Burnton in the case of *OGC v. Information Commissioner*. If I can summarise his judgment, it was that you could not have a situation in which anybody in court, so either party, was allowed to refer to Select Committee proceedings—and this judgment was specifically in relation to Select Committee proceedings—because it would be unfair on the other party. One party might pray in aid a statement made by a Select Committee and, if the other party wanted to challenge that, they would essentially be challenging Parliament. That is, of course, excluded by article 9 of the Bill of Rights. Therefore, it would not be fair to allow one party to have the advantage of citing a Select Committee report in his favour.

That is the current jurisprudence, with which you seem not only to be happy, but you actually want to establish it in the minds of your professional colleagues by giving them a seminar on the subject. I want to take the opportunity to say that I disagree with the judgment, and I think it may be going in the wrong direction. Select Committees are an integral and essential part of Parliament. As you know, they have played a much bigger role in Parliament in the last 20 years. Parliament is the cockpit of the nation; it is the body that not only passes legislation, but debates what should be in legislation and holds Government to account in the pursuit of policy. Therefore, it is something to which people in a democracy should naturally be allowed to refer. It is relevant for understanding policy decisions and may be relevant for understanding legislative decisions.

In my view, it is artificial to keep any reference to Select Committee proceedings out of the courts. If somebody has a good argument, which is based on a Select Committee report, it seems to me to be perfectly legitimate that they should bring that forward and say that a Select Committee in this particular case decided that the Minister's decision in the planning inquiry was completely wrong, or that the procedure was not followed in this other case, or what have you. That seems highly relevant, and part of a transparent democracy that it should be so.

It is important that the court should not be in a position in which it, to quote article 9, "questions or impeaches" anything said in Parliament. I take the word "question" to mean "challenge the validity of", as I might say, "I question the doctrine of the Trinity" or, "I question the theory of evolution". That is clearly what is meant there. It seems to me to be not unfair and not unreasonable that, contrary to the judgment in this case, one party should be able to pray in aid a Select Committee report. It is artificial and unjust to prevent them from doing so. It is inconsistent with a transparent democracy to try to hide what may be a very relevant argument from the court.

**Lord Judge:** It is very agreeable to hear a parliamentarian saying that, but Select Committees do not always agree. The opinion expressed by an individual member of a Select Committee is an opinion expressed by him or her. There will be opinions to the contrary. The argument is that, once you start saying, "Mr So-and-so or Lord Such-and-such or Lady So-and-so said this, this and this"—

**Q253 Lord Davies of Stamford:** If I may quote the judgment, it says "an opinion expressed by a Select Committee". That implies an opinion signed off by the Select Committee as a whole, incorporated in a Select Committee report.

**Lord Judge:** But as he goes on to say, the other side must then contend that the opinion of the Committee was wrong, and that is questioning what the Committee has decided. That is questioning what has happened in the process.

**Q254 Lord Davies of Stamford:** Yes, but I do not think it is unreasonable that there should be an advantage to the party that is quoting Parliament.

**Lord Judge:** Forgive me, but article 9 is there.

**Q255 Lord Davies of Stamford:** No, we agree with article 9. I am not challenging that. We agree that you cannot have a situation in which one party says, "Parliament was barmy; Parliament was wrong; the Select Committee was barmy." I agree with you, Lord Chief Justice. You cannot have that, so therefore there is an unfairness, because one party is praying in aid a Select Committee report. Another party might wish to challenge it and cannot do so in our court proceedings. That is said to be unfair, but I do not think it is unfair. I think it is quite reasonable that, if you have Parliament or a Select Committee on your side, you should have an advantage. That should be accepted.

**Lord Judge:** But—forgive my saying so—the Select Committee does not make the law.

**Q256 Lord Davies of Stamford:** I am not suggesting it does, but it is a statement of Parliament.

**Mr Cash:** Not even this one.

**Lord Judge:** I see the force of what you are saying, but I think—I may turn out to be wrong—that, once you embark on a discussion about what the Select Committee decided,

and counsel for the other side can say, “This was a load of nonsense; they have no idea what they are talking about”, you are then reaching the stage where you are impeaching—

**Q257 Lord Davies of Stamford:** You would indeed be, but I am saying that the counsel should not be allowed to say, “This is nonsense.” The other party’s counsel might be allowed to say, “This is a misconstruction of what the Select Committee said.” That is perfectly reasonable and that applies in the *Pepper v. Hart* case, for example, where there can be two interpretations given to what the Minister said or what the Member introducing the Bill said. That is perfectly reasonable. It is perfectly reasonable that neither party can challenge the validity of what the Select Committee has decided, but I think it is artificial and unreasonable to exclude altogether from discussion what may be an extremely relevant Select Committee report.

**Lord Judge:** It will have to be decided. I am merely giving my opinion. I see the force of what you say, but article 9 seems to me to be something that—

**Q258 Lord Davies of Stamford:** We are not arguing about article 9.

**Lord Judge:** No, but you have to decide. If you say article 9 does not embrace the decisions of the Select Committee—

**Q259 Lord Davies of Stamford:** Lord Chief Justice, you have misunderstood me. I am not saying that article 9 should be disapplied in any context. Article 9 should be applied. Therefore, it should not be possible for either party—any party in a court—to dispute the validity of what has been said by a Select Committee. That is perfectly right. I am simply saying that it does not follow, in my view—it should not follow, although unfortunately it does in present jurisprudence—that no one can cite the Select Committee report in the first place. That is the artificiality that should be removed.

**Lord Judge:** The problem is that we have to hear both sides. The side that will be supported by the view of the Select Committee will say, “Here it is”, and the other side is then bound to say, “That is the view of the Select Committee”—

**Lord Davies of Stamford:** It is not a miscarriage of justice—

**Chair:** Can we let Lord Judge reply, please, Lord Davies?

**Lord Judge:** I suspect we are not going to reach an accommodation tonight. What is the purpose of referring to the view of the Select Committee? Let us assume it is unanimous—it is not always, but let us assume that it is. Do we say that we will refer to it only when it is unanimous? Otherwise, you will have both sides saying that half or the majority may have thought one thing, but the minority is right.

**Lord Davies of Stamford:** But we don’t have minority reports, so—

**Chair:** We do.

**Lord Davies of Stamford:** There is no minority report. There is voting on particular amendments.

**Chair:** That is the point that Lord Judge was just making.

**Q260 Lord Davies of Stamford:** Do you think there is an injustice—I do not—in somebody who brings up the Select Committee argument, and who says, “The Select Committee endorses my point of view,” having an advantage? Perhaps it should be something that is, if you like, a trump card. I do not see any injustice in that.

**Lord Judge:** It then depends on the part in the process that the Select Committee’s report is playing. In *Pepper v. Hart*, we are trying to discover what the legislation meant. The Select

Committee has expressed views about this or that, but it will not actually have had all the evidence, or it will have had different evidence to the evidence that is before the court. What I am really finding difficult is, what is the purpose of the Select Committee's views on the particular topic that is being argued in court?

**Q261 Lord Davies of Stamford:** If it is relevant to the case—and the judge will have to decide whether it is relevant to the case—it seems to me to be a gross abuse of justice that something that might be very relevant indeed cannot even be mentioned. Indeed, it makes the whole proceeding in court somewhat absurd.

**Lord Judge:** If it is relevant, that is a different matter, but in truth I do not think that it is very often relevant to the argument.

**Lord Davies of Stamford:** You can talk about whether it is very often relevant or say that it does not matter how often it is relevant, but the question is whether in principle it should be barred. That is what my argument is.

**Chair:** May I bring in Sir Menzies?

**Q262 Sir Menzies Campbell:** First, I apologise for not being present at the commencement of the evidence. I am not sure that you need comfort from me, but if I may say so, I rather agree with the way in which you are responding to Lord Davies. First, Select Committee reports are often by majority. They proceed upon evidence from witnesses who cannot be compelled—at least, at the moment—to appear and the report has to reflect the evidence. Then, of course, the Government provides a response to the Select Committee report in which the Government may take an entirely different view. I am entirely sympathetic to the view that if one party refers to it favourably the *de quo* of the case may demand that the other party should refer to it unfavourably. Then you have a debate that seems to me to be wholly contrary to the terms of article 9.

**Lord Judge:** I understand the point Lord Davies was putting to me. Can I just go back to my own personal starting point about this? I think that the freedom to speak as you wish is infinitely precious. The moment anybody starts questioning what it is that an individual Member of Parliament has said—whether in the House or in a Select Committee—article 9 is therefore liable to be infringed, and you are letting a door open that I do not think should be allowed to be opened. It is inevitable, in a situation where you are referring to Select Committee discussions. Look at our discussion now: different people are expressing different views and asking different questions. We must not let anybody be allowed to say, “The judges are looking at what the Select Committee said” or, “Mr So-and-so QC said that Mr So-and-so MP was talking rubbish.” It is a matter of opinion, of course. But you do open the door, in my view.

**Lord Davies of Stamford:** It is common ground between all of us and Lord Justice Burnett that article 9 should always apply; he has made the point that there could be a conflict. If article 9 applies and you allow Select Committee reports to be cited, injustice may be done to some party who wants to challenge the Select Committee report that is being referred to; otherwise, article 9 will be breached. I am saying that it is better to have the right to cite the Select Committee report, even if it means that one party cannot make an argument against it.

**Sir Menzies Campbell:** Isn't there an answer to Lord Davies's point to be found in the fact that if you are a counsel appearing in the case you can adopt the argument of the Select Committee without attributing it? You do not need to mention, for example, paragraphs

37 to 41; you can simply adopt that as your submission and put it before the court. You do not have to go through this exercise which I think both you and I find difficult to accept.

**Lord Davies of Stamford:** Yes, but it may be a very relevant endorsement if an argument has been taken up or made by a Select Committee.

**Sir Menzies Campbell:** Yes, but the judge still has to decide whether the argument is valid or not.

**Lord Davies of Stamford:** He does, but it seems to be very artificial that you cannot refer to the fact that it is actually the decision of a Select Committee of the House. It is absurd if we can continue with the whole judicial proceedings, and nobody apparently can mention this great elephant just outside the room, which is that the Select Committee has adopted that view.

**Chair:** And the other side cannot question it.

**Q263 Lord Davies of Stamford:** In order to prevent the other side from being unfairly treated, they are not able to question it. I think that is where we have made the mistake. We have put too much emphasis on the fairness of the two parties, and not enough emphasis on the importance of transparency and openness in the courts' access to evidence from all sides.

**Lord Judge:** I can't possibly comment, can I? There is a difference of view between two members of this Select Committee.

**Q264 Lord Davies of Stamford:** Absolutely. I am glad we have had this discussion, Lord Chief Justice, but I do not know whether you think—

**Chair:** I think we must move on.

**Lord Judge:** If I may say so, my Lord, if the Select Committee has a view about this, you will no doubt tell Robert Rogers. When he comes to see us on 4 July, he will tell us whether this is a great new world or not. But if this is the view of the Select Committee, we would love to hear it.

**Chair:** We very much hope that we will have our report out by 4 July. I hope it is out long before that.

**Q265 Tristram Hunt:** Maybe this will be covered at your exciting 4 July seminar, but one problem experienced at this end of the equation is that the Houses are often not made of privileged material being submitted as evidence early enough. As part of the new discussions, are there plans to make sure that the Houses are informed at suitable moments, in terms of potential conflicts with the submission of material?

**Lord Judge:** We have to be realistic. This sort of situation arises very exceptionally. I know that you know about the times when it arises, because it affects you. In reality, in the overall scheme of things, it is very rare. It should be cleared up before the case starts, but the judge does not have a say in that. When the case starts, the judge may say, "No, hang on." There will be occasions when it is missed, and those are the times that should not happen. We have limited resources like everybody else, and to make this the most important feature of the litigation process would be unrealistic for us, because it is not. It is very important when it arises. If these things do slip under the wire, they should be treated as what they are: a moment of aberration, and of no consequence whatever by way of a threat or challenge to Parliament. They are mistakes; that is all they are.

**Q266 Tristram Hunt:** So are there systems so that when a judge sees the material, that is when the red light goes off?

**Lord Judge:** Yes. There are rules about it. You can only refer to *Pepper v. Hart*, and you can only do it by referring to *Hansard*. Those are the rules. So if somebody raises it, the judge will say, “Well, is this *Pepper v. Hart*? Otherwise it is not for our consideration. Have you done it by looking at *Hansard*? Are you producing *Hansard*? You have to serve everybody else and the court with it.” So the chances of many getting through the net are small, but they will. It is no good pretending to you otherwise.

**Q267 Chair:** Does that apply to judicial review cases as well?

**Lord Judge:** Yes. They are the particular ones. Judicial reviews are the most likely pieces of litigation to raise questions about what Parliament intended, and what was going on when Parliament enacted a regulation or a statute.

**Lord Justice Beatson:** It is mostly in the administrative court. Judges in the administrative court, who have an organ of Government as the defendant in every case, are, generally speaking, more alive to this, because it is more likely to happen. There are examples. For example, there was a challenge brought by the Fawcett Society to the Budget in 2010<sup>2</sup>, which started to raise this issue. The point was taken by the judge at a very early stage. There was a challenge by UNISON<sup>3</sup>—I do not have the details of it—which wanted to go into things again, and the judge took the point. So the judges who deal with challenges to central Government activity are alive to this. But our process is adversarial, and it is for the parties to bring the material to the court. If a claimant wants to use material improperly, it would generally be for the defendant to stop it. I do not know, for example, whether the Treasury solicitor, who is the solicitor for the Government defendant, monitors what is going on. It does sometimes get through because, in the way of litigation, the point arises late. There are quite a lot of examples of material being stopped by a judge raising it.

Coming back to the point that Lord Davies made, when Mr Justice Stanley Burnton became Lord Justice Stanley Burnton he referred to reports. It depends on the precise context. Those dealing with the work that is most likely to raise this matter are likely to be alive to it, but there is no foolproof system.

**Q268 Chair:** Do you think there should be a more formal foolproof system, where notification would have to be given, or authorisation sought for the use of privileged material?

**Lord Justice Beatson:** It was formerly the position and it was Parliament that decided to dispense with it. Whether there should be one turns on the question of whether each House of Parliament believes that there is a real problem that is of sufficient significance to create what will be quite a cumbersome procedure.

**Lord Judge:** What is more, if I may add this, we have introduced all sorts of processes to try to make the system more efficient. However many boxes you give people to tick, they occasionally do not tick the right box, or they occasionally overlook a box that should be ticked. If we put in a box saying, “Does any issue of parliamentary privilege arise?”, it would be left untouched in most cases. Then occasionally it would have a tick. Occasionally a point will arise and somebody will have forgotten to tick the box. We cannot create a foolproof system.

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2 R (on the application of the Fawcett Society) v Chancellor of the Exchequer [2010] EWHC 3522 (Admin)

3 R (on the application of Unison) v Secretary of State for Health [2010] EWHC 2655 (Admin)

If the material before you leads to the conclusion that there are constant problems about this, we will obviously address it. I would not dream of pretending otherwise. My perception is that this is not a particularly serious or constant problem. If it were to become one, we would love to hear from you and we would deal with it.

**Q269 Mr Cash:** There was a libel case in which I was involved and it was said by leading counsel for the newspaper in question that it was a unique case because it turned on the proceedings in Parliament in respect of the manner in which I had voted on a very controversial question. I put that on the record, because I have been on the receiving end, if you like. The outcome was quite satisfactory as it turned out. None the less, it was a case that definitely turned on not only the proceedings in Parliament but the manner in which I had voted on a particular occasion, in relation to coal mines in the early 1990s.

**Lord Judge:** If I may say so, if the litigation was whether or not you were right to vote the way you did, or the implication was that you were wrong to vote the way you did, I should not be surprised if you won.

**Mr Cash:** I'll park that one for the time being.

**Q270 Mr Jenkin:** The power of Select Committees to summon witnesses, require them to tell the truth and submit papers is an important part of the process of accountability, and applies not just to the Executive but to third parties and private parties. How do you think the Committees of both Houses should punish a contempt?

**Lord Judge:** Golly! It depends on how serious the contempt is.

**Q271 Mr Jenkin:** Okay. Let us suppose an individual—a director of a company—has, in a controversy, deliberately lied to a Select Committee.

**Lord Judge:** If he has committed perjury, what I would suggest you do, assuming that this process goes through—

**Q272 Mr Jenkin:** Except that we do not usually take evidence on oath. It is there, but it is rather unsatisfactory, because it is a statutory procedure, so let us leave that one aside. It is a contempt of the House to mislead a Select Committee, but it need not be perjury in the statutory sense.

**Lord Judge:** No, I understand, but if you have a process—I think this is open to question; it is rather like contempt of court processes, which have been significantly changed in the last few years—that culminates in an appropriate, justifiable conclusion that somebody has lied to the House, and you then think that you should exercise the sentencing powers, I think that is a pretty problematic one. I would suggest that you would look at the way in which courts deal with cases of perjury and attempts to pervert the course of justice. You would then find some indication of the way that this is dealt with outside the parliamentary process. I take the view that lying to Parliament is akin to perjury, even if you have not sworn an oath to tell the truth, and therefore you will get the guidance that you will need.

**Q273 Lord Davies of Stamford:** Is it a criminal offence without the oath?

**Lord Judge:** It is not in court, not in the ordinary court. I think it is at least arguable that it would amount to a contempt in parliamentary terms, but unless the witness is on oath or the equivalent, it is not perjury.

**Q274 Mr Jenkin:** Supposing it is assumed in our standing orders and “Erskine May” that the House could pass a resolution to apply a fine or a term of imprisonment to such an

individual, are you saying that if we had processes analogous to contempt of court processes, this would fall within the exclusive cognisance of Parliament, and that if somebody went to court to try to escape or nullify the judgment that had been reached and the resolution that had been passed, the courts would say, “This is none of our business”?

**Lord Judge:** It would depend what the argument was. If the argument was that he had not had a fair hearing, then I think the courts would have to look rather closely at it.

**Q275 Mr Jenkin:** I hear what you say, and I bank that one, but supposing that we imposed a fine and the application for a court to overrule this did not succeed, how would we enforce the fine?

**Lord Judge:** I do not know.

**Q276 Mr Jenkin:** In days of old, we would have sent out a Serjeant at Arms with a posse to remove the thumbnails of the person concerned, or whatever. Obviously that does not apply any more. The point I am getting at is that these powers have fallen into—this wonderful word we now use—desuetude. It leaves our Select Committees perhaps a little powerless. We rely only on political persuasion to get people to turn up and to tell the truth.

**Lord Judge:** But the times when you have run into a problem with this are negligible, aren't they? If Parliament asks people to come, people come.

**Q277 Mr Jenkin:** We have case law now. We have cases where people have just not come. In fact, a very eminent and learned witness to this Committee said that under circumstances where a witness was likely to be exposed and their reputation very badly damaged through being exposed to questioning by Parliament, he would just advise his client not to come, on the basis that there was nothing we could do about it.

**Lord Judge:** You must forgive me, I really am not going to comment on something that may arise for decision in court, but I can perfectly well see, for example, an individual whose conduct is liable to be criticised saying, “I am not going to give evidence to a Select Committee that might incriminate me.” Indeed, the Chairman of the Select Committee would have to tell him in advance, “Before you say anything else, I must warn you that you are not obliged to give evidence that may lead to you incriminating yourself.”

**Q278 Mr Jenkin:** But he cannot incriminate himself in a Select Committee because everything he says is privileged. That is the joy of freedom of speech.

**Lord Judge:** I had not thought of that. It is a good point. In any event, I think that we need to be careful. Take the way we operated. In the old days, if somebody was rude to the judge, he was brought up, the judge sent him down for two months, and that was the end of it. Well, we cannot operate like that. The individual who is the judge, the jury and the prosecutor needs to be very careful about exercising these functions. If somebody behaves very badly in court, the judge may say, “Take him down,” but he will then not deal with the case—we strongly advise them not to, and they very rarely do unless it is absolutely necessary—until the next day. Another judge will deal with it. There will be evidence about what happened. The judge who was offended will not act as the judge in his own cause, nor prosecute, and the process will then be taken forward. That way, there is no criticism of the fairness of the process.



**Q279 Mr Jenkin:** Supposing we had a pristine process, we still have this problem about how to enforce a fine, for example, which would probably be exemplary and symbolic. We used to be able to imprison people, but I do not expect we want to. I do not know if it is the House's wish to continue enforcing that right. How would we actually exercise this quasi-judicial power? I will jump forward, because time is very limited.

**Lord Judge:** May I say that if you were to resuscitate something that has actually died, you would need to think again?

**Q280 Mr Jenkin:** Thank you, my Lord. In the case of other jurisdictions, the New Zealand Parliament has actually applied a fine and it has been paid, which we were very encouraged by. Australia has criminalised contempts, and of course in the United States the two Houses of Congress no longer use their inherent powers, but they refer contempts to the Executive branch for criminal prosecution. Is that what we are going to have to do?

**Lord Justice Beatson:** Given that you are unlikely to want to set up a police force in the Palace of Westminster, it seems to me that you could take the United States model of using the prosecution authorities of the state. You would have to have some legislation to do it, but they could be your enforcement arm.

**Q281 Chair:** Is not the problem with that that if the fact that somebody had refused to come before a Select Committee or whatever went to the courts, that person could then question the legitimacy of the Select Committee and the questions that he was going to be asked, whether he would incriminate himself, and so on?

**Mr Jenkin:** Our proceedings would be questioned in another place.

**Lord Justice Beatson:** This goes back to your oxymoron. If your proceedings were fair and the person was given a chance to put his or her side, and then there was perhaps legislation that stated that for lying to a Select Committee there could be a fine—

**Q282 Lord Davies of Stamford:** Or refusing to turn up.

**Lord Justice Beatson:** Or refusing to turn up, there is then a conundrum. You either give up a little bit of your exclusive cognisance and you get enforcement, or you stay pure and are faced with the difficulty that you so vividly put about how on earth you are going to enforce it.

**Q283 Mr Jenkin:** The problem with just giving up a little bit is that if there is any connection with proceedings in Parliament, and there inevitably is, you are immediately breaching article 9 of the Bill of Rights.

**Lord Judge:** But that's your privilege; it is not anybody else's. You are allowed to diminish the privilege to the extent that you think appropriate. I am not advising you about this, but that is your privilege.

**Q284 Lord Davies of Stamford:** If I may say so, the question is this: we could criminalise not turning up, we could give ourselves the power of subpoena like the United States, and we could make it a criminal offence to tell a lie before a Select Committee. We then have to allow the prosecutors and the courts—

**Mr Jenkin:** And the defendants.

**Lord Davies of Stamford:** And the defendants. What we are concerned about and what the Chairman has raised is whether or not the judges would say, "Under article 9, you cannot question the decision of Parliament as regards your not turning up. You cannot question the decision of Parliament as regards your telling a lie. I am just here to prosecute

you or to send you down.” Or would the courts in fact open up the whole issue? The guy could then spend days going through the way that the Select Committee ran its business and the way the questions were asked and all the rest of it. That is what we are asking you.

**Lord Judge:** I do not see how you could give him a fair trial if he was not allowed to say, “I didn’t lie—the Members of Parliament were extremely aggressive in their questioning and I was confused.” I just do not see how you could do that. However, if I may say so, if you are going to go down this path, I would respectfully suggest that you would need to legislate for it. I do not think that you can resuscitate the old process by which poor old Sir John Eliot ended up in the tower. You cannot do it.

**Mr Jenkin:** That is very clear. Thank you very much.

**Q285 Chair:** Thank you both very much indeed for coming. That was an extremely informative, useful and interesting session.

**Lord Judge:** Thank you very much. We find it very interesting.

**Q286 Chair:** We promise you that we will get our report out well before July.

**Lord Judge:** If I may say so, isn’t it astonishing—I was saying this to Lord Justice Beatson on the way over—that in 1940, when we were at war, men were dying and it was going very badly, and someone could stand up in the House of Commons and say to the leader of the nation at that fraught time, “Go”, and nobody rushed him out, took him to a prison and locked him up for treason? It is so precious.

**Chair:** Thank you very much indeed.

# Written Evidence

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## Richard Gordon QC

### *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?](#)<sup>4</sup> (Constitution Society 2012) 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?

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4 <http://www.consoc.org.uk/wp-content/uploads/2012/06/Select-Committees-and-Coercive-Powers-Clarity-or-Confusion.pdf>

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:

*'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.

*18 January 2013*

## Sir Malcolm Jack KCB PhD FSA

### *Introduction*

1. I very much hope that the Joint Committee will not agree with the first question in the Government's Green Paper on Parliamentary Privilege<sup>5</sup> namely – Do you agree that the case has not been made for a comprehensive codification of parliamentary privilege? – without conducting its own thorough consideration of the benefits as well as the disadvantages of legislation in this area. Whatever the views of the Executive, Parliament itself should come to its own conclusions on this, of all subjects, after careful deliberation.

2. Before rehearsing the case for what, on careful balance, I believe to be the arguments in favour of codification it should be pointed out that what appears to be the principal worry of the Government – that privilege should not be a bar to criminal prosecution of Members where they have broken the law – was conclusively allayed in the case of *R. v. Chaytor* [2010]<sup>6</sup> In that judgment the Supreme Court in effect upheld what has been parliamentary practice since the Middle Ages, namely that Members are not protected from criminal prosecution by the existence of parliamentary privilege. While I understand the political motive for stating that clearly, in terms of the need for a Parliamentary Privileges Act it is a red herring which should not carry undue weight.

### *Background: the Joint Committee of 1998–99*

3. While the Government claims in its Green Paper that the Report of the Joint Committee on Parliamentary Privilege of 1998-99 is its “starting point”<sup>7</sup> in fact the negative way of putting the question about codification (which I have set out in paragraph 1 above) indicates that it has rejected the Joint Committee's principal recommendation for a new statute.

4. It is worth rehearsing the reasons why, after an exhaustive and wide ranging inquiry, your predecessor Joint Committee came out in favour of codification. The main points that the Joint Committee made were:

- An Act would make it easier for the electorate to understand the importance of parliamentary privilege by presenting a clear, accessible code;
- Such a Code would clarify two key areas – freedom of speech on the one hand and exclusive cognisance on the other [the latter referring to the rights of each House to set its own rules and practices; control its own precincts & exercise disciplinary & penal powers];
- Such a Code would clarify key terms in the Bill of Rights 1689 such as ‘proceedings in Parliament’; ‘place out of Parliament’; ‘questioning’; ‘impeaching’ etc.;
- Such a Code could maintain flexibility by stating principles;

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5 Cm 8318, April 2012.

6 *Chaytor* [2010] UKSC 52

7 Cm 8318, April 2012 paragraph 35.

- Such a Code would not increase the power of the Courts which already interpret the ambit of privilege.<sup>8</sup>

5. I would argue that the points in favour of codification made by the Joint Committee still apply but I would like to consider three further areas which have come to prominence since 1999 during my own time in the House Service. The first concerns a case in the European Court of Human Rights; the second is in the area of contempts and what powers Parliament has to deal with them (particularly with contempts afforded to Select Committees) and the third is the increasing use of privileged material in the Courts.

### ***The Case of A v. UK in the European Court of Human Rights***

6. In 2002 a case relating directly to words spoken by an MP was heard in the European Court of Human Rights. (*A v. UK*).<sup>9</sup> A Member of Parliament, during a daily adjournment debate in the House of Commons had been highly critical of one of his constituents describing her as a ‘neighbour from hell’ when advancing the grievances against her by other constituents of his. Supported by Liberty, an action was taken out by the aggrieved constituent claiming that the use of parliamentary privilege in this case infringed Article 6 of the European Convention (namely that everyone is entitled to a fair hearing by an independent tribunal established by law) and Article 8 (respect of private and family life). The action was against the UK Government and, in recognition of the importance of the principle at stake, the UK was joined in defence by eight other European Member states.

7. The European Court did not hesitate to hear the case despite the fact that it constituted an intrusion into the area of parliamentary proceedings proscribed in the UK by Article 9 of the Bill of Rights (1689) and by constitutional provisions in the cases of other Member states. In the event the Court came to the conclusion that the use of parliamentary privilege on that occasion was not a disproportionate restriction on the right of access to a court or in respect of private and family life and that therefore neither Article of the Convention had been violated.

8. While the ruling was a vindication of the absolute nature of parliamentary privilege, the judges were not unanimous nor were they uncritical of the exercise of privilege without recognition of modern, human rights such as in the provision of a right of reply by citizens who feel they have been libelled in Parliament. Moreover, in handling the defence case (I was myself involved in the matter as Clerk of the Journals) Counsel decided to rely upon what I have elsewhere<sup>10</sup> called the “functionality” argument for privilege – namely that privilege is a necessary part of the way parliaments must work, enshrined in most constitutional arrangements of Member states. Counsel did not judge it to be wise to rely on a statute as antique as the Bill of Rights of 1689 for fear that ambiguities in its meaning would obscure, rather than clarify, the defence case. Counsel’s view was that a modern statute, free of seventeenth century cant, would have cut much more ice with the Court if it had existed. Furthermore, it became clear that the case would become a precedent showing

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8 Joint Committee on Parliamentary Privilege of Session 1998-99 Report & Evidence HL Paper 43 I-III; HC 214 I-III. I: paragraphs 378-385.

9 *A v United Kingdom* (Application 3537/97) (2002) 36 EHRR 917 ECHR and see Erskine May Parliamentary Practice 24<sup>th</sup> Edition (2011) p. 301

10 See Malcolm Jack, “Parliamentary Privilege: A Dignified or Efficient Part of the Constitution?” Seventeenth Policy & Politics Annual Lecture, School for Policy Studies University of Bristol, 29<sup>th</sup> March 2012. (at <http://policypress.co.uk/PDFs/General/Malcolm%20Jack%20Lecture%20NEW.pdf>)



that the European Court will hear matters it considers within its jurisdiction even where parliamentary privilege is *prima facie* involved.

9. The experience of *A v. UK* suggests that cases clearly involving parliamentary proceedings may still in the future be considered by the European Court and that a modern statute would be more protective armoury for Parliament in such cases than reliance on Article 9.

### ***Select Committees: Powers in the face of Contempts***

10. The second area to emerge since 1999 (although the Joint Committee recognised it as problematic) is that of contempt and in particular, contempt committed towards Select Committees of the Houses.

11. Erskine May lists many sorts of examples of behaviour that might be considered as contempts towards committees.<sup>11</sup> They range from refusal to produce documents<sup>12</sup> to disorderly (even drunken behaviour) before Select Committees and evasion in answering questions on the part of witnesses. Disorderly behaviour of a physical sort can be dealt with by removal of persons causing disturbances by the Serjeant-at-Arms on instruction from the Chair. However, under existing conventions, there is little a Committee can do with recalcitrant or evasive witnesses except to exert moral pressure or failing that, to report the matter to the House itself. But the modern House of Commons has little power to act: the possibility of hauling people to the bar of the House and admonishing them would provide a theatre of the absurd in the twenty-first century while the House last imposed a fine in 1666. While the House of Lords, as a Court of Record, has the theoretical power to fine, the power has not been used since the nineteenth century. Any *ad hoc* act of punishment would no doubt receive a hostile public reaction especially if exercised in the name of “privilege”. On the other side of the fence, good witnesses giving forthright evidence are only thinly protected from interference by others, including their employers, as a recent case involving the Minister for Justice, of all ministers, has shown.

12. This weakness in Parliament’s ability to do its job properly has been widely recognised. The authors of a recent Constitution Society study state that the lack of coercive powers “poses a threat to the legitimacy of select committees”.<sup>13</sup> Select Committees themselves have struggled to get satisfactory evidence from witnesses. In a recent prominent case the Treasury Select Committee came to the conclusion that the evidence of the principal witness in an inquiry “fell well short of the standard that Parliament expects”<sup>14</sup> yet neither the Committee nor the House has any real power to deal with that entirely unsatisfactory situation. The prospect of a criminal conviction would be a strong deterrent to such behaviour on the part of witnesses.

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11 Erskine May, 24<sup>th</sup> Edition (2011) p. 251ff. and p. 817ff.

12 For the case of the Government of Canada refusing to hand over documents to a Committee until found in breach of privilege, see Erskine May, 24<sup>th</sup> Edition (2011) p. 819.

13 See R. Gordon Q.C. & Amy Street, “Select Committees and Coercive Powers – Clarity or Confusion?” The Constitution Society, 2012. p.21.

14 Treasury Select Committee Second Report of Session 2012-13 “Fixing Labor: preliminary findings” HC 481-1: paragraph 144. Also see Culture Media and Sport Select Committee Eleventh Report of Session 2010-12 “News International and Phone Hacking” HC 901-1

13. The present weakness can only be remedied by giving the emperor some clothes. The Australian Parliamentary Privileges Act 1987 gives Parliament the power to impose fines (on a stated scale) for those who commit contempts (the Act does not define contempts in terms but rather indicates the threshold for measuring them<sup>15</sup>) as well as to impose a prison sentence of up to six months (with a possibility of rescinding the decision)<sup>16</sup> Procedures for due process in the execution of these powers has been put in place.

#### ***Use of Select Committee Evidence in Court***

14. An increasing problem during the decade and more since the publication of the Joint Committee's report has been the increased questioning and reliance upon select committee reports and evidence in the Courts, disturbing the principle of the separation of jurisdictions between the legislature and the judiciary. Such incursions, which go beyond the permissible examination of proceedings following *Pepper v. Hart*<sup>17</sup> (where recourse to parliamentary proceedings is permissible to seek clarification of the meaning of statutory provisions), arise from a lack of clear guidance (in the form of a code) and necessitate repeated interventions by the Speaker of the House of Commons (and the Clerk of the Parliaments) which are not binding on the Courts.

15. Section 16 (3) of the Australian Parliamentary Privileges Act provides against such usage by stating that it is:

“unlawful for evidence to be tendered or received, questions asked or statements, submissions and comments made, concerning proceedings in Parliament”<sup>18</sup>

16. A provision of this sort should clarify the matter and contribute to the better operation, within their respective spheres, of the legislature and the judiciary.

#### ***Would legislation invite interference into the internal workings of Parliament by the Courts?***

17. One of the principal objections argued against encoding parliamentary privilege in statute is that it would lead to interference by the courts in the affairs of Parliament, linked in the minds of those arguing the case, with an increase in so-called judicial activism. There are a number of factors which, in my mind, render this argument weak but it is first necessary to be clear about what the boundaries between the two organs of the constitution actually are.

18. The first point to make is that modern parliamentary privilege, at least in respect of freedom of speech, is already a matter of statutory law. The Bill of Rights 1689 may be regarded as a sacrosanct, “constitutional” statute but that has not prevented the Courts, over the ages, from interpreting it. The result of the nineteenth century struggle between the Courts and Parliament was that Parliament gave up its effective right to determine what privilege is—it ceded that right to the Courts but retained the right to have exclusive

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15 See Australian Parliamentary Privileges Act 1987 s.4 (Essential Element of offences)

16 *Ibid.* s.7 (Penalties Imposed by Houses); s. 12 (Protection of Witnesses) and s. 13 (Unauthorised disclosure of Evidence).

17 See Erskine May 24<sup>th</sup> Edition (2011) p. 231ff & 297 ff.

18 Australian Parliamentary Privileges Act 1987 s.16 (3). Proceedings are defined in 16(2).

cognisance over its internal affairs. The argument recently advanced by the Liaison Committee—that a privileges statute would undermine the separation of powers—ignores the basic fact that the foundation of modern privilege, the Bill of Rights, is itself a statute.<sup>19</sup>

19. The most recent and significant statement about this matter was made by the then Attorney General in a memorandum laid before the House of Commons on 3<sup>rd</sup> April 2009.<sup>20</sup> While there is recognition of the right of Parliament to regulate its internal affairs without interference, the Attorney makes it clear that determining questions of law in relation to privilege is a matter for the Courts and not Parliament and such determination is based upon the interpretation of Article 9 of the Bill of Rights. It is clear from this statement of legal policy that there is no question of the Courts giving up that right in the existing status quo.

20. Nevertheless, I believe there are grounds for considering that the risk of interference in the internal affairs of Parliament is minimal should there be a new statute defining privilege. My confidence arises from pronouncements from the bench in the recent case of *R. v. Chaytor*.<sup>21</sup> At every court level—in the High Court, the Court of Appeal and the Supreme Court, the exclusive cognisance of Parliament over its own affairs is clearly acknowledged and there is no suggestion in any of the judgments delivered in these courts that there is a desire to interfere with Parliament’s internal workings. A new statute would in fact clarify exactly what the boundaries between Parliament and the Courts were, in a way useful to both sides.

21. Finally, I draw support for that conclusion from the experience of the Australian Commonwealth. After more than 20 years of codification in a common law system similar to our own, there has been no sign of an increase in court cases involving disputes over the meaning of the 1987 Privileges Act. On the contrary, it is the opinion of the parliamentary authorities in the Australian jurisdiction that the existence of the Act has been of considerable benefit in clarifying the relations between the various organs of the constitution. That is particularly the case because of the redefinition of otherwise obscure terms in the Bill of Rights 1689.

### **Conclusion**

22. I have concentrated in this memorandum, on the reasons why I think that the Joint Committee should reject the Executive’s invitation to put aside the question of codification without serious examination. There are other matters, such as a right of reply and the handling of court injunctions in the Houses, which also need consideration. It has taken over a decade for Government to come forward with a Privileges Bill – there is unlikely to be another opportunity for Parliament to consider these matters again for a very long time. It is therefore incumbent upon the Committee to seize the opportunity to conduct its own inquiry and to take forward what I believe to be an overdue and important constitutional reform.

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19 Liaison Committee Second Report of Session 2012-13 “Select Committees effectiveness, resources and powers” HC 697 paragraph 133.

20 For the full text of the Attorney’s view see House of Commons Committee on Issue of Privilege of Session 2009-10 HC 62 Ev. 130–31. Also see Erskine May, 24<sup>th</sup> Edition (2011) p. 303.

21 See *Chaytor* [2010] UKSC 52.

14 January 2013

## The Newspaper Society

The Newspaper Society represents regional media companies which publish around 1100 regional and local newspapers with 1600 associated websites, provide a wide variety of ever developing digital services, niche publications and some also have local radio and local television interests.

The Government's Green Paper on Parliamentary Privilege and the Joint Committee's inquiry are relevant to local media coverage of Parliamentary proceedings. The regional press is no longer confined to print reports of debates- it can inform, update and engage its audience in appropriate ways over a wide range of media platforms- in print, online, through video, blogs, twitter, forums, events and broadcasts. Direct involvement of MPs in titles' political coverage—election forums, online constituents' questions-can also refer back to Parliamentary proceedings, debates, statements, questions asked, EDMs put down. Many regional titles have dedicated Westminster based correspondents lobby. The NS's 'Newspaper Conference' <http://www.newspapersoc.org.uk/newspaper-conference> comprises political correspondents and London editors representing a wide range of local and regional newspapers. Other titles cover Parliamentary matters through their home based political or specialist editors rather than lobby correspondents , while all titles will cover pertinent proceedings in Parliament through their news or business or other coverage—highlighting the issues relevant to their readership and audiences, spotlighting the work of local MPs, identifying and publicising issues of concern which local people have raised individually or in a group with their MP, championing causes, campaigning for changes to the law, policies or practices which affect their readers' lives.

Regional and local media encounter the same problems in reporting Parliamentary proceedings as the national media, particularly where the law protects the freedom of speech and action of Parliamentarians, but not the fair and accurate media report of them. Publication of an advance draft of an EDM would not attract the protection of the Parliamentary Papers Act 1840, nor would defences automatically be forthcoming for reports of correspondence between an MP and his constituent—and certainly not if it related to family courts proceedings even if all those involved actively wanted wider publicity to highlight an issue of wider public interest ; while if an MP or Peer chose to speak out in either House in contravention of an injunction, be it obtained by Government, company or individual the local media company and its editor would be as uncertain as the Committee on super -injunctions as to whether they could fairly and accurately report his words through any means or media, or would be facing substantial fine ( or worse) for contempt for doing so.

We hope therefore that the Joint Committee on Parliamentary Privilege will recommend improvements which will facilitate all media reporting of proceedings in Parliament by providing straightforward and certain defences against any legal action brought in Parliament or the civil or criminal courts or elsewhere.

### ***Green Paper: Part One Chapter Three: Freedom of Speech and Criminality***

The NS has no objection in principle to measures that facilitate freedom of speech within Parliament, including Members' correspondence and material incidental to that, or evidence to Parliamentary committees, nor to extension of courts' use of proceedings in Parliament. However, care must be taken to ensure that any such extension of Parliamentarians' freedom is accompanied by comprehensive measures which will ensure that the media can easily report and comment upon what has been said and done and its context, fairly and accurately, contemporaneously or otherwise without fear of legal action or sanctions. The media must benefit from appropriate defences or safeguards of its reports in whatever form or whatever means they are made available to their audience.

Media protections require extension of defences against contempt and other legal proceedings, in addition to defamation. If MPs, peers or non-members were to benefit from extension of privilege to criminal offences, media coverage concerning such Parliamentary proceedings should also benefit from appropriate defences.

If more use were to be made of material in court proceedings, then care needs to be taken to deal with issues such as protection of sources and, indeed court reporting, access to court documentation and other open justice aspects. New restrictions or problems detrimental to freedom of speech, open justice or media reporting must be avoided. The interaction with the DPP guidelines on public interest considerations and prosecution of offences involving the media and other safeguards would also have to be considered, to ensure that freedom of expression protections were strengthened and were not diminished in any way.

### ***Chapter Four: Freedom of Speech and Civil Law***

#### ***Freedom of speech and injunctions***

The Newspaper Society supports previous Joint Committees' recommendations against restricting freedom of speech in Parliament and legislating to prevent members' breach of injunctions. However, we do advocate changes in favour of freedom of speech in Parliament and its wider dissemination by media report, through extension of defences for any media report of members' use of absolute privilege to circumvent injunctions and comment.

#### ***Rights of warning or reply (injunctions and defamation)***

The NS would not support any system of right of prior warning or right of reply which would require the media to check that the member had complied with the appropriate procedure, or oblige the media to publish the reply or risk loss of any defence which would otherwise be available for any media report.

#### ***Waivers and civil law- defamation***

The NS opposed the inclusion of section 13 in the Defamation Act 1996 and believes that it should be repealed as suggested by the Green Paper. The introduction of a discretionary power to waive privilege would not facilitate fair and accurate reporting of Parliament. It could lead to greater use of such power; moreover, its use would be unpredictable and

retrospective. We agree that the power of waiver could create a chilling effect could be created by the mere threat or possibility of its use, which would be detrimental to openness of debate and press reporting of the proceedings.

### ***Waivers and tribunals of inquiry***

We note the Green Paper's concern that waiver for the purposes of tribunals of inquiry could also create a chilling effect. We would draw to the committees' attention that the Green Paper's reasons for suggesting that no change is needed in practice are actually dependent upon press and public access to the statements made or evidence given to the Inquiry or Parliament and the wider dissemination by way of media report. This underlines the importance of open justice and open Committee proceedings (including any dealing with intelligence and security matters), the necessity for media access to proceedings and documentation, without automatic or discretionary reporting restrictions and for comprehensive defences for publication of reports of the proceedings.

### ***Chapter Seven- Select Committee Powers, criminalising contempt***

The NS would obviously be concerned by any change to Select Committee powers to summon witnesses, answer questions, produce documents and records that failed to respect the importance of confidentiality of sources or protection of journalistic material and thereby put journalists, editors and publishers and other relevant non-members at greater risk of contempt and sanctions of reprimand, fine or imprisonment without even the safeguards of normal independent investigation and prosecutions procedures and court proceedings (however doubtful the power or rare or theoretical the current use).

We would also be very concerned by any criminalisation of contempt which could draw in media and create similar problems or render them subject to contempt proceedings and sanctions including imprisonment.

### ***Chapter Eight- Reporting of parliamentary proceedings***

The NS considers that media reports should be protected by absolute rather than qualified privilege defences against all legal claims. These defences should provide protection against both defamation and contempt, plus additional measure necessary for defence against any criminal offences. This legal protection should cover all fair and accurate reports by any media of Parliamentary debates or other Parliamentary proceedings and for copies, abstracts, extracts or summaries of reports, papers, votes or proceedings. Thus it would be very helpful if wider changes could be made to the Parliamentary Papers Act 1840 and any other relevant legislation beyond the welcome reforms proposed by the Green Paper for reversal of the burden of proof and extension to the broadcast media. All defences should protect all reports at any time in any form. The defences should not be limited to contemporaneous reports, such as live feeds, but extend to all later publications.

Legal uncertainty as to the availability of defences does affect the local media and its report and comment upon statements made in Parliament. It inhibits reports of Parliamentary proceedings relating to material which is or might be in breach of injunctions or court orders prohibiting revelation of certain information, or preventing the publication of identifying information about individuals or organisations of any description. Instances include anything from the Spycatcher to last year's examples. This can affect report of

important issues and discussion of relevant matters. It can also hinder MPs' explanation to their own constituents and electors of their reasons for making any such statement.

The NS does not consider that requiring the media to satisfy new public interest tests prior to publication in order to benefit from any defence would alleviate the media's problems. This would not just delay reporting, but probably prevent it, as local and regional media companies might not be in position quickly to assess and substantiate public interest arguments, or feel that it would be too costly to risk legal action or to defend any legal action and so decide against publication.

We hope that it would be possible to bring forward legislation to enable the straightforward publication of reports of Parliamentary proceedings and papers, in any form, media and at any time- and comment upon them- both contemporaneously and at any time thereafter, without fear of civil or criminal legal action, including contempt proceedings.

*21 January 2013*

## Mr Bernard Bibby

1. No person in a position of “Privilege” regardless of their status should have a right to defame or denigrate the good standing of another individual without that defamed individual being given the opportunity to clear their name.
2. Equality under the law, common or otherwise should enable the ordinary person of this country the right of redress against any individual who makes a false statement against an individual’s unblemished character.
3. Parliamentary Privilege was secured to curtail the powers of a dictatorial monarch and in doing so both Houses were given immunity from prosecution for genuine matters raised in each chamber.
4. Parliamentary Privilege by any stretch of the imagination was not enacted to provide a loophole for members to take punitive advantage or to vent uninformed accusations or name calling against the reputation of good citizens of this country.
5. It is accepted that in general the right of each “House” to benefit from the use of Parliamentary Privilege to investigate matters that are pertinent to the safe and secure running of the country, but this privilege has come into misuse in recent times.
6. The abuses recently highlighted in the national media are but the thin edge of wedge and if meaningful steps are not taken to curtail these questionable actions by a few then the standing of each House is brought into question. Unchecked this open misuse of “Privilege” is the first step on a slippery slope to eroding the good standards of governance this Country once stood for around the World.
  - a) [The average member of the public has not the recourses at their disposal to take matters of defamation to Court. The citizen defamed by a member of either “House” is prevented from having the opportunity to see that their good name and hard won reputation is reinstated for all the public to see.]
  - b) Freedom of speech is guaranteed by article 9 of the Bill of Rights 1689: ‘freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament’.
  - c) This precludes ordinary members of the public from seeking redress against a malicious and unwarranted defamation by members of either House. This cannot be right, fair or equitable in a modern democracy.
7. This committee must see that the “Rights” of the individual are not sacrificed as cannon fodder by Members. To fire off with no concern for the long-term consequences that these, at best misjudged comments, and at worst deliberate intentioned act broadcast for whatever reason destroy the good name of the individual that the defamation is aimed at.
8. It is anticipated that following the evidence submitted to this Committee guidelines will be drawn up leading to the curtailment of this abuse of “Parliamentary Privilege” by members of each House to members of the public.



9. Consideration must be given to setting up an in house fast track response facility so that abuses of Parliamentary Privilege against the good name of innocent individuals can be investigated within a very short time after the abuse has come to light and with no expense incurred by the individual defamed.

10. This could be administered by a division of the Parliamentary Standards Committee and a report generated with full public disclosure.

*21 January 2013*

## Archerfield Partners LLP

### *Introduction*

1. We welcome the opportunity to put forward evidence to the Joint Committee on Parliamentary Privilege (“the Committee”). We do so in response to the call for evidence with respect to the Green Paper on Parliamentary Privilege (“the Green Paper”).

### *Scope of submission*

2. Our purpose in providing this document is to provide a response to the question raised in the Green Paper: “Q16: *The Government does not think that any legislative change to restrict freedom of speech in proceedings in Parliament in respect of court injunctions is desirable or necessary. Do you agree?*”

### *Submission*

3. In short, we do agree with the Government’s view that any legislative change to restrict freedom of speech in proceedings in Parliament in respect of court injunctions is undesirable or unnecessary. However, we consider that the issue is one of considerable importance which should not be accorded insufficient weight such that it can be dealt with by submitting a simply ‘yes’ or ‘no’ answer.

4. The Green Paper plainly acknowledges that the question of court injunctions and parliamentary privilege is a topical one. We agree that is the case but do not intend to make specific reference to any cases or prior incidents in this submission unless necessary. What is clear is that as long as the court continues to make orders restricting the disclosure of information which a Member may then disclose in Parliament without sanction under the protection of absolute privilege, the balance of legal rights is a delicate issue which needs careful consideration from all concerned. Like other forms of privilege, the protection offered by Parliamentary Privilege is just that, a privilege, which must carry with it reciprocal responsibilities. Just as Parliamentary Privilege is an essential part of our parliamentary democracy, so is the rule of law.

5. In our submission, concerns are likely to arise when a Member of either House receives information relating to a court injunction (whether that be the identity of the parties to the underlying litigation, the enjoined information, or just the fact of the injunction). The principal (and obvious) concern is that they will very likely only receive one side of the story. This is, of course, to be distinguished from the position of the court which (wherever possible) will seek to hear from both parties. It is not difficult to envisage a person who is subject to an injunction seeking to find a way to circumvent that injunction, and disclose the enjoined information in a way which would see them escape liability before the court. Parliament should be well aware of that fact and consider whether they are being used or whether the position is being misrepresented.

6. The starting point in considering such issues must surely be that the making of orders is a matter for the court. The rights and wrongs of a particular order are matters for the court. If Members wish to raise important questions about a particular order or type of order being granted by the court (such as super-injunctions) then surely it ought to be considered how best to do so in general terms without completely undermining the

protection of an individual's rights which the court has carefully weighed and balanced. The situation may be different once a claim has concluded, but the situation is delicate while proceedings are active and ongoing.

7. It is of course a fundamental feature of the constitution of the United Kingdom that Parliament and the courts keep to their appropriate functions: Parliament makes the law; the courts interpret it. Freedom of speech is of fundamental importance in Parliament, and it has been said to be its "single most important parliamentary privilege", but it should not be abused. There is a balance to be struck between important principles:

"On the one hand, the rights of parties in legal proceedings should not be prejudiced by discussion in Parliament, and Parliament should not prevent the courts from exercising their functions. On the other hand, Parliament has a constitutional right to discuss any matters it pleases."<sup>22</sup>

8. The "sub judice" rule (which we do not need to set out or summarise) is a means of preventing abuse of parliamentary privilege. It is necessary to preserve proper relations between courts and Parliament and to ensure that trials are not prejudiced by Parliament.

9. This vital division of roles was of interest and concern to the recent Joint Committee on Privacy and Injunctions. It was raised, for example, with the Attorney-General on 16 January 2012. He was referred to his public statement that it "ill-serves the parliamentary process if court orders are openly flouted for no good reason" and asked what he considered might amount to a "good reason" for a parliamentarian to breach a court order restricting disclosure of private information? Mr Grieve's reply at Q1087 was as follows (set out for convenience):

"I can probably think of very few good reasons. I do not exclude the possibility that a good reason might exist, but, on the face of it, it is very hard to think of good reasons why such a thing should take place. Parliament is a court; there are principles and conventions of comity between Parliament as a court and the courts more generally. Parliament is the enactor of legislation, which it is the courts' duty to enforce and interpret. Therefore, for Parliament to undermine another court, one that is specifically tasked to do certain things in the context of our constitution, is a serious thing. Parliamentary privilege—...—is not that of the individual Member of Parliament; it is the privilege of Parliament and its component Houses to enable them to do their work. For orders to be flouted by MPs in the course of debate or questions, whether it is a breach of the sub judice rule, which I am aware is a breach of a standing order of the House, or, beyond that, breach of the principle of comity, seems to me to be an inherently undesirable thing. That is not to say there might not be—this is why I say "for good reason"—an extraordinary reason of national or public interest that completely overrides it in some instance, but it is quite difficult to see in the generality of things what that would be. That is why I think it very important that the principles of comity should be observed. Without it, you will end up with a situation of anarchy where the courts cannot do their work. I also think it would bring Parliament into disrepute."

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22 Joint Committee on Parliamentary Privilege, Report HC 214-I 1989-99 and HL 43-I 1998-99 (30 March 1999).

10. The courts also regard this separation as of considerable significance. In the context of the widespread concern about the court order made in the “Trafigura” case, the Lord Chief Justice made similar observations

“The absolute privilege for Members to speak freely in Parliament did not come without a price and previous generations fought, and indeed died, for it. It is a very precious heritage which, in my view, should be vigorously maintained and defended by this generation.

There are clear conventions about the circumstances in which Parliament will or will not discuss proceedings in court and I have no doubt these conventions will be followed so as to avoid any possible interference with the administration of justice. That is not because a court has sought to order it, but because Parliament has chosen in the public interest not to insist on its privileges.”

11. If the system does not work as intended, then it is of course for Parliament to inquire into the exercise of free speech in relation to its proceedings. If court injunctions are flouted or the sub judice rule disregarded then we cannot see why Parliament would not want to be seen to take it extremely seriously.

12. One way in which court injunctions may be undermined is via the giving of evidence to a committee which includes enjoined information. Similarly, third parties may be defamed in such evidence. If such evidence is published by Parliament, the effect is that any person whose rights have been infringed may be without recourse (with the attendant impact on their rights under Article 6 of the European Convention on Human Rights). There may be a perception that someone seeking an injunction in privacy has some wrongdoing to hide and the revealing by some members of Parliament of individuals who have sought the courts protection has added to that impression. However, it is a dangerous misconception to believe that this is always the position. Injunctions are of course often sought by people who are being victimised, blackmailed and harassed. There are injunctions in Family and Children proceedings. When Parliament undermines the protection given by the courts to these individuals there is likely to be genuine injustice and significant distress caused to someone who has already been victimised.

13. The House of Commons “Guide for witnesses giving written or oral evidence to a House of Commons select committee” includes:

“You should be careful not to comment on matters currently before a court of law, or matters in respect of which court proceedings are imminent. If you anticipate such issues arising, you should discuss with the clerk of the committee how this might affect the written evidence you can submit.”

This wording was used on the Call for Evidence to which this submission relates. The Guide for witnesses also includes this:-

“Although a committee will generally publish most or all of the written evidence it receives, a committee may exercise its discretion not to publish evidence where a submission is very long or contains material to which it is inappropriate to give the protection of parliamentary privilege (see ‘Committees and the operation of parliamentary privilege’, below). As indicated earlier, a committee may also exercise

its discretion not to publish a submission in whole or in part if it contains material which is subject to issues of confidentiality: you should therefore make sure any such issues are brought to the attention of the committee.”

14. How closely these warnings are monitored is unclear but it is the case that this guidance has been ignored in the past. One would naturally expect there to be careful scrutiny of material submitted to the Committee before it is published to the world at large in any event—but especially in circumstances where that material clearly contains information which is obviously on its face private and confidential, defamatory or relates to ongoing legal proceedings. The risk that a person might seek to use parliamentary privilege to make allegations against third parties, or to seek to circumvent due court process, is obvious. In addition to the well-established conventions and the “sub judice” rule, one must consider the careful scrutiny that is required before the court will grant an injunction to prevent publication of information; and of the importance of the remedy of an injunction. This is the primary – indeed, in many cases, the only – relief of any interest or potential benefit to the claimant in a privacy case.

15. If there is doubt that about evidence received, one would have thought it appropriate to act with caution, particularly if such evidence is to be published on Parliament’s website. If it appears as if there are serious and genuine concerns arising and Parliament does wish to consider publication of evidence likely to infringe a person’s legal rights, one would have thought that as a bare minimum attempt at fairness – an approach should be made to the party in question or their solicitors to obtain their side of the story and, at the very least, provide an opportunity to comment. If a national newspaper were to publish private information or defamatory allegations without first contacting the person who was the subject of them, we anticipate it would rightly be criticised. We make reference to the recommendations of the Select Committee on Culture Media and Sport, in its Report *Privacy, Libel and Press Standards* (February 2010): at [91-93] which included that giving the subject of an article prior notice of publication was “often crucial to fair and balanced reporting”; it recommended that the PCC Code of Conduct should be amended, so as to require pre-notification as the norm (subject to a “public interest” exception); and noting that failure to pre-notify should be a factor “aggravating” damages<sup>23</sup>. Without making such enquiries, or undertaking any form of investigation or verification, one is unable to ascertain whether claims are true or false or of where the merits lay between the parties to litigation.

16. One must also consider what is to happen in the event that private information or defamatory allegations are to be or are published under the protection of parliamentary privilege. There should surely be a secure channel available through which people can communicate their concerns and draw to Parliaments attention the fact that they have been misled (if that is the case) without the risk of wider dissemination (particularly in relation to complaints about private information being published) and without fear of their correspondence being disseminated to those it was not addressed to.

17. There is an ongoing debate about the publication of private information or confidential material on the internet, even where there is a court order prohibiting publication. The concerns about the wide access provided by internet publication apply to Parliament’s

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23 <http://www.publications.parliament.uk/palcm200910/cmselect/cmcmds/362/362i.pdf>

website, as to any other. Unlike a “blog”, Parliament is regarded as an authoritative source. The publication by Parliament of enjoined information is likely to lead others, including national and international media, to follow up on its publication and to take matters further (including linking it to other stories). It cannot be right that where the courts have granted an order enjoining the publication of information to prevent an individual being harassed or blackmailed (as will often be the case), Parliament (or a single Member) can be the means by which the information is legitimately reported elsewhere. It is one thing for Parliament to comment on enjoined information available all over the internet, it is another for it to happen the other way round.

18. We should make clear that we believe that parliamentary privilege is of fundamental importance. It is a very important and powerful tool for democracy. However, as with all powerful rights, those who benefit from them need to recognise that they come with duties and responsibilities, which must be taken seriously so as to ensure that they are not abused.

19. We consider that it is an “abuse” of Parliamentary privilege for a party involved in litigation to use a Committee for his own purposes, to seek to publish information which is covered by an injunction and/or to prevent the court’s orders from being effective. There should be a mechanism by which someone likely to be adversely affected by publication of a third party’s evidence to be given prior notice of publication. This is particularly so where there has been no questioning or scrutiny of the contents of a submission of evidence. Where there are two sides to an ongoing case, Parliament should listen to both sides (if only to find out if they are being seriously misled): it should not act as a conduit for one party, in ongoing contested litigation, particularly where that person is defendant to a claim relating to his publication of private information, threats, unwarranted demands for money and harassment.

20. Of course in the vast majority of cases, Parliament should observe the sub judice rule. Courts are set up to look at both sides of an argument: that is the essence of contested litigation. Parliament should leave such disputes to the courts, where there is proper protection for due process and the rights of *both* sides. To do otherwise is to risk there being no independent review of decision making and possible flagrant breaches of convention.

21. To conclude, we wish to make clear that we agree with the statement in the Green Paper that Parliamentary privilege is an essential part of parliamentary democracy. It is vital to ensure that Members of Parliament are able to speak freely in debates, and Parliament’s internal affairs are protected from interference from the courts. We also agree that no legislative changes are appropriate in relation to injunctions and super-injunctions where parliamentary privilege has been used to circumvent the injunction provided proper measures are in place to deal with such scenarios and punish those who seek to use Parliament for their own ends.

22. The Green Paper recognises that the possibility does arise that this protection can be ‘abused’ by wilful flouting of the law without repercussion. However, it states that the Government believes that in general the importance of the protection of the freedom of speech outweighs such concerns. As a broad statement we agree but the risk of abuse means that Parliament should take extreme care that abuse does not happen and when it does, as a result of Parliament being misled, that those who have done the misleading are

dealt with properly so as to provide a genuine deterrent to those that would use Parliament to defeat an injunction for their own ends. This is in line with the Government view that there is a responsibility on parliamentarians to exercise freedom of speech in a way which reflects the public interest. It cannot be in the public interest for individuals who are subject to legitimately granted injunctions to know that they can mislead Parliament into publishing information in an attempt to render that injunction useless and know that they will face no sanction.

23. While we agree that there should be no legislative change it is vital that Parliament recognises that this means that there can be (and has been) serious abuse of the Privilege in circumstances where Parliament has been misled and guard against it. As things stand it is open for an individual who has been enjoined from breaching another individual's privacy and harassing them to dishonestly persuade a Member that they are in fact a victim; and to mislead that Member about the nature of the injunction; and the truth of the factual position underlying it. Having been misled the Member may publish the enjoined information without notice to the individual who has sought the courts protection and cause significant distress. The individual who has sought the courts protection may contact Parliament to let it know that it is being misled – but it is possible that the communication will be leaked to the press. When the court subsequently finds that the injunction has been properly granted and that the individual enjoined has been harassing the other individual and threatening to publish their information in an attempt to obtain a financial advantage for themselves – Parliament will have simply allowed itself to be a further tool of harassment and has added to the victim's distress. It would seem that an individual who has misled Parliament in that way is currently unlikely to face any sanction.

24. In our submissions, the competing legal rights could and should be balanced by considering the following:

- a) Prior notification where possible so that Parliament can be sure it has not been misled about even the most basic of facts;
- b) Allow for the removal and/or amendment of information published by Parliament which is subsequently shown to have been submitted in breach of the sub judice rule or to contain enjoined information and/or a notice or warning or that information that it should not be relied upon; and
- c) Hold to account those who use Parliament simply as a tool to breach court orders (for instance, by misleading Parliament), possibly via provisions relating to contempt, to discourage others to see this as a consequence free way of breaching court orders.

*24 January 2012*

## Lord Lester of Herne Hill

This evidence is submitted in response to the Joint Committee's call for written evidence on the Parliamentary Privilege Green Paper. It is limited to two specific issues in the Green Paper: liability in defamation proceedings for reports of Parliamentary proceedings,<sup>24</sup> and section 13 of the Defamation Act 1996.<sup>25</sup> I sought to address these issues in my 2010 private member's Bill to reform the law of defamation,<sup>26</sup> and earlier this month tabled amendments to the Government Defamation Bill which would have reinstated the clauses from my Bill.<sup>27</sup> The Government have consistently taken the view that the matter is best left to a Parliamentary Privilege Bill, and to this Committee.

### *Liability in defamation proceedings for reports of Parliamentary proceedings*

1. Section 1 of the Parliamentary Papers Act 1840 prevents any civil or criminal proceedings in respect of a 'report, paper, votes or proceedings' published by order of either House. Section 2 confers similar protection on copies of such publications. Section 3 confers a lesser degree of protection on 'any extract from or abstract of' such publications, which must be published in good faith and without malice.

2. Newspaper reports which are not taken from Hansard are also protected at common law. *Wason v Walter*<sup>28</sup> established that, by analogy with reports of court proceedings, a publisher of a report of a parliamentary debate is protected at common law from actions for defamation. If the whole debate is published the protection is absolute; if less than the whole is published, the protection is qualified by the requirement that it is published without malice.<sup>29</sup>

3. Court proceedings now enjoy absolute privilege under section 14 of the Defamation Act 1996. Whereas section 15 confers qualified privilege on reports of the proceedings in public of a legislature anywhere in the world,<sup>30</sup> as well as material published by or on the authority of a government or legislature anywhere in the world.<sup>31</sup> The report must be fair and accurate and published without malice, and in the public interest.

4. *Wason v Walter* was decided by analogy with the privilege afforded to court proceedings, and Cockburn CJ stated –

“[given the] paramount public and national importance that proceedings of the Houses of Parliament shall be communicated to the public, ... to us it seems clear that the principles on which the publication of reports of proceedings of Courts of

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24 Chapter 8.

25 Paragraphs 183-192.

26 Defamation Bill [HL] 2010-2012, Clause 7.

27 Amendments 43 & 44

28 (1868-69) 4 QB 73

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

30 Schedule 1, paragraph 1.

31 Schedule 1, paragraph 7.



Justice have been held to be privileged apply to the reports of Parliamentary proceedings. The analogy between the two cases is in every respect complete.”<sup>32</sup>

The same protection should therefore be conferred on fair and accurate reports of Parliamentary proceedings as applies to court proceedings.

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

“[T]he protection given to the media by the 1840 Act and the common law itself should be retained. We consider, further, that the statutory protection would be more transparent and accessible if it were included in a modern statute, whose language and style would be easier to understand than the 1840 Act. We recommend that the 1840 Act, as amended, should be replaced with a modern statute.”<sup>33</sup>

The 1840 Act was considered more recently by the House of Commons Culture, Media and Sport Committee in their report *Press standards, privacy and libel*.<sup>34</sup> Referring to the 2009 case between Trafigura and the Guardian Newspaper, the Committee concluded that Parliamentary questions which had been tabled regarding the case were clearly covered by these provisions and would not therefore be covered by the then existing ‘super-injunction’ which prevented publication of any reference to the case.

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

“[T]he Guardian did not contend that the information which it proposed to publish would be confined to material within the scope of Section 3 of the [1840] Act; even if it had been, it would still beg the question whether a newspaper which is subject to an injunction can claim to be acting ‘bona fide’ within the definition of the Act if, rather than seek a variation, it chooses to publish material in breach of the injunction.”<sup>35</sup>

7. The Committee therefore concluded that –

“The free and fair reporting of proceedings in Parliament is a cornerstone of a democracy. In the UK, publication of fair extracts of reports of proceedings in Parliament made without malice are protected by the Parliamentary Papers Act 1840. They cannot be fettered by a court order. However, the confusion over this issue has caused us the very gravest concern that this freedom is being undermined. We therefore repeat previous recommendations from the Committee on Parliamentary Privilege that the Ministry of Justice replace the Parliamentary Papers Act 1840 with a clear and comprehensible modern statute.”<sup>36</sup>

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

33 Paragraph 374.

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

35 Ev 462, quoted at paragraph 99, vol I.

36 Paragraph 101

Neither Committee specifically addressed the question of whether privilege for reports of Parliamentary proceedings should be absolute or remain qualified.

8. In my Bill I took the approach of providing absolute privilege (in defamation proceedings) for fair and accurate reports of proceedings in Parliament.<sup>37</sup> This was endorsed by the Joint Committee on the Draft Defamation Bill on the basis that it is of fundamental importance that proceedings in Parliament can be reported upon freely by the press to ensure that people can discover what is being said and done by elected representatives on their behalf –

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

The Government response left the issue to the Parliamentary Privilege Green paper, which drew a different conclusion<sup>38</sup> –

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

9. But these are objections to a wider issue than that which I sought to address in my Bill. Liability for contempt of court raises particular practical issues, as this example illustrates. My Bill and respective amendments to the Government Bill would apply only to liability in defamation proceedings. Given the overwhelming public interest in access to information about Parliamentary proceedings, it is right that liability for fair and accurate reports of such proceedings should be limited in the same way as for court proceedings for the purposes of defamation claims. In my view this is not in fact a matter of Parliamentary Privilege which, as the Green Paper correctly states, is concerned with ensuring that MPs are able to speak freely in debates. Rather, it is to do with privilege in defamation cases, and the Defamation Bill would therefore have been the appropriate place to deal with it. The issues raised in the Green Paper with respect to contempt and privacy may be best dealt with in more detail by the Joint Committee on Parliamentary Privilege, or the Law Commission in their review of the law of Contempt of Court.

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37 Clause 7.

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

**Section 13 of the Defamation Act 1996: the Neil Hamilton amendment**

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

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

“The [problem] I have in mind arises in a case in which two or more Members are together concerned in conduct in respect of which one of them wants to sue for libel. How, in that case can one of them allow his conduct to be investigated by the court without at the same time exposing the conduct of his colleagues to investigation as well?”<sup>39</sup>

12. Further principled objections were raised by myself and others during debate, including the impropriety of dealing with such an important constitutional issue as an amendment to a Defamation Bill,<sup>40</sup> and the unjustifiable interference with free speech which would arise if a newspaper seeking to criticise an MP had no idea whether, or upon what basis, parliamentary privilege might be waived so as to establish the truth.<sup>41</sup>

13. Section 13 was strongly criticised by the 1999 Report of the Joint Committee on Parliamentary Privilege, chaired by Lord Nicholls of Birkenhead<sup>42</sup> as undermining the basis of privilege and creating indefensible anomalies –

“A fundamental flaw is that it undermines the basis of privilege: freedom of speech is the privilege of the House as a whole and not of the individual member in his own right, although an individual member can assert and rely on it. Application of the new provision could also be impracticable in complicated cases; for example where two members ... are closely involved in the same action and one waives privilege and the other does not. Section 13 is also anomalous: it is available only in defamation proceedings. ... The Committee considers these criticisms are unanswerable.”<sup>43</sup>

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39 HL Hansard 7 May 1996, col 28.

40 For example Lord Simon, col 30 & Lord Richard col 33.

41 Col 40.

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

43 Paragraph 69

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

“We recommend that the mischief sought to be remedied by section 13 ... should be cured by a different means. Section 13 should be replaced by a short statutory provision empowering each House to waive Article 9 for the purpose of any court proceedings, whether relating to defamation or any other matter, where the words spoken or the acts done in proceedings in Parliament would not expose the speaker of the words or the doer of the acts to any legal liability. Each House will need to consider appropriate machinery once the section has been repealed.”<sup>44</sup>

15. I would respectfully agree with the recommendations of this authoritative Report, and sought to give effect to them through clause 16 of my Bill and amendment 44 to the Government Bill.<sup>45</sup>

*30 January 2013*

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44 Paragraph 89

45 HL Hansard 17 January 2013 Col GC322

## Robert Whitfield

This submission by Robert Whitfield is as an individual member of the public/subject/citizen with no political affiliations.

This is my second *independent* submission to a Parliamentary Joint Select Committee. As such it should be considered by the Committee as a *straight bat, objective* submission, and not accepted as my personal assertions.

I must first refer the Committee to my earlier written submission to the Parliamentary Joint Select Committee on the Draft Defamation Bill. The reference for that submission is on that Committee's website page as memorandum EV63.

This submission is to complement that earlier submission with inclusions which should better resonate with this Committee's specific remit, which was prompted as a result of the report of that earlier Joint Draft Defamation Bill Committee, which also referenced this Coalition Government's proposals for this Parliamentary Privilege inquiry, also included in The Queen's Speech to Parliament-9<sup>th</sup> May 2012.

This submission to include:

- a) Further implications associated with my submission to the earlier Committee Inquiry.
  - b) Text of Article 9 of the Bill of Rights
  - c) Text of one of the remaining recognised Articles in Magna Carta.
  - d) Is there a conflict between Clause 9 of the Bill of Rights and the above quoted Article 40 of Magna Carta-The Great Charter?
  - e) Should more emphasis be explained and/or placed on the rights of those outside Parliament?
  - f) Equality to all under the law?
  - g) Conclusions.
- a) Above I refer back to my earlier submission to the Parliamentary Joint Select Committee inquiry on the Draft Defamation Bill-ref EV63. This additional interpretation associated with that submission-which was necessarily part-quoted therein to prevent repeat of original the injustice by naming/identifying the 'wronged' institution-indicated in that submission could imply that, and in some circumstances, the Privilege of Free speech can be, and/or has been, used as a *weapon* to inflict injustice on innocents'. Since such unjustified, arbitrary statements made by Members of the Legislature, without any factual input, or able to be supported by due proper research, considerable reputational damage can be inflicted on innocents', will this Committee make recommendations to consider parameters to be applied to Parliamentary Procedures preventing unsupported injustices? I refer the Committee to the statement made by The Speaker to the House of Commons on 27<sup>th</sup> May 2010, repeated in the April 2012 Green paper. In particular paragraph three which includes the last sentence which reads: "*I would encourage any Member to research carefully and to take advice before exercising this freedom in sensitive and individual cases*". In view of the above

suggestion that, Article 9 should not be used as a *weapon* since due proper research would have disclosed the statement referred to in my earlier submission would not have been made, or advice sought could have advised against its delivery. I draw the committee's attention to Mr Speaker's statement to the House on 9<sup>th</sup> May 2012. It is an ominous sign the requirement that Mr Speaker's statement to the House 27<sup>th</sup> May 2010: *I would encourage any Member to research carefully and to take advice before exercising this freedom in sensitive and individual cases*, repeated from above, also in italics, was not included in Mr Speaker's statement to the House on 9<sup>th</sup> May 2012. Since it may be considered Mr Speaker's statement carries considerable authority, is it possible Mr Speaker's removal of the above sentence from his statement to the House on 9<sup>th</sup> May 2012, further erodes citizens' *rights*, and reduces legitimate, necessary requirements for Members statements to be substantiated?

- b) Text of Article 9 of the 1689 Bill of Rights.

*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.*

- c) Text of Article 40 of Magna Carta-The Great Charter.

*To no one will we sell, to no one deny or delay right or justice.*

- d) In 'b' and 'c' above are understood to be verbatim copies of the words associated with each. In 'c',-Magna Carta-the words *right* and *justice* seem to conflict with Article 9 of the 1689 Bill of Rights, if agreed the latter allows unbridled statements, including defamatory statements, to be delivered in Parliament by its Members. Can they both be right? Many eminent and highly respected people, held in the highest esteem, have delivered lectures on Magna Carta-The Great Charter. Some have built reputations founded upon its words and interpretations. And, although many democracies are reputed to be founded on the principles in The Great Charter, are there limitations when those principles are applied to individuals? Does it allow itself to be interpreted as applying to 'one' and 'all' in equal measure? Or is it a 'guideline' and could be subject to possible narrower interpretations, and thereby possible manipulation? If one considers the latter, where could that leave innocents? Where would that leave the words *right* and *justice* in Magna Carta-The Great Charter? One may find it difficult to find the words in lectures on Magna Carta, where other-than the highest ideals are the intent. If Magna Carta applies to 'one' and 'all' narrow and negative interpretations would be misconceived. If not, beyond inclusion in the laws of Nations, does it have any relevance when applied to individual's *right* or *justice*?

The 1689 Bill of Rights is enshrined in law. It is revered by Parliamentarians because it allows them unfettered rights of free speech. If the interpretation associated with the text, as in 'b' above, allows unfettered, defamatory statements the law permits such. That is an inalienable right enshrined in law. However, without a *right of reply* does that *deny* right, as indicated in Article 40 of Magna Carta? And, if unfettered right to free speech and arbitrary statements by Parliamentarians, which also permits the inalienable right to defame innocents', does Parliament accept '*injustices*' will prevail?

I now draw the Committee's attention to Erskine May, chapter 13, page 233, ARTICLE IX OF THE BILL OF RIGHTS. The first paragraph indicates conflicts can arise about some

meanings associated with the *Parliamentary insistence on protecting the Privilege of Exclusive Cognisance of proceedings, and concern that judicial interpretation should not narrow the protection of freedom of speech which Article 1X affords*. The second paragraph introduces a judgement by the *Judicial Committee of the Privy Council*, which, after deciding it was necessary for them to ensure justice was done in the case to which it refers, to give a more definitive requirement for such a conflict it had to take into consideration Proceedings in Parliament. *Lord Browne-Wilkinson identified three potentially conflicting issues: Quote: first, the need to ensure that the legislature can exercise its powers on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the courts. Though the other two could not be ignored, the Committee was of the view that 'the law has long been settled, and of these three public interests, the first must prevail'. Article 1X is a provision of the highest constitutional importance, and should not be narrowly construed*. To refer to the first requirement, above, if it is a need to ensure the legislature can exercise its powers on behalf of its electors, with access to all relevant information, why is it possible for a Member of Parliament-legislator-not to be required to present facts, evidence or due proper research to support/substantiate the statements they deliver in Parliament? Surely this is a fundamental anomaly, and could allow for major errors to be accepted no matter the provenance, or none, of such statements? Is that not taking privilege beyond the acceptable? I will return to this below in 'f' and 'conclusions'.

- e) With the emphasis on the rights of Parliamentarians, and bearing in mind those more aware and informed outside parliament, should more consideration be given to promoting the rights and benefits to less-informed citizens particularly encouraging awareness of those institutions who have an active role in developing greater understanding of democratic principles and of British Parliamentary democracy? This suggestion was included in the Government's Green Paper. One hopes that, if very diverse opinions are submitted to this Committee that would indicate the way British democracy is practised should be inclusive and not feared.
- f) Is it a misnomer there is equality for all under the law. The presumption often repeated by some Parliamentarians that they are equally answerable under the law, the same rights under the law as citizens, could be considered a limited, narrow interpretation of 'equality' under the law. Could it be considered the interpretation associated with the 1689 Bill of Rights, although enshrined in law, has evolved/constructed to be unequal to all? Although Parliamentarians can consider themselves 'within the law', due to the interpretation above does the law itself create inequalities? In addition, with 'Exclusive Cognisance', without amendments being considered, Parliament can ensure the law remains unequal to all, and Parliamentarians retain their benefits associated with Parliamentary Privilege. Do the above demonstrate equality in law is a myth?

### **Conclusions**

It is widely promoted, not least in the Green Paper, that Parliamentary Privilege is the sole domain of Parliament-not Government, any political party or anything less than for the consideration of all Parliamentarians, constituted as one Institution. Therefore can one reason that *all and/or any* relevant points raised in submissions to this Parliamentary Privilege Joint Select Committee, as Parliament's representatives, should be part of the Committee's deliberations? Especially since the wider public outside Parliament can be

immensely affected by such privilege? It is my understanding, notwithstanding the points raised in 'a' above, evidence and facts in support of statements in Parliament are not a requirement. Hence in 'd' above (in italics), it seems accepted by Parliamentarians Parliamentary Privilege can be responsible by permitting injustices. yet in 'd' above the requirements identified by the Judicial Committee of the Privy Council, dispute that in *first, the need to ensure that the legislature can exercise its powers freely on behalf of electors, with access to all relevant information.* If it is the case that the legislature needs access to all relevant information to make a decision, why is it an individual Member of the legislature, in the delivery of statements to the House, no evidence, facts or due proper legitimate research is required to support/substantiate such statements? As in my earlier submission, and agreed therein by a very senior Parliamentarian, respected on all sides of the House and surely widely outside Parliament, abuse of privilege has increased in the modern era. Without reform, and if Members continue so to do, is Parliament being discredited, and its reputation damaged-from within? Referring to the 'call for evidence' Committee communication, do current Parliamentary standards meet expected requirements of the legislature? Could a reasonably improved culture requirement be applied to Members with the content of their statements delivered in the House? However, due to possible heated debates taking place, oral contributions in debates, without doubt any exchange across the Chamber should be given the widest margin possible, within the Code of Conduct. However, contributions in debate that have been prepared in text in advance of delivery, which is quite often, it is suggested such written contributions, due to greater consideration given to content, should be subject to greater scrutiny. I believe that last sentence is related to my earlier submission. Is that a matter of standards or procedures?

Magna Carta: yes or no? Clause 9: yes or no? Never the twain shall meet? Are they mutually compatible?

Although in this submission I've referred to and included my earlier submission that was mainly for reference purposes. With this Joint Select Committee's remit, one can reasonably consider, if accepted by the Committee, the additional references to Magna Carta and Clause 9 of the 1689 Bill of Rights, one of its main considerations could be the unwritten Constitution?

Given the simplicity of the words and their reasonably understood meaning in Article 40 of Magna Carta-Great Charter-and given the opaque complications in the meaning of the evolving Clause 9 of the Bill of Rights, and with the 800<sup>th</sup> anniversary nationwide celebrations of the introduction of magna Carta in 2015, what positive message can this Committee advance to meet a mutual understanding between Magna Carta-Great Charter-and Clause 9 of the 1689 bill of Rights? As a major Parliamentary Joint Select Committee a powerful message from this Committee could resonate throughout the United Kingdom and maybe beyond. Maybe Parliament's concerns with its privileges are not so 'inward-looking' and have less-limitations than may have first appeared?

In conclusion I draw the Committee's attention to a recent lecture delivered by a former head of one of the UK's Security services when explaining one of the major purposes for its existence. "...and to protect, explicitly, Parliamentary democracy. Let me repeat-to protect parliamentary democracy. Whatever Parliament does or says there can be no better protection for its existence and, thereby its privileges. If anyone has any concerns about the application and continuance of democratic principles, given the additional checks and



balances, as indicated by Parliamentary Select Committees inquiries such as this, one may assert such concerns have no foundation in the United Kingdom.

I respectfully offer this submission to this Committee and hope it will receive due consideration and a positive response.

*24 January 2013*

## Simon Cramp

1. I am a man in my early 40s and have followed politics and the political process since I was 14 when I first brought my first newspaper the guardian. I have a mild learning disability which in compassed dyslexia and dyspraxia which I will have all my life. and have contributed to government and select committees inquiry and meet member both members of the house of commons and lords as a charity trustee and chaired meeting and vice president of the royal society of medicine in learning disability section and been adviser to Ofcom on older and disabled people given my experience and advice on telecommunications and have advised peers vice president of menicap on amendment on bills before the house.

2. I just wanted to highlight some of the things I have done in the past but at the moment due to a heart attack I am unable to play an active role as I would like till I get back to full fitness . But can't wait to get back when I feel much better

3. If I may I want to make general comments on the areas you have outlined in your call of evidence

- The case for the codification of Parliamentary Privilege
- Parliamentary freedom of speech
- Exclusive cognisance (each House of Parliament's control of its own precincts and Proceedings)
- Parliamentary standards
- Reporting of Parliamentary proceedings

4. I would like to see the committee retain the right when a member of the public or expert gives evidence to a select committee or joint committee it still protected by parliamentary privilege as it important that it always important for them to have they say in political process . Also if some is found to fiddle there parliamentary expense we should not have the soap opera we had when the people concerned tried to hide behind parliamentary privilege is completed wrong and any criminal wrong doing is not acceptable and in code the parliamentary privilege it should be deemed criminal. and if it a slip of the tongue and slightly wrong how a MP presented an allegation to the house of commons using parliamentary privilege then there a world of difference between as what tends to happen in the recent parliamentary debates the opposition called for under Leveson report re the former secretary of state for culture media and sport was not the smarter move as the government have made accusations and it means apart from the real people like the non-celebrate who can't afford court case to get damages it feel like the rule of them and us and it makes politicians on the whole saga look really bad and they should in the country be better behaviour and try and work towards the speaker request to be a bit more grow up but I wonder if I want to be part of process when my MP doesn't respond to me . Or they act like they do and still act like god. They need to be remind why they are they and treat the public with respect and not children

5. And when is likely to be introduced this century I doubt it

6. And so I welcomed the chance to put a submission but not sure I will see a change in the law in my life time

*28 January 2013*

## Sir Robert Rogers KCB Clerk of the House of Commons

### *Introduction*

1. I am grateful to the Joint Committee for the opportunity to respond to its Call for Evidence on the Green Paper on Parliamentary Privilege (Cm 8318, April 2012). I also much appreciate the consultative approach the Government has taken to the development of its thinking on parliamentary privilege. Speaker's Counsel and the Clerk of the Journals, as senior House of Commons officials, assisted the team of Government officials on matters of fact as the Green Paper was being prepared but were not involved in any discussion of policy. However, I should make it clear that neither I, nor my predecessor as Clerk of the House, were consulted on the draft chapters in the Green Paper. As Ministers are aware, my own views on the matters raised in the Green Paper do not necessarily accord with theirs.

2. The genesis of the Green Paper lay in the incoming Coalition Government's wish to ensure that parliamentary privilege could not be misused as a defence in cases of serious wrongdoing by a Member.

3. At the time there were concerns in some quarters that three Members and a Peer accused of criminal offences might be protected by privilege against successful prosecution.

4. To the surprise of very few, the Supreme Court gave this argument short shrift in its judgment in *R. v Chaytor*,<sup>46</sup> conclusively removing the apparently most pressing need for legislation.

5. I have considerable concerns about legislating on parliamentary privilege, and I think it reasonable to ask whether, with the main driver for such legislation removed, there is any purpose in doing so.

### *Chapter 1: Overview and general approach*

6. I strongly welcome the overview and general approach in Chapter 1 of the Green Paper. As the Government points out (Green Paper paragraph 18), Parliamentary privilege is part of the law, rather than something that puts Members of either House above the law. It is worth observing that privilege long predates the Bill of Rights 1689.<sup>47</sup> In the preceding centuries privilege was *asserted* by Parliament, not *conferred* by law. The Bill of Rights simply restated the situation as part of the comprehensive constitutional settlement upon the departure of the Stuarts.

7. In general the Government does not see enough evidence of problems in practice to justify a comprehensive codification of privilege in a Parliamentary Privilege Act along the lines of the 1987 Australian Act, which would inevitably have other consequences that may not be currently foreseen. As the Green Paper says (paragraph 39), since 1689 the boundaries of parliamentary privilege in this country have in practice largely been determined by the courts, within the framework set by the Bill of Rights, the (Scottish) Claim of Right Act and pre-existing common law. I agree with the Government that the

46 [2010] UKSC 52. This was also the view of Saunders J and the Court of Appeal below.

47 See *Haxey's Case* (1397) in which a Member introducing a Bill could not be found guilty of treason. And in 1541 the then Speaker included in his petition to the King the freedom of speech as one of the *ancient rights* of the House.

boundaries of parliamentary privilege have for the most part been very clear, and its operation has not been sufficiently problematic to justify such a radical departure from the UK's basic constitutional underpinning.

8. It is difficult—or impossible—to predict what the overall effect would be of expressing parliamentary privilege in statute. In essence, a number of different principles of statutory interpretation would operate on a new statute.

9. There is a well-established judicial reluctance to innovate or to extend the common law in relation to areas of law that have been overtaken by statute; in particular, there is a constitutional requirement of some judicial deference to Parliament's primary responsibility for deciding the means chosen to deal with a particular social or political problem and, even in an area that has once been fertile ground for common law development, the fact that Parliament has determined where to set the boundaries of legislative intervention will make the judges reluctant to continue innovating themselves.

10. But it is the responsibility of the courts to apply statute, and to determine questions about how it is to be construed; which is very much the business of the judiciary. Any new statute about privilege would be the subject of intense scrutiny by all kinds of political and social interests, and it is inconceivable that the text would not, however carefully crafted, leave ample room for actual or pretended misunderstandings and ambiguities, which would all have to be resolved through the courts; and the stakes would be high.

11. The courts would, of course, be bound to search for the legislative intent, so that in applying and construing the statute they would be searching for Parliament's intentions rather than developing their own—but demonstration of legislative intent is an inexact science that always, and particularly in an area of this magnitude, leaves considerable room for manoeuvre. The operation of the presumption against interference with the common law means that the courts would be able to reassert principles of the old common law wherever they were not explicitly and inescapably replaced, while the interpretative function would, in effect, enable the courts to create a new common law, based on the statute but not necessarily taking it in Parliament's or the Government's actually intended direction. Although in theory the manner and form of in which the new statute was cast would be able to, and should, give a steer to the courts as to how far to reflect or depart from the pre-existing common law, in practice that is far easier said than done.

12. There would also be issues of legislative construction arising out of human rights, and not impossibly European Union, considerations. Although a new statute on privilege would undoubtedly fall to be recognised as a constitutional statute and would therefore be protected to a considerable extent from unwitting interference by the application of earlier or later statutes (both under the rule in *Thoburn*<sup>48</sup> and as a matter of legislative construction first principles), it would not be automatically immune from section 3 of the Human Rights Act 1998, and any attempt to introduce an express exception would be politically controversial and unattractive. This, with freedom of expression being a Convention right, would introduce another layer of both complexity and unpredictability into the application of the Act.

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48 *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

13. Uncertainty as to judicial development and application of the Act could, of course, be constrained to some extent by the inclusion of express provisions, but the danger there is that it is inevitable that the list of exceptions and restrictions will be found to be incomplete or deficient in some way, and the judges would again be invited and obliged to fill the gaps.

14. The changing practice of Parliament would also be a factor. To take one example, forty years ago select committees operated in a way that would have been immediately recognisable to their predecessors a century before. In recent years select committees have increasingly used new media, techniques and practices, and will no doubt continue to do so. “Freezing” parliamentary practice for the purpose of—for example—defining closely what constitutes a proceeding would, I suggest, be overtaken by events.

15. Overall, encapsulation in statute would inevitably replace the present degree of flexibility that is largely vested in the two Houses with an unpredictable and uncontrollable layer of judicial discretion.

16. Before leaving this aspect, it may be useful to comment on the Australian Parliamentary Privileges Act 1987, often prayed in aid by codification enthusiasts. That Act was passed in direct response to concern that the Supreme Court of New South Wales was allowing witnesses in a criminal trial to be cross-examined as to their earlier evidence to a Parliamentary Committee. No problem of this sort has arisen in the UK jurisdiction. It is also worth remarking that the Australian Act operates only at Commonwealth (Federal) level. I am not aware of parallel State legislation; if the 1987 Act is of such utility, it is perhaps odd that no similar legislation has been passed at State level. (Incidentally, in the Canadian jurisdiction, expert opinion is strongly against codification.)

17. In summary, therefore, I strongly agree (Green Paper Q1) that the case has not been made for a comprehensive codification of parliamentary privilege.

## PART ONE: FREEDOM OF SPEECH

### *Chapter 2: Freedom of speech: general issues*

18. It follows from what I say above that in my view it is not necessary, and probably not desirable, that “proceedings in Parliament” should be defined in legislation (Green Paper Q2). The decision of Popplewell J in *Rost v Edwards*<sup>49</sup> that registers of Members’ declared interests were not proceedings in Parliament was, I suggest, ill-founded. It has been criticised in passing by higher judicial authority in *Prebble v Television New Zealand*.<sup>50</sup> I therefore dissent from the statement in Green Paper (paragraph 54) that the current law is unambiguous and I look forward to Popplewell J’s decision being reversed in due course.

19. On constituents’ communication with Members, I recognise the paramount importance to Members that those whom they represent ought not to be prevented from seeking their help or from passing on their views. In his statement to the House on the opening day of the present Session, Mr Speaker said that “It is also important that our constituents feel free to come to us no matter what the circumstances, and that they suffer no disadvantage as a result”.<sup>51</sup> There will be tensions between the constituent’s right to

49 [1990] 2 QB 460.

50 [1995] 1 AC 321.

51 HC Deb 9 May 2012 column 2.

approach their Member and the constituent's other potential duties, perhaps as an employee or a party to court proceedings. I believe it is appropriate for the courts to continue to accord a qualified privilege in the law of defamation to both Members and constituents as far as correspondence and other communications are concerned, always subject to the general and absolute privilege of Members (and witnesses) in actual proceedings in Parliament. On balance, I am inclined to agree with the Nicholls Committee (Green Paper Q3) that the current protection of qualified privilege for Members' correspondence is sufficient.

20. I agree with the Government (Green Paper paragraph 82) that it is neither necessary nor desirable to define "court or place out of Parliament", as there is no evidence that this phrase is not generally well understood. The Leveson inquiry, for example, was such a 'place', as it was a judge-led inquiry with statutory powers, and so it rightly refrained from re-hashing select committee evidence and reports, or parliamentary debates on phone hacking and freedom of the media. The Scott inquiry on Arms to Iraq, which had no statutory basis and did not exercise quasi-judicial powers, was not.<sup>52</sup> Accordingly, I rather think that "court or place out of Parliament" should not be defined in legislation (Green Paper Q4).

21. On the use of parliamentary proceedings in the courts, I have observed over recent decades the encroachment of the courts into territory which previously they would have avoided. The decision of the House of 31 October 1980 to allow reference to be made in court proceedings to the Official Report and Reports and evidence of Committees without first petitioning the House for permission to do so carried a very explicit rider "re-affirming the status of proceedings in Parliament confirmed by article IX of the Bill of Rights".<sup>53</sup>

22. The 1992 *Pepper v Hart* judgement allows only as a last resort, in order to help a court resolve a demonstrable ambiguity in an Act, reference to a Minister's prepared exposition of the Bill's intent, as delivered in debate. I have the impression that the nuances of that original judicial decision can be overlooked in a somewhat informal approach to the use in judicial proceedings of proceedings in Parliament, on the basis that to repeat, or even analyse, select committee reports (for example) does not amount to "impeaching or questioning". The UK Supreme Court's *Chaytor* judgement itself is by no means immune from this attitude, as exemplified by its copious use of the Report of the Nicholls Committee and indeed its reference to a private note of procedural advice from my predecessor to the Speaker.<sup>54</sup> While we remain vigilant to react (and to intervene) whenever Parliamentary proceedings appear to be used in evidence in court, I am not convinced that the situations when the courts can use proceedings in Parliament should be set out in legislation (Green Paper Q5).

23. I have been able to discuss these and related issues with senior members of the judiciary over the last year, and it is clear to me that there is a welcome appreciation, at the highest levels of the judiciary, of possible Parliamentary concerns.

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52 Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions, HC 115 of Session 1995–96).

53 House of Commons Journal, Volume 236, Session 1979–80, page 823.

54 See [2010] UKSC 52 at paragraphs 54 to 59.

### **Chapter 3: Freedom of speech and criminality**

24. I have grave reservations about the draft clauses attached to this Chapter of the Green Paper. The freedom of speech in Parliament is a cardinal principle of the United Kingdom's constitutional arrangements.

25. As I do not believe that the protection of privilege should be disappplied in cases of alleged criminality to enable the use of proceedings in Parliament as evidence (Green Paper Q6), I am reluctant to engage further with the linked hypothetical and dependent questions in the Green Paper (Q7, Q8, Q9, Q10, Q11, Q12, Q13, Q14 and Q15).

26. The most unwelcome provision in the drafting of the Green Paper's clauses comes in sub-section (1) of the second draft clause: "*The Minister may by order made by statutory instrument amend the Schedule to this Act*". However plausible the safeguards hedging this provision,<sup>55</sup> the possible threat, in circumstances yet to be identified, from the Executive to Parliament's exercise of the fundamental constitutional principle freedom of speech is of real concern.

27. I can only echo the words of my distinguished predecessor Sir William McKay, quoted in the Green Paper (paragraph 100), which I take to have much wider application than the context in which they were first uttered: the chilling effect would be "too high a price to pay for the remedying of a very, very serious but very rare mischief".<sup>56</sup> I would be happy to provide the Joint Committee with a detailed analysis of the draft clauses as a whole, rather than burden this Memorandum with a great deal of technical detail.

### **Chapter 4: Freedom of speech and civil law**

28. The Joint Committee on Privacy and Injunctions, like other committees before it including the Nicholls Committee, was reluctant to introduce a new rule banning the breach of court orders in debate. As quoted in the Green Paper (paragraph 172) the Joint Committee on Privacy and Injunctions concluded that "the threshold for restricting what Members can say during Parliamentary proceedings should be high. We do not believe that the threshold has yet been crossed".<sup>57</sup> I doubt that this is the definitive end of the matter; no doubt Parliament will have to return to this matter in due course. Comity between Parliament and the courts is very much a two-way street, and it is possible that eventually the House will adopt a resolution parallel to the *sub judice* resolution along the lines set out in my evidence to the Joint Committee on Privacy and Injunctions, which I have made available to the present Joint Committee with this Memorandum.<sup>58</sup> Any solution to the question of respect for court orders ought in my view to be a matter for the Houses themselves, so naturally I agree with the Government that legislative change to restrict freedom of speech in proceedings in Parliament in respect of court injunctions is neither desirable or necessary (Green Paper Q16).

29. Dissatisfaction with section 13 of the Defamation Act 1996 originated with its enactment and, it can be argued, provided the original reason for creating the Nicholls

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55 Such as the proposed use of the affirmative procedure.

56 Report of the Joint Committee on the Draft Corruption Bill, Session 2002–03, HL Paper 157 / HC 705, paragraph 124, page 43.

57 Joint Committee on Privacy and Injunctions, First Report of Session 2010–12, HL Paper 274 / HC 1443, paragraph 230.

58 Joint Committee on Privacy and Injunctions, First Report of Session 2010–12, written evidence.



Committee. The approach taken in that hastily-inserted clause to allow an individual Member to waive parliamentary privilege as far as he was concerned was in my view misconceived, as the freedom of debate properly belongs to the House as a whole and ought not to be dispensed with to suit the personal claim of an individual Member. I recognise that section 13 has hardly been used, and attracted no attention in the Joint Committee on the draft Defamation Bill, but my preference would be for the repeal of this provision, without replacement (Q17 and Q18 of the Green Paper).

30. I referred earlier to the Leveson inquiry, which is mentioned at paragraph 194 of the Green Paper. I agree with the Government (Green Paper paragraph 197) that even though such an inquiry cannot take notice of statements made in Parliament, that does not prevent the public drawing their own conclusions, nor does it prevent the inquiry from asking questions similar to those that were asked in Parliament. Thus I would not favour a general power for each House to waive the protection of privilege to permit inquiries to consider evidence given in proceedings (Green Paper Q19).

## PART TWO: EXCLUSIVE COGNISANCE

### *Chapter 5: Application of legislation to Parliament*

31. The Nicholls Committee was clear that Parliament itself is not a statute-free zone. As the Green Paper (paragraph 205) says, the Nicholls Committee recognised the need for a dividing line between the internal activities of the House which were protected by privilege and those that were not. The Nicholls Committee considered that, while there are cases on the boundary between the two areas which are difficult to categorise, the protection of privilege should be given only to activities that are “so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament’s sovereignty as a legislative and deliberative assembly”.<sup>59</sup>

32. In its decision in *Chaytor*, the UK Supreme Court commented on the *Herbert* case<sup>60</sup> but did not have (or at any rate, it did not take) the opportunity to reverse that judgement that the House’s then Refreshment Committee was not bound by the Licensing Acts in deciding the opening times for bars in the House of Commons. The Green Paper quotes the President of the Supreme Court in *Chaytor* as saying that the presumption following *Herbert*, that statutes do not apply to activities within the Palace of Westminster unless they expressly provide to the contrary, is “open to question”.<sup>61</sup>

33. As the Government regards the current state of the law as satisfactory, and does not believe there is a need to bring forward draft legislation at this time, the Joint Committee might conclude that there is no need for legislation to clarify the extent of Parliament’s privilege to organise its internal affairs (Q20 in the Green Paper). I suggest that any such attempt to legislate would encounter the difficulties and hazards I outlined in paragraphs 8 to 15 above.

<sup>59</sup> Joint Committee on Parliamentary Privilege, Session 1998-99, paragraph 247.

<sup>60</sup> *R v Graham-Campbell ex p Herbert* [1935] 1 KB 594.

<sup>61</sup> [2010] UKSC 52 at paragraph 78.

## Chapter 6: Regulation of Members

### *Recall of MPs*

34. The Green Paper (paragraph 227) refers to the Government's proposal to give constituents the power of recall by petition, where a Member is convicted in the United Kingdom of an offence and receives a custodial sentence of 12 months or less, or where the House of Commons resolves that a Member should face recall. I am making available to the Joint Committee my written evidence submitted last July to the House of Commons Political and Constitutional Reform Committee.<sup>62</sup> In its Report, the Committee recommended that the Government abandon its plans to introduce a power of recall and use the parliamentary time this would free up to better effect.<sup>63</sup> The Coalition Mid-term Review reaffirmed the Government's intention to bring forward legislation in this Parliament on this matter,<sup>64</sup> a commitment which was re-iterated in oral questions by the Deputy Prime Minister.<sup>65</sup>

35. I welcome the Political and Constitutional Reform Committee's endorsement of my advice that the second recall condition (a resolution of the House) should not be trammelled by any qualification on the face of the Bill, lest the House's decision in particular case be subjected to questioning in court. The House's own process should not in my view be subject to statutory constraints, but rather remain entirely within the House's exclusive cognisance.

36. If the Government's proposals are enacted, then it would be imperative to ensure that the actual process by which the House decision was arrived at in particular case was impeccably fair —see paragraph 34 of my written evidence to the Political and Constitutional Reform Committee. The seriousness with which the House already takes the need for fairness in its self-regulatory disciplinary process has been underlined recently by the addition of lay members to the Committee on Standards.<sup>66</sup>

### *Lay members*

37. In the Green Paper (paragraphs 232 to 244) the Government sets out the background to the Standing Order changes adopted on 12 March 2012 providing for the division of the House of Commons Committee on Standards and Privileges into separate Committees of Privileges and on Standards respectively, and the appointment of lay members to the latter committee only. In his evidence to the House of Commons Procedure Committee, my predecessor Sir Malcolm Jack comprehensively addressed the concerns raised by the proposed introduction of lay members.<sup>67</sup>

62 House of Commons Political and Constitutional Reform Committee, First Report of Session 2012-12, *Recall of MPs*, HC 373.

63 House of Commons Political and Constitutional Reform Committee, First Report of Session 2012-12, *Recall of MPs*, HC 373, paragraph 89.

64 *The Coalition: together in the national interest*, 7 January 2013, page 39.

65 HC Deb 8 January 2013, column 140.

66 Under Standing Order No. 149A, Sharon Darcy, Peter Jinman and Walter Rader were appointed by the House on 13 December 2012, after a fair and open competition, to the Committee on Standards with effect from 7 January 2013.

67 House of Commons Procedure Committee, Sixth Report of Session 2010-12, *Lay membership of the Committee on Standards and Privileges*, HC 1606.

38. The House will be able to judge in the light of experience whether the inability of the Committee on Standards lay members to cast votes in committee will affect their capacity to enhance public confidence in the House's disciplinary process. My view is that the lay members are in a constitutionally proper but very strong position, in that the Committee may not meet without at least one of them being present and may not report until any of the lay members present who wishes to add a paper expressing his or her own views has done so.

39. I agree with the Procedure Committee that the solution it arrived at, which falls short of appointing lay members as the equals of Members of Parliament on the Committee, answers the difficulties over parliamentary privilege.<sup>68</sup> Accordingly, my answer to the Green Paper's Q21 ("*Would you support legislation that clarified that the privileged status of proceedings of the Committee on Standards in the House of Commons would not be affected by the granting of full voting rights to lay members?*") would be No.

40. If the Joint Committee were to give serious consideration to the Green Paper's draft Clause on lay members of the Standards Committee (and I trust it will not), I would point out that it purports to confer a statutory power on the House to decide who shall vote in its proceedings. To introduce the principle that the right to vote in proceedings is conferred by statute would be a clear inroad into exclusive cognisance. Not only could it provide a platform for further extension, by possible judicial interpretation perhaps, but it might lead also to the Government of the day being tempted to use its (perhaps slender) legislative majority to bolster its strength in the House by adding any number of "experts" with full voting rights to committees, including committees on bills.

### **Chapter 7: Select committee powers**

41. The Committee has already seen the written evidence which I submitted last July to the House of Commons Liaison Committee. In its Report<sup>69</sup> the Liaison Committee looked forward to the establishment of the present Joint Committee, was not persuaded that the disadvantages of enshrining parliamentary privilege in statute would outweigh the benefits, and concluded that Parliament should set out a clear, and realistic, statement of its powers — and perhaps also its responsibilities — in a resolution of the House and set out in more detail in Standing Orders how those powers are to be exercised (see text box).

#### **Extract from House of Commons Liaison Committee's Report**

(HC 697 of Session 2012-13)

133. We are expecting a joint committee of both Houses to be established to consider the options set out in the Parliamentary Privilege Green Paper. We expect to be represented on that joint committee, and do not wish to prejudge its conclusions, but it may be helpful if we give an indication here of our thinking. **We are persuaded that the disadvantages of enshrining parliamentary privilege in statute would outweigh the benefits.** A Privilege Bill might undermine the

<sup>68</sup> House of Commons Procedure Committee, Sixth Report of Session 2010-12, *Lay membership of the Committee on Standards and Privileges*, HC 1606, paragraph 50.

<sup>69</sup> House of Commons Liaison Committee, Second Report of Session 2012-13, *Select committee effectiveness, resources and powers*, HC 697, paragraphs 133 to 135.

centuries old principle that Parliament and the courts should operate independently, threatening the fundamental tenets of our constitution as set out in the Bill of Rights. In practical terms, we are concerned that — if the courts were involved in deciding if someone should be punished for refusing to appear before a committee, or lying, or refusing us written information — they would be drawn into questioning how Parliament and its committees operate ("proceedings in Parliament"), and would be unlikely to enforce parliamentary privilege unless Parliament and its committees followed the kind of standards of process and evidence that apply in the courts. This would be both wrong in principle and impractical. MPs would have to be displaced by lawyers trained to conduct impartial cross-examinations. Select committees are not courts of law. Their effectiveness rests upon the direct involvement of their members and upon their ability to act swiftly and informally.

134. There are two points of view on whether it is now necessary to take some action: either

- a) doing nothing is no longer an option: it is only a question of time before our powers are challenged; or
- b) recent problems have not been severe and either possible solution would bring more disadvantages than advantages.

135. On balance, we conclude that, at the very least Parliament should set out a clear, and realistic, statement of its powers — and perhaps also its responsibilities — in a resolution of the House and set out in more detail in Standing Orders how those powers are to be exercised. We note the Clerk of the House's view that this might not be fully effective, but this would at least show Parliament's determination to retain the powers it has within the "exclusive cognizance" of Parliamentary Privilege. Evidence of such determination is altogether lacking at present. We look forward to the Joint Committee's conclusions.

## PART THREE: OTHER PRIVILEGES

### *Chapter 8: Reporting of parliamentary proceedings*

42. The Parliamentary Papers Act 1840 was a restoration in statute of the position that, in the view of the House of Commons at least, obtained until the decision of the courts in *Stockdale v Hansard*.<sup>70</sup> The Act provides absolute immunity for the publishers of papers ordered to be published by the House, and a qualified privilege for publishers of extracts from or abstracts of House papers—the qualification being that the publication must be bonâ fide and without malice.

43. The Green Paper's draft clauses (on pages 75 and 76) are restricted to the rebalancing of the burden of proof in favour of reporters, and a further unambiguous protection for broadcasts of proceedings whose broadcasting has been authorised by the House together with a qualified protection for broadcasts of parliamentary proceedings not authorised by

70 [1837] 112 ER.

the House. The Government has sought views, in the light of the recommendations of the recent Joint Committees on Privacy and Injunctions<sup>71</sup> and on the draft Defamation Bill,<sup>72</sup> as to whether there are other changes which could be made to the law that would clarify the extent of protection for publishers, while still protecting individuals' rights.

44. While I have no objection to the intention underlying the drafting of the proposed clause, I very much welcome the Government's view that the existing conditions in common and statute law that reports of parliamentary proceedings should be made in good faith and without malice are crucial (Green Paper, paragraph 311). This is on the same lines as my written evidence to the Joint Committee on Privacy and Injunctions, in which I expressed my view that it would be essential that any recasting of the 1840 Act continued to make protection conditional upon acting with good faith and without malice.

### **Chapter 9: Miscellaneous issues**

#### *Freedom from arrest in civil matters*

45. The Government agrees (Green Paper, paragraph 318) with the Nicholls Committee that the privilege of freedom from arrest in civil matters ought to be formally abolished. It does not appear to me that there would be any untoward consequences for Parliament from taking such a step.

#### *Mental Health Act 1983*

46. Mr Gavin Barwell's Mental Health Discrimination (No.2) Bill, which was passed by the Commons on Friday 30 November 2012, has been taken up by Lord Stevenson of Coddenham and received its Second Reading in the House of Lords on Friday 18 January and had its order for commitment to a Committee on the whole House in the Lords discharged on Monday 4 February 2013, as no amendments to the Bill had been tabled. The Bill would repeal section 141 of the Mental Health Act 1983, removing the provision under which Members of Parliament lose their seats if they are detained under the Act for more than six months. It would also abolish any common law which disqualifies a person from membership of the House of Commons on grounds of mental illness. The Speaker's Conference on Parliamentary Representation<sup>73</sup> saw a danger that section 141 might deter Members from admitting mental health problems and seeking suitable treatment, and that, from a purely medical point of view, the section might not operate in the best interests of Members. The Government agreed with the Speaker's Conference that section 141 should be repealed as soon as practicable.

#### *Exemption from attending court as a witness*

47. The Green Paper asks (Q30) whether there is a continuing case for Members' exemption from attending court as a witness. I am not aware of any recent cases where the exercise of the courts' subpoena power has interfered with the conduct of Parliamentary business, or caused insuperable difficulty for any Member. The Government cites the Nicholls Committee's view that courts are used to accommodating other witnesses, such as

71 Report from the Joint Committee on Privacy and Injunctions, Session 2010–12, HL Paper 273/HC 1443.

72 Report from the Joint Committee on the draft Defamation Bill, Session 2010–12, HL Paper 203/HC 930-I.

73 HC 239, January 2010.

surgeons, who have duties elsewhere and notes that, since the commencement of the Criminal Justice Act 2003, Members have been liable for jury service. Many of us can vividly recall the fate of a Government being decided by a single vote; the Joint Committee will no doubt take a view on whether the potential hazard in Members having to seek permission, whether as juror or as a witness, to be allowed to exercise their Parliamentary duties instead of being in court, is one that should be accepted.

*Service of court documents within the precincts*

48. On the personal service of court documents, the Nicholls Committee actually suggested a minor extension of parliamentary privilege, to extend the ban on service in the precincts to cover every day, irrespective of the sittings of the House. As modern practice in serving documents by post seems perfectly adequate, I would suggest that the Joint Committee might concur with the Nicholls Committee (Q31 in the Green Paper) and there is no need to allow the serving of court documents in person within the precincts of the Palace on any day.

*Abusive contempts*

49. The Government asks (Q32 in the Green Paper) whether there is a continuing case for Parliament to retain a power to find individuals guilty of contempt on the basis of insulting or disrespectful language. The Government recognises the decision that an individual has committed an abusive contempt is one for both Houses, so there would be no need for legislation to abolish abusive contempts, but suggests that both Houses may wish to consider formally resolving that they will not in future find individuals guilty of committing “abusive contempts.” The House has long recognised that its dignity is normally best served by not deigning to take formal notice of abuse in the media or elsewhere; there seems no merit in removing a reserve power by passing such a blank-cheque Resolution.

*5th February 2013*

## David Beamish Clerk of the Parliaments

### *Introduction*

1. I am grateful to the Joint Committee for the opportunity to submit written evidence to this inquiry. My evidence follows broadly the same structure as the Government's Green Paper on parliamentary privilege,<sup>74</sup> addressing the meaning of "proceedings in Parliament", freedom of speech, exclusive cognisance and other privileges in turn. Where appropriate, I have sought to provide answers to the questions posed by the Government. At the end of the paper, I turn to the issue canvassed in the introductory chapter to the Green Paper, namely whether the case has been made for a comprehensive codification of parliamentary privilege.

2. I have had the benefit of seeing the written evidence submitted by the Clerk of the House of Commons, Sir Robert Rogers, in draft. I associate myself with much of his analysis, for which in some areas I have simply indicated my support, rather than replicating it. Where there are differences of emphasis between us, I have set out my views more fully.

### *Definition of "proceedings in Parliament"*

3. The Green Paper outlines a number of areas of possible ambiguity around the term "proceedings in Parliament". As Lord Rodger of Earlsferry noted in his judgment in *R v Chaytor*, Article 9 of the Bill of Rights 1689, in which this term is used, reflected Parliament's determination to protect "matters cognizable only in Parliament" from interference by either the Crown or the courts.<sup>75</sup> The key questions are thus (a) whether the principle that "proceedings in Parliament" are "cognizable only in Parliament", is sufficiently clear and understood, and (b) whether there are adequate protections in place to ensure that Parliament's exclusive cognisance in respect of such proceedings can be defended—in effect, whether an enforcement mechanism is needed.

4. On the first of these questions, the Green Paper concludes that "the current situation is satisfactory", and states that the Government "does not plan to legislate in this area".<sup>76</sup> I cannot entirely agree with this analysis. In particular, I endorse the view of the Clerk of the House of Commons that the decision in *Rost v Edwards* that registers of members' declared interests were not proceedings in Parliament is open to question. But more generally, even if the current understanding of the term "proceedings in Parliament" is broadly satisfactory, the process by which it has evolved and continues to evolve is far from satisfactory.

5. The key issue is that what constitutes a "proceeding in Parliament", thereby engaging the protection afforded by Article 9 of the Bill of Rights, is now, by virtue of Article 9, a matter of statutory interpretation, and therefore the responsibility of the courts. My predecessor, Sir Michael Pownall, wrote in March 2010 to the solicitor acting for Lord Hanningfield as follows:

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74 *Parliamentary Privilege*, Cm 8318. Referred to hereafter as "the Green Paper".

75 See *R v Chaytor and others* [2010] UKSC 52, paragraphs 102-104.

76 Paragraph 62.

“Article 9 limits the application of parliamentary privilege to ‘proceedings in Parliament.’ The decision as to what constitutes a ‘proceeding in Parliament’, and therefore what is or is not admissible as evidence, is ultimately a matter for the court, not the House.”

Lord Phillips of Worth Matravers, in his judgment in the case of *R v Chaytor*, quoted these words, with the following comment: “This statement was correct. It applies as much to the House of Commons as to the House of Lords, and to an issue as to the scope of the exclusive cognisance of Parliament as it does to an issue as to the application of article 9.”<sup>77</sup>

6. I do not question this clear statement of the role of the judiciary in determining the extent of parliamentary privilege. But reliance upon the judiciary to interpret the protection afforded by Article 9 carries a risk, illustrated by the inroads made by the courts in recent years into our former understanding of the terms “questioned” and “impeached” in Article 9.

7. The Green Paper cites a number of landmark cases, to illustrate the extent to which the courts are able to rely upon “proceedings in Parliament”; it then states that “in each case, the courts are interrogating matters of fact. These uses of parliamentary materials by the courts are widely accepted in Parliament, Government and the courts as representing sensible, pragmatic positions.”<sup>78</sup> This is an over-simplification: in recent years the Speaker and on occasion the Clerk of the Parliaments have had to intervene in a number of cases, sometimes at very short notice, with a view to preventing reliance on the use of privileged material in the courts. The response of the courts has not always been sympathetic. In a recent case, in which the two Houses were represented by the Attorney General, Mr Justice Blake rejected the Houses’ application to limit the parties’ reliance upon privileged material, and asserted the court’s right to assess such material in order to understand the “policy aims” underlying particular statutory provisions:

“In my judgment, there is no constitutional impediment to the court receiving the material ... for the purpose of informing itself as to the statutory history, the relevant considerations that led to the formation of policy, the aim of the policy in promoting the Regulations, and the existence of factors that might be relevant to the assessment of whether the Regulations were proportionate in their derogation from the principle of equal treatment of the grounds of age.”<sup>79</sup>

Such use of privileged material goes well beyond “interrogating matters of fact”, though an important factor in the court’s decision may have been that the two Houses did not discover until court proceedings were well advanced that use was to be made of Parliamentary material, so that their intervention occurred only late in the day, by which time the material had become so intertwined in the case made by each party that it was difficult for it to be extricated or excluded. On the other hand, it might be felt that the

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77 *R v Chaytor and others* [2010] UKSC 52, paragraph 15.

78 Paragraph 85.

79 *R (Age UK) v Secretary of State for Business, Innovation and Skills* [2009] EWHC 2336, paragraph 50.



resulting analysis of policy aims goes to the heart of the function of parliamentary debate, and that such judicial scrutiny is likely to have a “chilling effect” upon that debate.<sup>80</sup>

8. I understand the Government’s argument, in paragraphs 59–60 of the Green Paper, that a new statutory definition of “proceedings in Parliament” would be considered by the courts as a matter of modern statutory interpretation, and that the lack of such a definition allows a degree of flexibility. But, as I have noted, the definition of the term is already a matter of judicial interpretation, albeit of a statute which is couched in broad (possibly vague) terms, and which dates back to 1689. While there is a risk that a modern statute would encourage fresh judicial intervention in the United Kingdom courts, there is also a possibility that the uncertainty of the precise meaning of the Bill of Rights, its breadth and antiquity, may count against it in the European Court of Human Rights, which has asserted its jurisdiction in cases engaging parliamentary privilege.<sup>81</sup>

9. More generally, there is a narrow dividing line between helpful flexibility and unhelpful ambiguity and uncertainty, and I am not wholly persuaded by the Government’s view that the current situation is “satisfactory”. The committee may therefore wish to consider whether, either by legislation or other means (such as resolutions of both Houses setting out in terms the extent of Parliament’s exclusive cognisance in respect of “proceedings in Parliament”), greater certainty could be achieved.

10. If legislation were contemplated, it could also include provision for one or other House to assert privilege in specific cases—in other words, the “enforcement mechanism” touched on in paragraph 3 above. More thought would have to be given to the means for asserting privilege, though there may be an analogy with section 34 of the Freedom of Information Act 2000. Under this section a certificate signed by either the Speaker of the House of Commons or the Clerk of the Parliaments certifying that the withholding of material is “required for the purpose of avoiding an infringement of the privileges of either House of Parliament” is deemed to be “conclusive evidence of that fact”.

### ***Freedom of speech and criminality***

11. Like the Clerk of the House of Commons, I have grave reservations about the Government’s proposals in this area. As the Green Paper acknowledges, “freedom of speech in Parliament is of fundamental importance”.<sup>82</sup> Without the absolute guarantee of freedom of speech in the course of parliamentary proceedings, neither House would be able fearlessly to scrutinise and challenge the executive or to debate publicly the issues of the day.

12. Freedom of speech comes at a price. Individual rights (such as the right to privacy) may be adversely affected, and individuals may be defamed without having any legal recourse; in rare and extreme cases (such as the Duncan Sandys case in 1938) ostensibly criminal

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80 An even more recent example was the judgment in *R (Pelling) v Secretary of State for the Home Department and others* [2011] EWHC 3291, where the judge, Mrs Justice Dobbs, based her decision in part on scrutiny conducted by committees of the two Houses—for instance, at paragraph 68: “the committee accepted that the department had representable [*the report actually said “respectably”*] arguable grounds for concluding that its consultation was adequate”.

81 The relationship between the immunity conferred by Article 9 of the Bill of Rights 1689 and Article 6(1) of the European Convention on Human Rights was a central issue in 2002 in *A v the UK* (Application no. 35373/9).

82 Paragraph 45.

conduct may go unpunished. Historically, there has been consensus that this is a price worth paying, in pursuit of the legitimate aim of ensuring the immunity of parliamentary proceedings from executive or judicial interference.

13. That consensus appears no longer to prevail, at least in respect of criminal offences. The Government's analysis of freedom of speech and criminality, in Chapter 3 of the Green Paper, suggests that "It can be argued that it is wrong in principle to deny the courts access to any relevant evidence when the alleged act is serious enough to have been recognised as a criminal offence".<sup>83</sup>

14. It is notable that the Government's argument is based on a "principle" (presumably that the public interest in bringing those guilty of criminal offences to justice outweighs the public interest in preserving the immunity of parliamentary proceedings), rather than the facts of any individual case. However, in the case of bribery offences the Green Paper itself refers to the case of *US v Brewster* in the United States, in which a case was successfully prosecuted without evidence relating to debates in Congress being admitted.<sup>84</sup> More generally, in the case that in 2010 prompted particular public concern, that of *R v Chaytor*, the Supreme Court comprehensively rejected the argument that parliamentary privilege attached to members' submission of false claims for expenses. I am not aware of any case in which Members of either House accused of serious wrongdoing have been able to hide behind parliamentary privilege, thereby avoiding prosecution.

15. Against this background, it appears that the Government's draft clauses waiving Article 9 in respect of certain criminal offences seek to remedy a hypothetical mischief by inflicting very real and serious damage on a fundamental constitutional protection. They could have a profoundly "chilling effect" on debate in parliament, while the safeguards proposed by the Government appear inadequate. Like the Clerk of the House of Commons, I agree with Sir William McKay that the Government's proposal to waive privilege would be "too high a price to pay for the remedying of a very, very serious but very rare mischief".

16. In particular, the reasoning behind the proposed exclusion of certain "speech offences" from the draft clauses does not stand up to analysis: debate in Parliament is not simply about the expression of opinion (which might fall within the scope of "speech offences"), but about the discussion of fact. Divorced from fact, parliamentary debate would lose much of its value.

17. To illustrate this point with a hypothetical example: in the course of a debate on urban renewal, a Member of Parliament might refer to facts communicated, in confidence, by constituents who had played a tangential part in the 2011 riots. It seems likely that, under the draft clauses contained in the Green Paper, such evidence could potentially be treated as admissible for the purpose of subsequent prosecutions for public order offences. I do not underestimate the public interest in prosecuting such offences. However, the possibility that parliamentary proceedings could be used in such a way would surely have a dramatic effect on the relationship between parliamentarians and the public, as well as on the quality of debate in Parliament.

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83 Paragraph 94.

84 Paragraph 107.

### ***Freedom of speech and civil law***

18. I fully endorse the comments of the Clerk of the House of Commons in respect of freedom of speech and civil law.

### ***Application of legislation to Parliament***

19. It is well understood that Parliament is not a “statute-free zone”, and I endorse the Government’s statement, in paragraph 200 of the Green Paper, that “the fact that an individual commits an act within the bounds of the precincts of Parliament does not give it any special protection, unless that individual was participating in the proceedings of Parliament at the time.” The Green Paper goes on to acknowledge that there may nevertheless be uncertainty as to “the extent to which statute law applies to either House of Parliament ... in the absence of any specific provision applying the legislation to Parliament being written into the Act.”

20. This area is complicated by the decision in the *A P Herbert* case in 1934.<sup>85</sup> In that case the court decided, in the words of the Joint Committee on Parliamentary Privilege in 1999, that it “would not hear a complaint regarding sales of alcohol in the precincts of Parliament without the necessary licence because the House of Commons was acting collectively in a manner which fell within the area of the internal affairs of the House”.<sup>86</sup>

21. The Green Paper dismisses the implications of the *Herbert* judgment, quoting an observation by Lord Phillips of *Worth Matravers*, in his judgment in *R v Chaytor*, that the presumption that statutes do not apply to activities within the Palace of Westminster unless they expressly provide to the contrary, is “open to question”. On this slender basis, the Government conclude that “the line likely to be taken by the courts in future appears to be reasonably clear”.

22. However, since the *A P Herbert* case was decided, a number of Acts have expressly provided that their provisions, or certain of them, are to apply to Parliament, no doubt on the footing that the case was rightly decided. Indeed, Lord Phillips notes that “statutory inroads have been made by express provisions” in a number of Acts since 1990. In some instances, the application provision has been in terms specifically designed to override exclusive cognisance in relation to the particular subject matter of the Act in question<sup>87</sup>. The express inclusion of such a provision in some Acts leaves uncertain the extent to which other Acts (in which the same or a similar application formula does not appear) apply to Parliament. By inference, they would not seem to apply, in the absence of some compelling implication that they must have been intended to apply, to the internal workings of either House of Parliament. It has, for example, been the longstanding view that the Health and Safety at Work etc. Act 1974 does not apply to Parliament: indeed, in the 1990s the then government embarked on the preparation of a Bill that would have extended the 1974 Act to Parliament.

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85 *R v Graham-Campbell ex p Herbert* [1935] 1 KB 594.

86 Report of the Joint Committee on Parliamentary Privilege (1998–99), paragraph 249.

87 For example section 277(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 states that “Nothing in any rule of law or the law or practice of Parliament prevents a person from bringing a civil employment claim before the court...”

23. It is unsatisfactory that, in the light of the *A P Herbert* case, there should be uncertainty about which Acts should be regarded as applying to Parliament. Even if the decision in the *A P Herbert* case were now to be expressly overruled by a higher court, or if its effect were to be reversed by statute, careful thought would need to be given to the practical consequences for the approach to be taken to the application of Acts passed since the decision was made.

24. The Joint Committee on Parliamentary Privilege in 1999 recommended the enactment of a provision that would, in effect, confine the ambit of exclusive cognisance to “activities directly and closely related to proceedings in Parliament”, and would clarify that, as respects other activities, there should be a principle of statutory interpretation that, in the absence of a contrary expression of intention, Acts of Parliament should bind both Houses.

25. Following the Joint Committee’s report, further thought was given to this issue within Government and the two Houses, and a different approach was agreed in early 2002, whereby Government departments were required to consult the respective House authorities on whether any proposed legislation that is to apply to the Crown, or its servants, should also apply to the two Houses. Unfortunately this policy, though endorsed at the time by the Treasury Solicitor and Parliamentary Counsel, has not been consistently observed—there have been occasions where the Houses’ authorities have had to react, sometimes quite late in a Bill’s passage through Parliament, to provision that was thought to impinge inappropriately on exclusive cognisance.

26. In conclusion, I invite the Joint Committee to consider the means whereby the extent of Parliament’s privilege to organise its internal affairs may be clarified. The approach recommended by the 1999 Joint Committee would require legislation, but is consistent with what I take to be the essential rationale of exclusive cognisance, and would offer clarity going forward. Alternatively, a restatement by the Joint Committee of the principle that legislation does not apply to Parliament unless explicitly stated, combined with adherence to the policy agreed in 2002, would in itself be a significant step forward.

### ***Lay members on Select Committees***

I endorse the Clerk of the House of Commons’s analysis of the Government’s proposals regarding lay members of the Committee on Standards. I note also that the Government appears to have overlooked the fact that in 2009, following the establishment of the Supreme Court, the House of Lords amended Standing Order 77 to provide for the appointment of non-members to sit with the Committee for Privileges and Conduct in hearing peerage claims. The Standing Order accordingly reads as follows:

77. A Committee for Privileges and Conduct shall be appointed at the beginning of every session; sixteen Lords shall be named of the Committee, of whom two shall be former holders of high judicial office. In any claim of peerage, the Committee for Privileges and Conduct shall sit with three holders of high judicial office, who shall have the same speaking and voting rights as the members of the Committee.

The normal principles of statutory interpretation could lead the courts to conclude that, if Parliament legislates to ensure that Article 9 of the Bill of Rights continues to protect the Committee on Standards, notwithstanding the appointment of lay members to that Committee, then Parliament’s intention is that committees not subject to explicit statutory

provision are not so protected. For this reason my answer to the Government's question whether I support legislation to clarify that the privileged status of proceedings of the Committee on Standards would not be affected by the granting of full voting rights to lay members, like that of the Clerk of the House of Commons, is "No".

### ***Select Committee powers***

The Clerk of the House of Commons has covered the issue of Select Committee powers very comprehensively in his recent memorandum to the House of Commons Liaison Committee.<sup>88</sup> The powers of the two Houses are generally considered to differ somewhat (the House of Lords is generally considered to retain a power to fine), but in all other respects I warmly endorse Sir Robert's analysis. As his memorandum makes clear, there is no perfect answer, and the three options he proposes (do nothing; proceed by amending Standing Orders or agreeing resolutions of both Houses; legislation) all carry significant risk. I look forward to the Joint Committee's conclusions on this issue.

### ***Reporting of parliamentary proceedings***

Like the Clerk of the House of Commons I have no objection in principle to the Government's proposed amendment to the Parliamentary Papers Act 1840. However, I am puzzled by the Government's statement that the 1999 Joint Committee on Parliamentary Privilege "did not ... call for substantial revision of the way in which publications are currently protected".<sup>89</sup> In fact the Joint Committee expressed concern over the wide application of the 1840 Act, commenting that "we find it hard to see why annual reports of bodies such as the Forestry Commission ... should receive legal immunity." It therefore recommended that "unless there are strong reasons in the public interest, no paper other than one emanating from the House or its committees should be absolutely privileged."<sup>90</sup>

The Green Paper, which focuses exclusively on the reporting of parliamentary proceedings, fails to take account of this recommendation. This is primarily a matter for the House of Commons, but the Joint Committee may wish to take this opportunity to reassess the extent to which non-essential and routine House of Commons papers are afforded absolute immunity by virtue of the 1840 Act.

### ***Miscellaneous privileges***

The Green Paper notes, at paragraph 318, that the 1999 Joint Committee recommended that the privilege of freedom from arrest in civil matters be "formally abolished". It then states that "the Government agrees". The Green Paper adopts a similar approach in discussing members' immunity from attending court as witnesses and "privilege of peerage" (paragraphs 323 and 342).

These privileges exist in common law, not statute: the 1999 Joint Committee accordingly recommended that they be formally abolished as part of a comprehensive Parliamentary Privilege Act. It is unclear how the Government now propose to abolish them, since the Green Paper contains no draft clauses to this effect.

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88 July 2012. See <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmliaisn/697/697we36.htm>.

89 Paragraph 304.

90 Joint Committee on Parliamentary Privilege, paragraphs 350–351.

Paragraphs 328–338 of the Green Paper touch on various historic Standing Orders of the House of Lords. On 23 May 2012 I wrote to the then Leader of the House, Lord Strathclyde, suggesting that the House of Lords Procedure Committee was the appropriate body to consider such matters. He replied on 29 June, agreeing with this approach, and I propose to put a paper before the Procedure Committee in due course.

#### The case for and against codification

Finally I turn to the question of codification. It is clear from the analysis of privilege in *Erskine May*, from decisions of the courts, from reports of previous committees and from the Green Paper itself, that partial codification of parliamentary privilege has been occurring for more than 300 years—Article 9 of the Bill of Rights 1689 was itself an attempt to “codify” (that is, express in statutory terms) part of a wider pre-existing privilege. The Parliamentary Papers Act 1840 was a later attempt to codify what the House of Commons of the day considered (though the courts did not) to be the privileges enjoyed by those publishing or reporting on parliamentary papers.

The question posed by the Government, in chapter 1 of the Green Paper, is “Do you agree that the case has not been made for a comprehensive codification of parliamentary privilege?” I submit that this is not the right—or at least not the only—question. For what the Green Paper proposes is further partial, piecemeal codification of aspects of parliamentary privilege. So an alternative question might be, “Do you agree that additional specific aspects of parliamentary privilege, or waivers of parliamentary privilege, should be codified?” To this latter question my answer would be a categorical “No”.

Various select committees over the years have resisted proposals for legislation which would have affected parliamentary privilege but which fell short of comprehensive reform of the law in this area. The Joint Committee on Parliamentary Privilege in 1999 called for a comprehensive Parliamentary Privilege Bill. When, a few years later, the Government of the day sought to waive parliamentary privilege in one specific area, in the draft Corruption Bill, the Joint Committee charged with scrutinising that bill agreed with the then Clerk of the House of Commons, Sir Roger Sands, who told the Committee that “I would find it somewhat easier to accept the inclusion in the Bill of a provision derogating from the principle of freedom of speech in the case of alleged corruption by a Member of Parliament if it were being presented in the context of a wider statutory restatement of parliamentary immunities and the scope of parliamentary freedom of speech.”<sup>91</sup> The Joint Committee accordingly endorsed its predecessor committee’s view that a comprehensive statute was required.

These successive recommendations did not prevent further attempts by the Government to introduce piecemeal legislation, and these too were rejected by successive committees. Thus the Joint Committee on the draft Bribery Bill in 2009 warned that “Legislating in a piecemeal fashion risks undermining the important constitutional principles of parliamentary privilege without consciousness of the overall impact of doing so ... We believe that, should the Government deem it necessary, such an Act would be the most

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91 Report of the Joint Committee on the Draft Corruption Bill (session 2002–03), paragraph 112

appropriate place to address the potential evidential problems in relation to bribery offences.”<sup>92</sup>

Also in 2009, the House of Commons Justice Select Committee welcomed the removal of a waiver of Article 9 in the Parliamentary Standards Bill, and, in its report on Constitutional Reform and Renewal, warned of the dangers of piecemeal reform and the need for a “proper understanding of the position and role of Parliament in relation to the institutions of the State”.<sup>93</sup>

This provides the background to the Green Paper’s opposition to comprehensive codification, and to the draft clauses it does contain. I hope that the Joint Committee, like its predecessors, will firmly reject piecemeal legislation, and for the same reason: the various elements which make up parliamentary privilege are not only delicately inter-related, but also form part of a wider web of conventions, laws and practices, which collectively embody the relationships between the legislature, the courts and the executive. Ill-considered changes in one area, taken in isolation, may have unpredictable and possibly damaging effects on the wider constitutional framework. The Government’s proposal to introduce a blanket waiver in respect of alleged criminal offences would be particularly damaging in this respect, giving the authority to waive privilege to the Director of Public Prosecutions, and in the process undermining the protection afforded to proceedings in Parliament without offering any counter-balancing restatement or assertion of the essential aim and value of that protection.

In conclusion, I find the arguments for and against comprehensive codification to be finely balanced. In this paper I have touched on several difficult issues, which in some cases may not be amenable to resolution other than by statute. The advantage of a comprehensive statute would be to clarify and consolidate parliamentary privilege in a modern form, comprehensible to Members, the public, and the judges of the European Court of Human Rights. A statute might thus increase legal certainty. It could also enable the two Houses to acquire enforceable powers to punish for contempt and to summon recalcitrant witnesses, including ministers and civil servants. Experience in Australia, which has had a Parliamentary Privileges Act since 1987, seems to have been largely positive.<sup>94</sup>

On the other side of the coin are the reservations so forcefully expressed by the Clerk of the House of Commons regarding comprehensive codification, in particular his entirely legitimate concern over the consequences of requiring the courts to construe and apply a new statute.

I look forward to the results of the Joint Committee’s consideration of these issues, and stand ready to assist the Joint Committee in its deliberations.

*4 February 2013*

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92 Report of the Joint Committee on the Draft Bribery Bill (session 2008–09), paragraph 228.

93 Justice Committee, 11th Report (session 2008–09, HC 923), paragraph 22.

94 It should however be noted that the Australian Act “was enacted in response to a surge of judicial interventionism in New South Wales in the 1980s” (Joint Committee on Parliamentary Privilege, paragraph 66, referring to section 16 of the Act, reproducing the effect of Article 9 of the Bill of Rights).

## President and Clerk of the New South Wales Legislative Council

### *Introduction*

The New South Wales Legislative Council makes this submission in response to the UK Government's Green Paper on Parliamentary Privilege. The submission addresses a number of issues raised in the Paper, including issues on which the New South Wales Legislative Council has a particular perspective or has had particular experiences. It is made in recognition of the significant implications of any changes in the law of privilege in Westminster to other Westminster parliaments, including in Australia. The submission does not, however, attempt to respond to every question or issue raised in the Paper.

Before continuing to the issues addressed in this submission, however, it is perhaps relevant to note the basis upon which parliamentary privilege in New South Wales rests.

Like the British Parliament, the New South Wales Parliament has not enacted wide-ranging privileges legislation. Rather, the immunities and powers of the Parliament are:

- derived from the common law doctrine that the Parliament possesses such immunities and powers as are 'reasonably necessary' for its effective functioning;
- legislated by the adoption in 1971 of the *Bill of Rights 1689*;
- codified in certain specific areas by legislation such as the Parliamentary Evidence Act 1901, the Parliamentary Papers (Supplementary Provisions) Act 1975, the Jury Act 1977, the Evidence Act 1995 and the Defamation Act 2005.

By contrast, most other Australian jurisdictions have legislated to adopt the immunities and powers of the House of Commons at a certain date. Some jurisdictions have also adopted further privileges legislation, such as the *Parliamentary Privileges Act 1987* enacted by the Commonwealth, while other jurisdictions have constitutional provisions conferring wide-ranging powers on their Houses. Some jurisdictions have a combination of all three models.

The fact that the New South Wales Parliament, like the British Parliament, has not gone further in the codification of its immunities and powers, while at the same time being able to observe the operation of the Commonwealth's *Parliamentary Privileges Act 1987*, means that the NSW Legislative Council may be able to offer some useful perspectives on aspects of the Green Paper.

### *Overview and general approach*

In Chapter 1 of the Green Paper, the UK Government expresses the view at paragraph 37 that it 'does not believe that the case has yet been made for a comprehensive codification of privilege in a Parliamentary Privilege Act as was done in Australia in 1987'. In stating this, the UK Government does not agree with the approach recommended by the 1999 UK Joint Committee on Parliamentary Privilege.

As indicated, the NSW Parliament similarly has not gone down the path of legislative codification of its privileges, except in a few specific areas. However, there have been many attempts to do so.



Between 1856 and 1912, there were six failed attempts to enact more comprehensive privileges legislation in New South Wales.

More recently, on 2 December 2010, the Speaker of the Legislative Assembly tabled in that House a draft Parliamentary Privileges Bill 2010. It being the second last sitting day of the Legislative Assembly for the 54th Parliament, the draft bill was not progressed before prorogation. It has not been progressed in the current 55<sup>th</sup> Parliament.

It is significant to note, however, that the draft bill incorporated some significant measures to codify the law of privilege in New South Wales. Of note, it removed some areas of doubt about the operation of Article 9. Drawing on the Commonwealth experience, it incorporated a definition of ‘proceedings in Parliament’ taken (with a slight modification discussed later) from section 16(2) of the *Parliamentary Privileges Act 1987* (Cth). It also provided a definition of the term ‘impeached or questioned’ taken directly from section 16(3) of the *Parliamentary Privileges Act 1987* (Cth). This is certainly the most important provision of the Commonwealth Act. Both matters are discussed further later in this submission.

The bill also contained a definition of contempt, provisions concerning communications to members, provisions concerning the arrest and attendance of members before courts, a clause to address the issue of ‘effective repetition’, and provisions defining the powers of the parliament to fine and imprison.

In addressing these issues, the bill also included a savings provision to ensure that the powers and immunities of the House prior to the bill being enacted continued in force, except to the extent that the bill provided otherwise:

Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of its members and committees as in force immediately before the commencement of this Act, continue in force.

As is canvassed in the Green Paper, the danger in attempting to enact privileges legislation is that powers and immunities are unintentionally lost or limited. The 2010 draft bill did not attempt to cover the field of privilege but addressed certain issues of privilege on which there is uncertainty, while at the same time preserving the pre-existing powers and immunities of the Houses.

In this context, the UK Green Paper perhaps overstates the case when it characterises the *Parliamentary Privileges Act 1987* (Cth) as an attempt at ‘comprehensive codification of privilege’ (at paragraph 37). The Commonwealth legislation, as is observed in the Green Paper, was a legislative response to particular circumstances in an attempt to reassert the true law of privilege. It was not an attempt to cover the field of privilege. Section 5 of the *Parliamentary Privileges Act 1987* specifically preserves parliamentary privilege as it existed prior to the Act under section 49 of the Commonwealth Constitution of Australia.

Equally, section 16(2) of the *Parliamentary Privileges Act 1987* (Cth), in providing a definition of ‘proceedings in Parliament’ under Article 9, was drafted in such a way through the inclusion of the words ‘without limiting the generality of the foregoing’ as to ensure that the scope of Article 9 was not limited.

It may be possible to examine a similar limited codification of parliamentary privilege in the UK, provided that existing privileges are preserved.

### ***Freedom of speech and the jurisdiction of the courts***

In Chapter 2 of the Green Paper, the UK Government notes that freedom of speech in parliament is of fundamental importance in allowing the full and free ventilation of issues by members of parliament in the public interest, and in protecting the independence of the parliament from outside interference. This position is incontrovertible.

However, as is expressed at paragraph 48, ‘recent developments have seen proceedings in Parliament used in courts more regularly than in the past’, citing:

The use of proceedings to establish what was said or done in Parliament as a matter of historical fact (the so-called ‘historical exceptions’ doctrine);

The use of proceedings in judicial review of ministerial decisions;

The use of proceedings as an aid to the interpretation of Acts.

Additional discussion of the uses of proceedings in parliament follows at paragraphs 83 – 88.

The Green Paper further states at paragraph 48 that these protections have not encroached upon the protections provided by parliamentary privilege, and at paragraph 85 that ‘These uses of parliamentary material by the courts are widely accepted in Parliament, Government and the courts as representing sensible, pragmatic positions’.

It should be observed, however, that the perceptible narrowing of parliamentary privilege in these areas in recent decades has been the subject of considerable adverse comment in this part of the world, particularly from New Zealand,<sup>95</sup> no doubt in the light of the decisions in *Buchanan v Jennings*.

Historically, since the case of *Stockdale v Hansard* in 1839, if not the *Bill of Rights* in 1689, the touchstones of parliamentary privilege have been its absolute nature and its comprehensive reach. This has for centuries safeguarded the autonomy of parliament as an institution and guaranteed the unimpeded freedom of speech of its members. However, the changes cited in the Green Paper in the last two decades have to an extent redefined the nature of the relationship between parliament and the courts.

The ‘historical exceptions’ doctrine and the increasing use of use of parliamentary proceedings in judicial review of ministerial decisions deserve particular comment.

The ‘historical exceptions’ doctrine traces back to 1994.<sup>96</sup> It is generally understood as permitting the courts to take notice of parliamentary records to ascertain what was said or done as a matter of historical fact.<sup>97</sup>

95 See for example J.Allen, ‘Parliamentary Privilege: Will the Empire Strike Back?’ *New Zealand Universities Law Review*, Vol 20, No 205, 2002; D.McGee, ‘The Scope of Parliamentary Privilege’, *New Zealand Law Journal*, No 84, 2004; P.Joseph, ‘Parliament’s Attenuated Privilege of Freedom of Speech’, *The Law Quarterly Review*, Vol 126, October 2010.

96 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321.

97 *Ibid* at 337

The doctrine finds expression in a long line of cases, both in NSW and elsewhere. Most recently in NSW in 2012, in *La Perouse Local Aboriginal Land Council v Minister Administering the Crown Lands Act*,<sup>98</sup> Sheahan J accepted the tendering of evidence given by the Minister Administering the Crown Lands Act before a committee of the Legislative Council on the basis ‘that it is used only to prove the fact of the parliamentary exchange rather than [as] proof of the asserted fact’.<sup>99</sup>

However, the concern that has been expressed in relation to such cases is how can something be ascertained as a matter of historical fact without in fact drawing lines of evidence? Indeed, why is evidence sought to be adduced at all if not to make a finding or draw an inference from it? For example, Professor Philip Joseph, Professor of Law at the University of Canterbury (NZ), has argued that ‘the propensity for inference or deduction makes the *Prebble* distinction impossible to police, causing Parliament’s privilege to unravel at the margins’.<sup>100</sup> David McGee, the former Clerk of the New Zealand Parliament, is equally critical:

The so-called historical exception has thus become a means for litigants to smuggle into their cases parliamentary material whose admission inevitably impeaches freedom of speech in Parliament and to lead the Courts, rather than the Parliament itself, to adjudge the accuracy and motivation of parliamentary contributions.<sup>101</sup>

The use of proceedings in Parliament to establish a fact, such as the presence of a member in Parliament on a particular day, seems uncontroversial.<sup>102</sup> The issue, which is not addressed in the Green Paper, is the extent to which the courts have applied this principle properly.

The use of proceedings in judicial reviews of ministerial decisions, now seemingly established practice in common law countries, has also raised some concerns.

It seems incontrovertible that to use ministerial statements in parliament to question in court a minister’s exercise of statutory power is to question proceedings in parliament.

The objection to such use, which has been expressed by many observers, is that ministers will take care not to inform parliament of their reasons in relation to particular administrative decisions, for fear that the information may be revisited by the courts, thereby restricting free discussion of such matters in parliament. This is the so-called “chilling effect”.<sup>103</sup>

Professor Joseph has argued that ministers are no less members of Parliament because they hold ministerial office, and as such, they are entitled to the protection of Article 9. Moreover, it is not clear that applying Article 9 strictly would significantly affect judicial decisions, as few cases turn solely on statements made in parliament.

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98 [2012] NSWLEC 5

99 *Ibid* at 81.

100 Joseph, *op cit*, p 577.

101 D.McGee, ‘The scope of parliamentary privilege’, *The New Zealand Law Journal*, March 2004, pp 86.

102 It is noted that the explanatory memorandum to the 1987 Parliamentary Privileges Bill in the Commonwealth Parliament, in its discussion of section 16(3)(c), indicated that it would not prevent the use of proceedings in parliament to establish a fact.

103 Many commentators have cited the decision in *Toussaint v Attorney General of St Vincent and the Grenadines* [2007] 1 WLR 2825 as an example of a court case that may lead to the “chilling” of parliamentary debate.

At the Commonwealth level in Australia, the provisions of section 16(3) of the *Parliamentary Privileges Act 1987* (Cth) explicitly prevent the tendering of parliamentary proceedings, including ministerial statements, for the purposes of questioning the statements or drawing inferences or conclusions from them. The courts at the federal level have upheld the principle.<sup>104</sup> A detailed discussion of the operation of section 16(3) is available in *Odgers*;<sup>105</sup> it is arguably the most important provision of the Commonwealth Act.

A section drafted in identical terms to section 16(3) was included in the draft Parliamentary Privileges Bill 2010 tabled by the Speaker in the Legislative Assembly in 2010.

The one area where the use of parliamentary proceedings in court seems relatively uncontroversial is in the use of second reading speeches and other proceedings as an aid to statutory interpretation.

### ***Should the term 'proceedings in Parliament' be defined in statute?***

The Green Paper concludes at paragraph 62 that there is no need to define in statute the term 'proceedings in Parliament' in Article 9, contrary to the previous recommendations of the 1999 UK Joint Committee on Parliamentary Privilege. In support, it cites at paragraph 59 the argument that seeking to define privilege more closely may have the unintended effect of eroding or weakening privilege.

By comparison, the Green Paper notes that section 16(2) of the *Parliamentary Privileges Act 1987* (Cth) now provides a definition of 'proceedings in Parliament' at the Commonwealth level in Australia.

The NSW Parliament is similar to the British Parliament in that it has not sought to define the meaning of 'proceedings in Parliament' in statute. However, it is not clear that section 16(2) in any way erodes or weakens privilege:

As indicated before, in providing a more extensive definition of 'proceedings in Parliament', section 16(2) was drafted in such a way, through the inclusion of the words 'without limiting the generality of the foregoing', that it ensured that the scope of Article 9 was not limited.

Moreover, the definition of 'proceedings in Parliament' in section 16(2)(c) as including documents prepared 'for purposes of or incidental to' business of a House or a committee is broad.

Indeed, in Australia, section 16(2) has informed a sound and broad reading of the scope of 'proceedings in Parliament' in the courts.<sup>106</sup>

Section 16(2) has also informed the Legislative Council's approach to various legal matters. In 2004, based in part on a reading of section 16(2), the House sought and obtained the return of privileged documents illegally seized from the office of a member by search

<sup>104</sup> See *Amann Aviation Pty Ltd v The Commonwealth* (1988) 81 ALR 710; *Hamsher v Swift* (1992) 33 FCR 545.

<sup>105</sup> *Odgers' Australian Senate Practice*, 13<sup>th</sup> Edition, 2002, pp 51-52.

<sup>106</sup> See for example *O'Chee v Rowley* (1997) 150 ALR 199 and *In the matter of OPEL Networks Pty Ltd* [2010] NSWSC 142

warrant. More recently, the NSW Crown Solicitor has advised that the NSW Parliament's interest disclosure regime, which is a statutory regime, is likely to be protected by privilege, again in part based on a reading of section 16(2).

Indeed the Privileges Committee of the Legislative Council has developed a test of whether a document constitutes a proceeding in Parliament based on the definition in section 16(2).<sup>107</sup>

The definition in section 16(2) is also referred to in protocols that the NSW Parliament has established with the NSW Police Force and the Independent Commission Against Corruption for the execution of search warrants at Parliament House.

In short, the definition in section 16(2), while strictly only applicable in the Commonwealth sphere, has been widely accepted and applied in NSW, with no obvious problems and arguable benefits. The draft privileges bill tabled in the Legislative Assembly in 2010 by the Speaker included the same definition of 'proceedings in Parliament' (with a slight modification discussed later).

#### ***Privilege and communications with members***

The Green Paper discusses at paragraphs 63 to 76 the issue of whether absolute or qualified privilege should attach to communications from constituents to members.

The Paper indicates that in the UK, such communications do not attract absolute privilege (with some views expressed to the contrary), unless closely connected or preparatory to parliamentary proceedings. Such communications may attract qualified privilege if made in good faith and without malice, but that is a matter for the courts to decide.

For its part, the 1999 UK Joint Committee on Parliamentary Privilege argued that the term 'proceedings in parliament' should not cover constituency correspondence, nor should it cover correspondence between member and ministers.

In NSW and Australia, the question of whether correspondence from a constituent to a member is covered by privilege depends on whether it was provided 'for the purposes of or incidental to' proceedings in a House or a committee, drawing on section 16(2) of the Commonwealth Act again. The balance of judicial and other opinion appears to favour the view that unsolicited material provided to a member attracts qualified but not absolute privilege unless it is directly concerned with proceedings in parliament (such as the presentation of a petition) or is 'appropriated' or retained for use by a member to transact parliamentary business.<sup>108</sup>

This general rule becomes less clear, however, where a constituent provides material to a member in the hope that the member will raise it in the House. For example, if a person provides information to a member with an explicit request that the member initiate some action in the Parliament in relation to that information, for example correspondence requesting the tabling of a petition, there is a much stronger basis for concluding that that

<sup>107</sup> NSW Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No 2*, Report No 28, March 2004, p 8.

<sup>108</sup> *Grassby* (1991) 55 A Crim R 419; *O'Chee v Rowley* (1997) 150 ALR 199; *Erglis v Buckley* [2005] QSC 025; D.McGee, *Parliamentary Practice in New Zealand*, 3<sup>rd</sup> edn, 2005, p 622.

correspondence is protected by parliamentary privilege than if the person provides the information simply as a matter of political intelligence or gossip.

In NSW, in 1985, the Joint Select Committee upon Parliamentary Privilege advocated that the protection of absolute privilege be extended to all communications between members and ministers relating to the responsibilities of the member.<sup>109</sup> However, this recommendation was subsequently opposed by the Attorney-General's Department and Law Reform Commission.<sup>110</sup>

To date, no further action has been taken on this matter. However, as indicated previously, the draft Parliamentary Privileges Bill tabled by the Speaker in the Legislative Assembly in 2010 incorporated a definition of 'proceedings in Parliament' taken from section 16(2) of the *Parliamentary Privileges Act 1987* (Cth), but with a slight modification. Interestingly, that modification expanded the equivalent Commonwealth provision to provide that the term 'proceedings in Parliament' covered persons such as constituents who provide information to members for the purposes of making statements or asking questions. At least that was the intention as expressed in the explanatory notes. The wording of the draft bill leaves unclear whether the provision extended privilege beyond the current position in NSW expressed above, but it probably did not.

The Legislative Council has some direct experience of these issues. Previously, reference was made in this submission to events in 2004 when the Independent Commission Against Corruption executed a search warrant on the office of a member of the Legislative Council and illegally seized certain documents covered by privilege.

Following recommendations of the Privileges and Ethics Committee which inquired into the incident, the House required the return of the documents until the issues of privilege had been resolved. The member concerned and the Clerk were required to identify any privileged documents, according to the definition in section 16(2), with any items not deemed to be privileged to be returned to the ICAC.

In 2004, following a further inquiry by the Privileges Committee into the matter, the House upheld the claim of privilege relating to those particular documents, which were later released to the member. The Committee found that while the documents were not brought into existence for the purposes of or incidental to the transaction of parliamentary business, at least some of the documents were nevertheless subsequently retained or used for the purposes of transacting parliamentary business: they were used or intended to be used by the member in speeches or questions in the House.

### ***Freedom of speech and criminality***

In Chapter 4 of the Green Paper, the UK Government canvasses taking legislative steps to "disapply" the protection of privilege in cases where members are accused of criminal conduct, such as bribery or corruption, unless there are clear reasons why the proceedings should not be admissible out of concern for a "chilling effect" on freedom of speech in

109 NSW Parliament, Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985, pp 105 – 110;

110 New South Wales Attorney General's Department, *Discussion Paper – Parliamentary Privilege in New South Wales*, 1991, pp 26-27; New South Wales Law Reform Commission, *Report 75 – Defamation*, September 1995, p 174.

parliament. Illustrative clauses designed to achieve this are provided at the end of the Chapter.

This is perhaps the most controversial proposal in the Green Paper. The fundamental objection to opening up the use of proceedings in Parliament to wider use in support of criminal prosecutions is the possibility of undermining the principal functions of privilege: allowing members to raise matters in parliament in the public interest, and ensuring the independence of the parliament from outside interference.

Concerning the former function, allowing members to raise matters in the public interest, in his decision in *Prebble v Television New Zealand Ltd*, Lord Browne-Wilkinson expressed the position that where there are competing interests at play – the need to ensure that parliament can exercise its powers freely on behalf of the electors, and ensuring that all relevant evidence is available to the courts – the first must prevail.<sup>111</sup> The UK Government's proposal would partially overturn this common law position in relation to criminal matters.

Concerning the latter function, the protection of the independence of parliament, it should be emphasised that the privilege of freedom of speech exists not only to protect parliament from interference by the courts, but also from the executive government. Establishing a situation where prosecutions could be threatened or initiated against members based on their parliamentary activities is problematic. As stated by White J in *United States v Brewster*<sup>112</sup>:

... the opportunities for an Executive, in whose sole discretion the decision to prosecute rests under the statute before us, to claim that legislative conduct has been sold are obvious and undeniable. These opportunities, inherent in the political process as it now exists, create an enormous potential for executive control of legislative behaviour by threats or suggestions of criminal prosecution – precisely the evil that the Speech or Debate Clause was designed to prevent.<sup>113</sup>

In NSW, responsibility for investigating matters of bribery, extortion and official misconduct by members of Parliament rests primarily with the Independent Commission Against Corruption (ICAC), which is an independent statutory body established amongst other things to investigate, expose and prevent corruption involving public officials, including ministers and members. Findings of corrupt conduct by the ICAC may subsequently form the basis of proceedings by the Director of Public Prosecutions.

Significantly, while the ICAC has wide investigatory powers, under section 122 of the *Independent Commission Against Corruption Act 1988*, parliamentary privilege is expressly preserved in relation to the freedom of speech and debates and proceedings in Parliament.

This provision arose recently when the ICAC sought to use members' interest disclosure returns for the purposes of several investigations concerning current and former members of the Legislative Council. The interest returns being considered to be protected by privilege, the Parliament took the unusual step of passing legislation waiving privilege over

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111 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 336.

112 (1972) 408 US 501.

113 *Ibid* at 544.

the interest returns in respect of ICAC investigations only. The Parliament deliberately adopted this limited ‘carve-out’ of privilege for the purposes of ICAC investigations, eschewing a broader reading-down of privilege. The step was taken in the belief that a ‘carve-out’ of privilege attaching to interest returns does not affect the fundamental privilege of the freedom of speech in the House.

This is likely to be the preferred approach to such issues in the future: dealing with them on a case-by-case basis, but guided by the fundamental principles that freedom of speech should not be read down where doing so would discourage members of parliament from bringing matters before parliament in the public interest, or where doing so would undermine the independence of the parliament from outside interference.

Beyond the jurisdiction of the ICAC, both common law and statutory offences of bribery continue to exist in NSW. It is an offence to offer a benefit in order to influence the vote of a member in parliament, as well as to accept such a benefit. However, in the two significant Australian decisions in this area, *R v White*<sup>114</sup> and *R v Boston*<sup>115</sup>, given the nature of the cases, almost no reference is made to the possibility that Article 9 might preclude the court’s jurisdiction.

In the absence of any significant guidance from the Australian courts, Professor Carney, Professor of Law at Queensland University, has suggested that any future cases of criminal misconduct in Australia that involve issues of privilege would likely be guided by UK, Canadian and US authorities, notably the decision of the US Supreme Court in *United States v Johnson*<sup>116</sup>. In short, the protection of privilege may be confined to conduct that actually occurs within the debates or proceedings of parliament. However this is an area of the law inadequately addressed in Australia.<sup>117</sup>

### **Rights of reply**

In Chapter 4 in paragraphs 176 to 182, the Green Paper discusses the possibility of making rights of warning or reply available, noting that rights of reply are operational in the Australian Senate and New Zealand Parliament, amongst other houses of parliament.

A right of reply process is also available in the NSW Legislative Council. It was introduced in 1997, based on the Australian Senate model. Since 1997, the Privileges Committee, which manages the process, has received 40 rights of reply requests, with 38 subsequently forming the basis of reports to the House, representing an average of about 2½ per year. As such, the NSW Legislative Council has the second greatest experience of right of replies in Australia after the Australian Senate.

In 2012, the Privileges Committee undertook an inquiry into the right of reply process. In its report, the Committee concluded that the process has worked effectively to date in

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114 (1875) 13 SCR (NSW) 322.

115 (1923) 33 CLR 386.

116 (1966) 383 US 169.

117 For further discussion, see G.Carney, *Members of Parliament: Law and Ethics*, Prospect Media, Sydney, 2000, pp 303 – 315.



allowing persons adversely referred to in the House to have their voice heard or their views put in the same forum where the original comments were made.<sup>118</sup>

The Green Paper expresses the view at paragraph 181 that the difficulty with right of replies is that they lack effectiveness: they are published several weeks later than the original statements, and do not generate the same publicity.

This has not generally been an issue in the Legislative Council. With modern internet search engines such as Google, rights of reply are ‘findable’ online just as readily as the original statements to which the right of reply responds. The Legislative Council Privileges Committee has adopted particular protocols when placing right of reply reports on its webpage to ensure that the right of reply is easily ‘findable’.

### ***Waiving of privilege***

In Chapter 4, the UK Government also contemplates the desirability of individual Houses being able to waive parliamentary privilege. However, it is observed that this would mean that no member of Parliament could rely on his or her statements being protected, thereby having a chilling effect on freedom of speech.

There has been only one example, in 1997, where privilege has been waived in the NSW Legislative Council. In that instance, the Parliament passed legislation, the *Special Commissions of Inquiry Amendment Act 1997*, to enable the waiving of privilege to allow an extra-parliamentary inquiry into allegations made by a member within the House. However, a very careful and cautious approach was adopted. The Act enabled the House to declare by resolution passed by a two-thirds majority that privilege was waived in connection with the Special Commission of Inquiry only. In addition, while permitting a collective waiver of privilege by the House, the Act preserved the right of any individual member to claim parliamentary privilege. Moreover, the provisions of the Act were also specified to expire six months after their commencement date.

This cautious approach to the waiving of privilege was subsequently upheld in both the NSW Court of Appeal<sup>119</sup> and the High Court.<sup>120</sup> Of note, the NSW Court of Appeal observed:

We see nothing incongruous in a House of Parliament being able to waive the former privilege, and thus permitting an external inquiry into statements made inside the House while at the same time the statute operates not to waive a member’s privilege.<sup>121</sup>

### ***The powers of select committees***

In Chapter 7, the Green Paper examines the powers of select committees to summon witnesses, and to order documents and records, based on concerns arising out of the recent

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<sup>118</sup> Submissions seeking a right of reply have been received from a wide range of persons and groups. They include individuals from fields as diverse as academia, religious organisations, local government and the building industry, as well as private citizens. See NSW Legislative Council Privileges Committee, *The right of reply process*, Report 61, June 2012.

<sup>119</sup> *Arena v Nader* (1997) 42 NSWLR 427

<sup>120</sup> *Arena v Nader* (1997) 71 ALJR 1604

<sup>121</sup> *Arena v Nader* (1997) 42 NSWLR 427 at 327.

hearings of the Culture, Media and Sport Select Committee in relation to phone hacking. It contemplates codifying the powers in legislation, or criminalising certain contempts.

The experience of the NSW Parliament in this regard may be instructive.

As indicated previously, as with the British Parliament, the NSW Parliament has not generally codified its powers and immunities in legislation. However, one major exception to this is the codification of the powers of committees to compel the attendance of witnesses under the *Parliamentary Evidence Act 1901*. The Act provides that any person, other than a member of Parliament, may be summonsed to give evidence. Any person who refuses such a summons may be compelled to attend by warrant issued by the courts.

Since 1901, but more importantly since the development of the modern committee system in more recent times, there have been no known instances where the Parliament has needed to resort to the seeking of a warrant.<sup>122</sup> In the vast majority of cases witnesses attend committee hearings voluntarily. In the few cases where they have not, a summons has been issued, and the witness has complied.

By contrast, the power of committees of the NSW Parliament to order the production of documents and records is generally not based on legislation, the exception being those statutory committees with an express power to ‘send for persons, papers and records’. Rather, the power relies on the common law doctrine that the Houses of the NSW Parliament have such powers as are ‘reasonably necessary’ for their effective functioning.

It is the opinion of the current and former Clerks of the Legislative Council that all Council committees also have the power to order the production of State papers, if such a procedure is necessary or desirable in the context of a particular inquiry. This position is founded on the position that committees are a properly constituted extension of the House, and share the same immunities and powers as the House.

By contrast, the Crown Solicitor has repeatedly argued that the power of the House to order the production of state papers is not readily delegated to a committee of the House.

The result is that the executive government has repeatedly challenged the power of committees of the Legislative Council to order the production of state papers, hampering the work of several committee inquiries over the years.

### **The power to deal with contempt**

In Chapter 7, the Green Paper also examines the power to deal with contempt.

It is settled law in Australia, if not in the UK, that it is for the courts to determine the existence and extent of parliamentary powers, but that the exercise of those powers is a matter for individual Houses of Parliament.

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<sup>122</sup> In 2011, a committee of the Legislative Council did request that the President seek a warrant from a judge of the Supreme Court for the apprehension of certain witnesses. In the event, the President refused, on the basis that the previous non-attendance of the witnesses before the Committee may have been with just and reasonable cause, as provided for in the *Parliamentary Evidence Act 1901*. At the time, the Committee was continuing to meet and hold public hearings despite the prorogation of the House, raising concerns whether the Committee proceedings were properly constituted and whether witnesses were protected by parliamentary privilege.

The conduct of modern Australian Parliaments, including the New South Wales Legislative Council, provides clear evidence of the acceptance of the jurisdiction of the courts to determine the existence of their privileges. There have been two occasions in NSW in the past 50 years where the courts have been called upon to determine the existence and extent of the powers of the Legislative Council.<sup>123</sup>

Nevertheless, at various times, it has been suggested in NSW, as it is suggested in the Green Paper, that the power of the Parliament to deal with contempt could be referred to the courts, possibly through the enactment of a statute specifying offences amounting to contempt of Parliament. However, as also discussed in the Green Paper, objections have previously been raised to this proposal on the grounds that it would undermine the separation between parliament and the courts. In a 1985 select committee report, Kirby J, at that time President of the NSW Court of Appeal, is quoted as follows:

That is undesirable in constitutional theory, for it means that the courts become the guardians of the housekeeping of Parliament. That would be embarrassing to the courts and diminish all the authority, integrity and independence of the Parliament.<sup>124</sup>

Should the New South Wales Parliament ever seek to adopt coercive powers to deal with contempt, the matter would need to be examined closely. It is likely that the adoption of coercive powers to deal with contempt would need to include a threshold definition of contempt, as in section 4 of the *Parliamentary Privileges Act 1987* (Cth), together with a non-exhaustive list of possible contempts, such as those contained in the Australian Senate Privileges Resolution of 25 February 1988. This was the approach adopted in the draft Parliamentary Privileges Bill 2010 tabled by the Speaker in the Legislative Assembly in 2010.

It is also likely that processes or systems would need to be investigated to guard against contempt being decided on political grounds, and the problems associated with parliament being both 'prosecution and judge'. In this regard, the procedures contained in Parts 1 and 2 of the Australian Senate Privileges Resolution of February 1988 would be a likely starting point.

It is unlikely that enforcement of the contempt power of Parliament by the courts would be contemplated.

### ***The right of the Houses to the attendance and service of their members***

In Chapter 9, the Green Paper addresses a number of miscellaneous issues. Of note, it discusses two matters concerning the right of the houses of parliament to the attendance and service of their members: the freedom of members from arrest in civil matters, and the exemption of members from attending court as a witness when the parliament is sitting. The Green Paper proposes abolishing the freedom from arrest in civil matters, and removing the exemption from attending court, noting in support that members in the UK are no longer exempt from jury duty.

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123 *Armstrong v Budd* (1969) 71 SR (NSW) 386 concerned the power of the House to expel a member; the Egan cases concerned the power of the House to compel the production of state papers. See the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650, the decision of the High Court in *Egan v Willis* (1998) 195 CLR 424 and the decision of the New South Wales Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563.

124 NSW Parliament, Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985, p 123.

The NSW Parliament has not gone down the path of winding back these immunities, on the basis that the Houses have an inherent right and superior claim to the attendance and service of their members. In an age of strong party discipline, the numbers in the Legislative Council are finely balanced, and the absence of one member has the potential to alter a decision of the House. It is true that major parties generally arrange to provide pairs for absent members, but that is not the case for cross-bench members. The same arguments also apply to committees of the House, on which the numbers are equally finely balanced, given their membership of only six or seven members.

For these reasons, in 2010 the NSW Legislative Council made a submission to an inquiry initiated by the NSW Attorney General opposing a proposal from the NSW Law Reform Commission for the removal of the exemption of members of parliament from jury duty. The proposal was subsequently dropped. By contrast, as indicated, the exemption of members of the UK Parliament from jury duty was removed in 2003, based on Lord Justice Auld's 2001 Review of the Criminal Courts in England and Wales.

Looking specifically at the proposal in the Green Paper to abolish the freedom from arrest in civil matters, this immunity is presumed to exist at common law in NSW, although the potential for a person to be arrested and imprisoned in a civil, as distinct from a criminal, process is now extremely small. The draft Parliamentary Privileges Bill 2010 tabled by the Speaker in the Legislative Assembly in 2010 sought to codify the immunity, based on section 14 of the *Parliamentary Privileges Act 1987* (Cth).

The exemption of members from attending court as a witness when parliament is sitting is codified under section 15(2) of the *Evidence Act 1995* (Cth), which provides that:

15(2) A member of a House of an Australian Parliament is not compellable to give evidence if the member would, if compelled to give evidence, be prevented from attending:

- a) a sitting of that House, or a joint sitting of that Parliament, or
- b) a meeting of a committee of that House or that Parliament, being a committee of which he or she is a member.

These provisions are unlikely to be changed in NSW or Australia.

**11 February 2013**

## Sir Robert Rogers KCB Clerk of the House of Commons (further submission)

### *Strauss revisited — are MPs' letters proceedings in Parliament?*

At the oral evidence session on Tuesday 12 February 2013 (Q 229), I offered to submit further written evidence on the extent to which Members' correspondence may be covered by Article 9 of the Bill of Rights as proceedings in Parliament.

### *Duncan Sandys 1938*

In the *Duncan Sandys* case (1938-39) the House had agreed with the Select Committee on the Official Secrets Acts that the working definition of 'proceedings' should be extended to communications between one Member and another or between a Member and a Minister so closely related to some matter pending in or expected to be brought before the House that they form part of the business of the House.

Mr Sandys, the Conservative Member for Norwood, was also a serving officer in the Territorial Army. He had sent a written draft of parliamentary question to the Secretary of State for War, which incorporated highly sensitive and detailed information about the deficiencies of anti-aircraft provision in London. Subsequently the Attorney General informed Mr Sandys that he had a legal obligation to reveal the source of his information, or face the consequences under the Official Secrets Act. Although the Attorney General later assured Mr Sandys that he personally would not face prosecution, Mr Sandys raised the issue as a matter of privilege, which was referred to an ad hoc Select Committee.

In its Report, the Select Committee on the Official Secrets Act referred to matters 'so closely related to some matter pending in, or expected to be brought before, the House, that though they do not take place in the chamber or a committee room they form part of the business of the House, as, for example, where a member sends to a Minister the draft of a question he is thinking of putting down or shows it to another member with a view to obtaining advice as to the propriety of putting it down or as to the manner in which it should be framed.' The Attorney-General told the Select Committee that, should such a case come before the courts, he could not but think that they would give a broad construction to the term 'proceeding in parliament' having regard to the great fundamental purpose which the privilege of freedom of speech served, and that he could 'see a possible construction of "proceedings" which would extend to matters outside the precincts if they were related to what is to happen in the House'.

### *George Strauss 1958*

In the *Strauss* case (1958), the House of Commons decided not to endorse the view of the Committee of Privileges that a letter written by a Member of the House of Commons to a Minister concerning the day-to-day administration of a nationalised industry was a proceeding in Parliament.

Speaking in the debate on the *Strauss* case, the Leader of the House (R. A. Butler) expressed the opinion that the 1939 decision in the *Sandys* case had marked the "high tide" of Parliamentary privilege. The *Strauss* case also dealt with communications between a Member and a Minister, but the connection to parliamentary proceedings was not as clear

as in the *Sandys* case. George Strauss, the Member for Vauxhall, had written to the Paymaster General, Reginald Maudling (Conservative) criticising the scrap metal dealings of the London Electricity Board as “a scandal” open to “strong suspicion” and alleging that there had been “day to day maladministration’ .... “in the nature of a public scandal”.

Mr Strauss declared in his letter to the Minister that he had an indirect personal financial interest, in that a subsidiary of his firm were scrap metal merchants who shared the view of the LEB’s behaviour held by the National Association of Non-Ferrous Scrap Metal Merchants. Under the rules applying to parliamentary questions at the time, Mr Strauss would have been unable to raise in a parliamentary question such a matter of day-to-day administration by a nationalised industry. The Minister passed Mr Strauss’s letter on to the LEB, who threatened to sue Mr Strauss for defamation. Mr Strauss’s complaint of a breach of privilege was referred to the Committee of Privileges.

The Committee of Privileges “adopted and followed” the reasoning of the Select Committee in the *Duncan Sandys* case by concluding that Mr Strauss in writing to the Paymaster General directing his attention to matters of administration in a nationalised industry was conducting or engaged in a “proceeding in Parliament” and that in so doing he was protected by Article 9 of the Bill of Rights.

But a motion to approve the Committee’s Reports on the case was debated on 8 July 1958 (HC Deb volume 591 columns 208 to 345). Herbert Morrison successfully moved an amendment “to leave out from “House” to the end of the Question and to add instead thereof: “does not consider that Mr. Strauss’s letter of the 8th February, 1957, was ‘a proceeding in Parliament’ and is of opinion therefore that the letters from the Chairman of the London Electricity Board and the Board’s Solicitors constituted no breach of Privilege”. ”

#### ***Joint Committee on the Publication of Proceedings in Parliament 1970***

The Joint Committee on the Publication of Proceedings in Parliament recommended that “proceedings in Parliament” should be defined by statute, and offered the following definition (Second Report, Session 1969–70, HL 109/ HC 261, paragraph 27)—

“(1) For the purpose of the defence of absolute privilege in an action or prosecution for defamation the expression ‘proceedings in Parliament’ shall without prejudice to the generality thereof include

- a) all things said done or written by a Member or by any officer of either House of Parliament or by any person ordered or authorised to attend before such House, in or in the presence of such House and in the course of a sitting of such House, and for the purpose of the business being or about to be transacted, wherever such sitting may be held and whether or not it be held in the presence of strangers to such House:

provided that for the purpose aforesaid the expression ‘House’ shall be deemed to include any Committee sub-Committee or other group or body of members or members and officers of either House of Parliament appointed by or with the authority of such House for the purpose of carrying out any of the functions of or of representing such House; and

- b) all things said done or written between Members or between Members and officers of either House of Parliament or between Members and Ministers of the Crown for the purpose of enabling any Member or any such officer to carry out his functions as such

provided that publication thereof be no wider than is reasonably necessary for that purpose.”

### **Australia 1987**

As the Joint Committee is aware, the Australian Parliamentary Privileges Act 1987 provides in section 16(2) that—

‘For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

- a) the giving of evidence before a House or a committee, and evidence so given;
- b) the presentation or submission of a document to a House or a committee;
- c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
- d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published’.

### **Defamation Act 1996**

In the 2010 *Chaytor* judgement, the President of the Supreme Court, Lord Phillips of Worth Matravers, referred to the wording of section 13 of the Defamation Act 1996, which he held could not extend the ambit of Article 9 of the Bill of Rights. Section 13(4) of that Act provides that –

“Nothing in this section affects any enactment or rule of law so far as it protects a person (including a person who has waived the protection referred to above) from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament.”

The following subsection 13(3) amplifies the point, by providing that “Without prejudice to the generality of subsection (4), that subsection applies to —

- a) the giving of evidence before either House or a committee;
- b) the presentation or submission of a document to either House or a committee;
- c) the preparation of a document for the purposes of or incidental to the transacting of any such business;

- d) the formulation, making or publication of a document, including a report, by or pursuant to an order to either House or a committee; and
- e) any communication with the Parliamentary Commissioner for Standards or any person having functions in connection with the registration of members' interests.

#### ***Joint Committee on Parliamentary Privilege 1999***

The Joint Committee on Parliamentary Privilege's Report of 1999 stated that "Proceedings are broadly interpreted to mean what is said or done in the formal proceedings of either House or the committees of either House together with conversations, letters and other documentation directly connected with those proceedings." (HL 43-1/HC214-1, paragraph 12) In the Joint Committee's view, Members' correspondence did not form part of parliamentary proceedings: "Article 9 protects parliamentary proceedings: activities which are recognisably part of the formal collegiate activities of Parliament." (HL 43-1/HC214-1, paragraph 55).

#### ***UK Supreme Court 2010***

In the Chaytor judgement [2010] UKSC 52, Lord Phillips of Worth Matravers quoted with approval (at paragraph 15) advice given by the Clerk of the Parliaments —

"Article 9 limits the application of parliamentary privilege to 'proceedings in Parliament.' The decision as to what constitutes a 'proceeding in Parliament', and therefore what is or is not admissible as evidence, is ultimately a matter for the court, not the House."

In the same judgement (paragraph 47), Lord Phillips stated that —

"the principal matter to which article 9 is directed is freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament."

Lord Phillips concluded (paragraph 61) that—

"There are good reasons of policy for giving article 9 a narrow ambit that restricts it to the important purpose for which it was enacted — freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown's judges. The protection of article 9 is absolute. It is capable of variation by primary legislation, but not capable of waiver, even by Parliamentary resolution. Its effect where it applies is to prevent those injured by civil wrongdoing from obtaining redress and to prevent the prosecution of Members for conduct which is criminal".



### **Conclusion**

It would be a matter for the courts to decide in any particular case whether something done, said or written was actually a “proceeding in Parliament” and thereby entitled to the absolute protection afforded by Article 9. I have explained to the Committee, my reasons for preferring the elasticity of the law as it stands in the United Kingdom over setting in aspic our contemporary application of the term. For the health of our parliamentary democracy in the long run, I would suggest, the wiser course is to apply a pragmatic test in each case of how closely what the Member (or witness, or parliamentary official) did or wrote is connected to actual proceedings in the House or its committees. It follows that I would resist interpretations that took at their starting point a formulation such as that of Justice O’Connor in 1885 (*R v Bunting* [1885] Ontario Reports p. 563) that “a Member of Parliament is privileged in anything he may say or do within the scope of his duties in the course of parliamentary business”, unless those duties were narrowly defined.

In general, in my view, whether a Member’s letter is a proceeding in Parliament will depend, in the circumstances of the case, on how closely the letter is connected to an occurrence, actual or clearly foreseen, in the House or one of its committees.

Article 9 is not the only factor, however: as *Erskine May* points out (24th edition, page 270) “the special position of a person providing information to a Member for the exercise of his parliamentary duties has been regarded by the courts as enjoying qualified privilege at law”.

**1 March 2013**

## **Rt Hon Tom Brake MP, Deputy Leader of the House of Commons**

### ***Penal powers of the House and Select Committees***

1. The Green Paper suggests that “in practice, there may not be an issue to address” in relation to Select Committee and House powers to summon witnesses and punish contempts. In light of the recent Liaison Committee report, is this still the Government’s view?

**The Government remains of the view that in practice, Select Committees are very rarely in a position where their powers are not adequate to fully meet their objectives.**

**Amongst the many thousands of inquiries that Select Committees have undertaken, there have undoubtedly been instances of frustration. However, historically there have only been a handful of occasions, such as in the case of the Culture, Media and Sport Select Committee’s inquiry into News International, when Select Committees have felt it necessary to escalate those matters of frustration. There is very little evidence to suggest that existing powers to summons witnesses have proved ineffective and hampered the work of committees.**

- The Green Paper asks, “should the House of Commons be given a statutory power to fine non-members?” In light of the responses to the consultation, has the Government formed a view?

**No, the Government has not formed a view in light of the consultation responses. Strong views have been expressed by respondees on both sides of the argument of whether Select Committees should be given statutory powers. Consultation responses from the Clerk of Legislation, Parliament of Western Australia and Sir Malcolm Jack (ex-Clerk of the House) supported the view of the 1999 Joint Committee that the House of Commons should be given a power to fine non-members. However other responses, such as the Newspaper Society, were opposed due to concerns about the need for journalists to protect their sources which might, in turn, put them at risk of being found in contempt and fined.**

**The Government’s Green Paper set out our concern in this area that a process would need to be in place which would guarantee that any individual who is subject to a fine has received a fair hearing. The Government does not believe that the current Select Committee procedures provide the safeguards that would be necessary. Committees would want to consider carefully the impact that introducing a power to fine would have on the nature of their procedures and the character of their way of operating.**

**We look forward to receiving the Committee’s views, particularly in the light of further evidence gathered in the oral evidence sessions.**

- What would be the Government’s view of a formal procedure to admonish an individual in response to a contempt, perhaps by means of a resolution passed on the recommendation of a Privileges Committee?

The Government has not so far seen sufficient evidence to suggest that the current arrangements are not effective. Under the current arrangements, the Privileges Committee can make a recommendation, following complaints from a Select Committee, about whether an individual is in contempt of Parliament and that can be endorsed by the House. Such procedures, along with public criticism from the Select Committee itself, would appear to serve as an effective deterrent. The Government is not sure what further purpose a resolution admonishing an individual would serve, but would welcome more details on how the Committee might see such a formal process working

- What would be the effect on the relationship between Parliament and the courts of legislation which allowed the courts to evaluate a Committee's need for particular evidence?

Legislation which allowed the courts to evaluate a Committee's need for particular evidence or any other aspect of a Committee's procedures, would be a departure from the current relationship between Parliament and the Courts which is governed by the principles of exclusive cognisance and the separation of powers. Such principles underpin parliament's ability to operate effectively and independently, so the Government would have concerns about legislation that potentially undermined them.

2. It is clear that any proceedings against a non-member alleged to have committed a contempt would have to be conducted in accordance with the European Convention on Human Rights. What does the Government see as the benefits/disadvantages of either setting up internal, parliamentary processes for conducting such proceedings, possibly with a statutory underpinning akin to Australian practice, or establishing a statutory regime whereby allegations of contempt would be referred to the courts?

The Government does not believe that the current arrangements provide the kind of safeguards that individuals have a right to expect of anybody with the power of prosecution. Under Article 6 of the European Convention on Human Rights (ECHR) an individual is entitled to a fair hearing by an independent and impartial tribunal. As such, in order for the defendant in any such proceedings to be given a fair hearing, the House would have to significantly change its current procedures and practices.

In order to comply with Article 6, that standard of fairness for non-Members would require, for example, safeguards as identified by the Joint Committee in their 1999 Report in relation to the procedural fairness of disciplinary procedures against members:

- Clear prior statement of allegations against a non-member and the evidence on which those allegations are based
- Opportunity to take legal advice and have legal assistance throughout
- Opportunity to be heard in person
- Opportunity to call and examine witnesses
- Opportunity to attend meetings at which evidence is given and receive transcripts of evidence

- Any person who has a personal interest in the matter under investigation to be disqualified from participating in the proceedings except as a witness
- In determining a non-member's guilt, it should be clear what the criterion applied is eg. balance of probabilities.

The Australian model gives each House the power to punish a contempt subject to a 'threshold test' set out in statute. That test is whether the action/behaviour amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committees of its authority or functions. The threshold test means that the Houses have freedom in ascertaining what constitutes a contempt, although there is provision for judicial review of that decision in cases of imprisonment, though this is yet to be used.

The Government believes that serious consideration would have to be given to how this would apply in the UK Parliament, as it is clear that a threshold test would provide uncertainty about what would constitute a contempt. It would also not prevent the courts from potentially questioning parliamentary procedures.

Giving such proceedings a statutory footing would require a definition of contempt to be established in order to alleviate uncertainty. The consequence however, is to invite the courts to examine proceedings in Parliament, which would be a clear departure from the principles of the exclusive cognisance of Parliament. It would also change the nature of proceedings; potentially limiting what witnesses would otherwise disclose to a Committee and how the Committee would question a witness and lead to witnesses taking legal advice and/or appearing with legal advisers.

Given the difficulties in placing contempt on a statutory footing and that the evidence would seem to suggest that there is not currently a significant problem to address, the disadvantages would appear to outweigh the benefits. We would however, welcome the Committee's views.

#### *Other matters relating to Select Committees*

3. Does the Government still support the principle of passing legislation to confer full voting rights on lay members of the Committee on Standards, despite the concerns raised about the proposal by the Clerks of both Houses?

- House of Lords Standing Order 77 provides that the House of Lords Committee for Privileges and Conduct, in hearing any claim of peerage, "shall sit with three holders of high judicial office, who shall have the same speaking and voting rights as the members of the Committee." What impact would the Government's draft clause have upon the status of external members of the Lords committee?

The Government provided an illustrative clause in its Green Paper following the recommendation of the Committee on Standards in Public Life, that it may be desirable in principle for lay members of the Committee on Standards to have voting rights.

The intention of the draft clause was to address concerns raised in relation to the members of the Commons Standards Committee. It does not refer to other committees

and is not intended to change the status or cast doubt on that of the members of any other committee. However, we are grateful to the clerks for raising concerns about possible unintended consequences for the House of Lords Committee for Privileges and Conduct.

As concerns have been raised about any proposed legislation, the Government would obviously listen to the views of the House as to whether legislation is desirable.

#### *Judicial questioning of proceedings in Parliament*

4. The Green Paper states that “Recent developments have seen proceedings in Parliament used in court more regularly than in the past without encroaching upon the protections provided by parliamentary privilege”. The evidence received by this Committee does not entirely support that view, particularly in relation to judicial review cases<sup>125</sup> where the use of parliamentary material has grown in recent years. Has the Government’s view changed since the publication of the Green Paper? What use should courts be able to make of parliamentary proceedings, in particular select committee reports?

- Would the Government support the introduction of a formal process for notifying the two Houses in cases where the courts proposed to make use of privileged material?

It is useful both from the perspective of the courts and from the perspective of the Government that the courts are able to refer to statements by a Minister in the passage of legislation in order to help interpret provisions in that legislation where they are ambiguous. This was first permitted in the case of *Pepper –v- Hart* and it enables proper account to be taken of the legislative intentions of government at the time the legislation was enacted. The Government also finds it useful to be able to put on the record what it intends the consequences of legislation to be so that unnecessary amendments to legislation are not made.

In judicial review cases it may be relevant to the issues in question to know what the Government’s publicly stated position on an issue was at a particular time and using as evidence the statement of ministers to Parliament is an excellent source of evidence to enable courts to make decisions based on the best material available.

Therefore, it is unlikely that use of statements in Parliament in either of these contexts would have a chilling effect on the willingness of MPs or Lords to freely speak their mind on the issues being debated. The mischief which Article 9 of the Bill of Rights seeks to prevent is not in play in situations where the court may refer to the content of proceedings in Parliament.

If one were to introduce a formal process for notifying the Houses in cases where the courts proposed to make use of privileged material there would need to be a clear understanding of the purpose of such notification. Would it be to enable Parliament to object to the court using the material in question if it thought it was appropriate to do so? What would be the mechanism for each House deciding whether to object?

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<sup>125</sup> Cases referred to in the course of the inquiry include *R (Pelling) v. Secretary of State for the Home Department and others* [2011] EWHC 3291 and *R (on the application of Reilly) v. Secretary of State for Work and Pensions* [2013].

The Government would have reservations about establishing a process unless the need for such a process was clearly demonstrated. As the Lord Chief Justice, Lord Judge, explained in his oral evidence to the Joint Committee, instances such as this are exceptional and setting up such a procedure would not necessarily eliminate the potential for error. It therefore appears undesirable to introduce any added bureaucracy to the court process.

#### *Article 9*

5. The Green Paper suggests that parliamentary privilege might be disapplied in criminal cases. Given the decision of the Supreme Court in *R v Chaytor*, which clearly established that members could not claim immunity from prosecution for misuse of expenses; does the Government still think this is necessary?

- Can the Government give any example of an occasion when a criminal prosecution could not go ahead because of privilege?

**One of the drivers for looking at this issue again, was the concern raised when some MPs and Peers tried to invoke Parliamentary privilege to avoid prosecution during the expenses row.**

However, there are conceivably other criminal cases where evidence could be withheld on the basis of Parliamentary privilege, thereby preventing successful prosecution. For example, bribery or corruption. These are discussed in the Government's Green Paper and were also highlighted by the 1999 Joint Committee.

An MP could be accused of accepting a bribe to ask a question or raise an issue in debate. The debate could be evidence of the act but could not be questioned in court.

We are not aware of any examples of criminal prosecutions that have not been able to go ahead because of privilege. Given the importance of protecting freedom of speech, we don't currently believe that the evidence supports a disapplication of privilege. We do however look forward to receiving the Committee's views.

- What is the Government's response to the concerns expressed by both clerks that the Government's proposal would have a profoundly chilling effect upon debate in Parliament?
- Lord Browne-Wilkinson in *Prebble v Television New Zealand* said that "the important public interest protected by ... privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say." Don't the Government's draft clauses fundamentally undermine this principle?

**As the Green Paper makes clear, the Government is concerned about the possible chilling effect any such legislation could have. The Green Paper therefore suggests ways of mitigating that by excluding certain offences, namely 'speech offences'. The clauses are, however, only illustrative and we are grateful for the views of others including the Clerks of each House.**

6. The Green Paper suggests that the Government sees no need to define “proceedings in Parliament” in statute, or even to provide an illustrative and non-exclusive list of the kinds of things that constitute proceedings in Parliament, along the lines of the Australian Parliamentary Privileges Act. Is this still the Government’s view?

**The Government is not aware of a compelling case for defining “proceedings in Parliament”. We welcome the Committee’s views.**

7. The Clerk of the House has told us that in his view the decision of the court in *Rost v. Edwards*, that the Register of Members’ Interests is not privileged, was wrong. The Green Paper simply describes it as “unambiguous”. Does the Government agree with the decision in *Rost v. Edwards*? If not, what should Parliament do about it?

**It would seem that the decision of the courts in Rost-v-Edwards is at odds with the view of Parliament. However, as the Clerk of the House described in his evidence, a difference in view of this kind is extremely rare. Other case law illustrates that the courts interpretation of privilege is shared with Parliament, as in the case of R-v-Chaytor.**

**Given the rarity with which the court’s interpretation of privilege differs from Parliament, the Government believes that making statutory provision is a disproportionate response.**

8. The Green Paper says that the Government sees no need to re-draw the line between parliamentary proceedings and correspondence between MPs, ministers and constituents. Does the law give sufficient protection to MPs in performing their work?

**The Government is not aware of evidence which suggests that MPs do not have sufficient protection to carry out their work. As stated in the Green Paper, the law is clear that correspondence between MPs and their constituents is not a proceeding.**

**Extending qualified privilege to all correspondence between MPs and constituents would seem to run the risk of potentially encouraging correspondence to MPs intended to circumvent court orders and damage the privacy or reputation of third parties, in effect extending the protection of privilege to those matters where there seems to be little justification for it applying. The Government believes that the current position is appropriate which enables the courts to determine the boundaries of privilege in individual cases.**

**Constituents would already be able to obtain the necessary protection in defamation proceedings due to the qualified privilege attaching to correspondence made in good faith and without malice.**

9. In a recent New Zealand case, *Gow v. Leigh*, the court found that briefing supplied by an official to a minister, for the purpose of answering a parliamentary question, was not a “proceeding in Parliament”, and was therefore protected only by qualified privilege. The case does not apply to the UK, but what is the Government’s view of the underlying principle?

**It is possible that such a definition of “proceeding in Parliament” is too narrow. Such material is directly linked to a Minister being held to account by Parliament.**

Such an interpretation could potentially have a chilling effect on the content of briefing by officials if officials could be legally liable for that content.

Given the court's discussion of what constitutes proceedings in Parliament in the UK context in *R –v- Chaytor*, it is not clear that the UK courts would reach the same position as the decision in *Gow –v- Leigh* in New Zealand. However, the courts have favoured a relatively narrow interpretation of “proceedings in Parliament” given the absolute nature of the protection in Article 9 of the ECHR.

### *Defamation*

10. The balance of the evidence received by the Committee advocates the repeal of section 13 of the Defamation Act 1996 – a recommendation of the 1999 Joint Committee. Does the Government agree that section 13 should be repealed?

- If section 13 were to be repealed, does the Government believe there is a case for replacing it with a general power of waiver conferred upon the two Houses as recommended by the 1999 Joint Committee, or should it be repealed without replacement, as proposed by the Clerk of the House?

**There are clearly problems with Section 13 of the Defamation Act. It is at odds with the principle that freedom of speech is a privilege of the House, not just individual members and it can create an imbalance where one party to proceedings can choose to use the parliamentary record but the other cannot.**

**However, the Government is not aware of any instances in which anyone has used the power of waiver and as such it would not appear to be a pressing priority to repeal Section 13.**

**The Government acknowledges concerns with introducing a general power of waiver for Parliament given the potential chilling effect on debate.**

**We would welcome a view on this matter from the Joint Committee.**

### *Reporting or repetition of proceedings in Parliament*

11. The Green Paper suggests ways of modernising and clarifying the law regarding the reporting of parliamentary proceedings. Should absolute privilege apply either to any verbatim extracts of parliamentary proceedings? Should such privilege apply to all “fair and accurate” reports of such proceedings?

- Lord Lester of Herne Hill, in evidence to this committee, has stated his view that absolute privilege should attach to fair and accurate reports of parliamentary proceedings, in defamation cases only – he accepts that only qualified privilege should attach in other circumstances, such as breaches of court injunctions. What is the Government's response to his suggestion?
- Does the Government believe the law should be clarified to make clear that the cover afforded by privilege to reported proceedings is comprehensive: i.e. that it covers not just defamation and libel proceedings, but also where publication would breach court



injunctions, or restrictions put in place by other statute law such as the Official Secrets Act 1989, Sexual Offences (Amendment) Act 1992 or the Education Act 2011?

**As stated in the Green Paper, the Government's view is that the current situation, whereby fair and accurate reports are protected by privilege, if they are made in good faith and without malice, is the right one.**

**We think this strikes the right balance in allowing MPs to speak freely without allowing that privilege to be abused by others acting maliciously.**

**If absolute privilege were extended to all fair and accurate reports, defamatory information about an individual could be deliberately given to an MP with the intention of obtaining absolute privilege. If the MP used it during a proceeding in Parliament, the individual who is the subject of that information would then have no right of redress if the information was subsequently reported because of the privilege attached to it. However, we obviously welcome the views of others, including those of Lord Lester of Herne Hill and will consider them carefully.**

12. The New Zealand case of *Jennings v Buchanan* cast doubt on the protection afforded to “effective repetition” – an MP saying “I do not resile from my speech” might be held liable as though he had repeated the whole speech outside the protection of parliamentary proceedings. The legal position in the UK is unclear: does the Government believe the situation should be clarified, and what protection do they think should be afforded to such statements?

**There does not appear to be sufficient lack of clarity, or problems at present to justify legislating on this matter. The case of *Jennings v Buchanan* made it clear that protection was not afforded to “effective repetition”.**

**It is possible that the courts may take a more expansive view of what counts as repetition of a statement outside the House, so it is advisable not to say anything which could be interpreted as referring to the defamatory statement in a way which adopts or repeats it outside a parliamentary proceeding.**

**It is correct that even words so neutral sounding as “I do not resile from my statement in the House” can be actionable where referring to a defamatory statement made in the House. Such a comment made by the defendant in *Jennings-v-Buchanan* where the Privy Council, applying a legal position which it held to be the same in the UK, found the defendant liable in defamation.**

### ***Other privileges***

13. Given that Members normally manage to arrange any court appearances at a mutually convenient time, does the Government believe that there is still any need for the theoretical immunity of Members from being subpoenaed as witnesses? If not, how would the Government go about abolishing this privilege?

- Members of both Houses have been liable for jury service since 2003. Is there a case for restoring Members' exemption from compulsory jury service? Should an exemption from jury service only apply when the Houses are sitting?

- Should the current exemption Members have from being summoned to court as witnesses be restricted to days when the House is sitting?

**As stated in the Green paper, the Government sees no continuing justification for Members being exempt from orders requiring them to attend court as witnesses.**

**No evidence has been produced to suggest that there has been a problem with MPs completing jury service.**

*10 April 2013*

## David Howarth and Nigel Pleming QC

### CONTEMPT OF PARLIAMENT

#### STATUTE

Power of the Houses of Parliament to enforce their orders:

1. Each House of Parliament may make provision for making and enforcing orders directed at persons other than their own members for the purposes of securing the attendance and co-operation of witnesses before either House or any of its committees, providing information or documents to either House or any of its committees, protecting Parliamentary proceedings from disruption and contempt and securing compliance with any other aspect of either House's privileges.
2. Article 9 of the Bill of Rights 1689 applies to any provision made under subsection (1) and to any act of any person taken in furtherance or contemplation of any such provision.

### STANDING ORDERS OF THE HOUSE OF COMMONS

#### *Enforcement Powers of the House and of Committees of the House*

1. The House and all Committees of the House may order any person to appear before them, to give evidence to them or to supply any information or document to them.<sup>126</sup>
2. Where the House or any Committee of the House has issued an order to any person to appear before it or to give evidence to it or to supply information or a document to it and it appears to the Speaker or, as the case may be, to the Chair of the Committee, that the person so ordered has failed to comply with the order, the Speaker or the Chair may propose and the House or the Committee may resolve to enforce the order.
3. Where a resolution to enforce an order has been made and the person to whom the order is addressed evinces an intention to refuse to comply, the Speaker or, as the case may be, the Chair of the Committee may propose and the House or the Committee may resolve to constitute itself as an enforcement committee.
4. An enforcement committee may apply to the Speaker for a warrant for the arrest of a person who has evinced an intention to refuse to comply with an order under (1) and (3) above.
5. An enforcement committee must take all reasonable steps to ensure that proceedings before them are fair including:
  - a) Allowing the accused person adequate time and (if necessary) facilities to prepare a response to the enforcement of the order;
  - b) Allowing the accused person to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal

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<sup>126</sup> [We do not here cover giving untruthful evidence to a committee. Members may consider the existing provision for administering an oath, thereby invoking the law on perjury, to be sufficient. If not, separate provision would have to be made for that form of contempt.]

assistance, applying to the Liaison Committee for the payment of any reasonable costs of such legal assistance;

- c) Providing, where necessary, the free assistance of an interpreter if the accused person cannot understand or speak English;
- d) Applying to the Liaison Committee for the payment of any reasonable expenses of an accused person, including (but not limited to) travel and subsistence costs.
- e) Where an enforcement committee is of the opinion that it cannot act fairly in the matter,<sup>127</sup> transferring the case to the Liaison Committee<sup>128</sup>, which at that point may also resolve to constitute itself as an enforcement committee.

6. The proceedings before an enforcement committee shall be held in public, and its decision(s) pronounced publicly, save that the press and the public may be excluded from all or part of the proceedings in the interests of morals, public order or national security, or to the extent strictly necessary in the opinion of the committee in special circumstances where publicity would prejudice the interests of justice.

7. An enforcement committee may decide with regard to any accused person who has evinced an intention to refuse to comply with an order:

- a) To take no further action;
- b) To impose a fine of any amount;
- c) To impose a sentence of imprisonment of up to two years.

8. The power to impose a sentence of imprisonment includes a power to impose such a sentence in default of payment of a fine under 7(b).

9. Fines shall be payable within 14 days of pronouncement to the Corporate Officer of the House.

10. If the House or the Committee finds that the accused person evincing an intention to refuse to comply had a reasonable excuse for refusing to comply, it must decide to take no further action.

11. Any sentence of imprisonment must be subject to a condition that if the person so sentenced subsequently agrees to comply with the relevant order or any substitute order, the person must be released forthwith (but if the person subsequently again refuses to comply, the prison sentence may be reimposed for a further period of up to two years).

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127 This might be particularly so if the issue concerns the dignity or personal feelings of members of the originating committee, who might then be seen to be lacking in independence and impartiality. Cf *Demicoli v Malta* (1992) 14 E.H.R.R. 47 at paras 41-42.

128 Other options here would be reference to a separate contempt enforcement committee or to the Committee of Privileges. A new committee has the advantage of clear separation from all existing committees, but would not have the reach or weight of the Liaison Committee. Privileges would be the right committee to use from the point of view of tradition, and it is the default option for dealing with contempts not otherwise dealt with by Standing Orders, but members might want to consider the confusion and resentment the word 'privilege' engenders in the media.

12. An enforcement committee must appoint a legally qualified adviser, who may, but need not, be, the person who holds the office of counsel to the Speaker, and must receive any advice the legal adviser wishes to offer, either in public or in private session as the House or the Committee may determine.

13. A decision by an enforcement committee other than the House itself may be appealed by any person on whom a penalty has been imposed to an enforcement committee of the whole House:

- a) Any appeal must be made in writing to the Speaker within 14 days;
- b) The Speaker may make further provision governing proceedings on appeal to ensure that they are fair.

### ***Contempt in the face of the House or of a Committee of the House***

1. The Speaker and all Chairs of Committees may order the removal or the detention of any person who appears to them to be disrupting proceedings.

2. Any detention under (1) may last only until the end of the day's proceedings in the House or in that Committee, at which point, notwithstanding any other provision and taking precedence over all other business, the Speaker or the Chair of the Committee may propose and the House or the Committee may resolve that it constitutes an enforcement committee with the same powers and subject to the same rules as enforcement committees established under Standing Order [*Enforcement Powers of the House and of Committees of the House*].<sup>129</sup>

### ***Other Contempts of the House***

1. Any alleged contempt of the House that does not fall within the terms of SO [*Enforcement Powers of the House and of Committees of the House*] or SO [*Contempt in the face of the House or of a Committee of the House*] must be referred to the Committee of Privileges

2. The Committee of Privileges may resolve to constitute itself as an enforcement committee with the same powers and subject to the same rules as enforcement committees established under Standing Order [*Enforcement Powers of the House and of Committees of the House*].

### ***Note: The Contempt Powers of Courts***

The procedure outlined above follows in rough outline the contempt powers of courts. Superior courts of record have an inherent jurisdiction to deal with contempts, a jurisdiction modified and regulated by statute but not replaced by it. Inferior tribunals, such as Magistrates' Courts, have a statutory jurisdiction.

All courts have jurisdiction to deal with disruption of their proceedings. The normal procedure is that people disrupting proceedings are warned that if they persist in their disruptive conduct they will be held in contempt. Those who persist may be apprehended

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<sup>129</sup> This includes the power to transfer to another committee. The problem of independence and lack of impartiality might be particularly acute in these cases (see note 2 above).

and sent to the cells until the court wishes to deal with them, usually at the end of the day. Contemnors have a right to bail, but since they are an obvious flight risk, they would find it difficult to obtain bail before the court deals with them. The court has jurisdiction to punish contemnors itself summarily, by fine or imprisonment of up to two years, although it is now thought that they should exercise their summary powers 'sparingly and with restraint' and 'as far as possible' adopt 'proper procedural safeguards ... to ensure that the defendant is dealt with fairly' (Borrie and Low, *Law of Contempt* 12.43). If the summary procedure would not be fair, the contemnor can either be bailed to appear before the same court at a later date or before a different court. In practice, the normal outcome is that the contemnor purges his or her contempt by apologising to the court, often through the offices of a duty solicitor.

Superior courts also have extensive powers to enforce compliance with their orders (including proceedings for 'civil contempt' and disobedience of witness orders – but note that in civil proceedings a witness summons must be backed by an offer of reasonable expenses). Sanctions for disobedience include fines, imprisonment of up to two years and sequestration. Proceedings are usually brought before the court that issued the order, and objections that the judge who issued an order should not hear the contempt proceedings because of bias are usually dismissed. To reinforce that point, unlike in normal legal proceedings where the process is adversarial, in civil contempt proceedings, the court itself can call evidence and serve subpoenas on its own motion (Borrie and Low 6.52). However, since contempt proceedings are often in their nature penal, so that the full range of procedural protections apply, including the right to effective legal representation, it is conceivable that fairness might occasionally require reference to another court.

A contemnor committed to prison may apply for discharge at any time even before the end of the sentence and will be released immediately if the contempt has been purged by compliance with the court's order.

*11 February 2013*

## **Rt Hon Kevin Barron MP, Chair, Committee on Standards**

### **Letter to Lord Brabazon of Tara**

The Green Paper on Parliamentary Privilege contains a wide range of proposals, including matters relating to the Regulation of Members. As the Committee will know, on 12 March 2012, the House of Commons agreed that the Committee on Standards should contain lay members. They have now been appointed, and have already been making a significant contribution to the Committee's work.

When the Committee on Standards in Public Life recommended the inclusion of external members on the Committee it considered they should have full voting rights and that "if the House authorities are of the opinion that clarifying the question of parliamentary privilege" required an amendment to the Parliamentary Standards Act, "the Government should facilitate this." The Committee on Standards and Privileges agreed that lay members should have full voting rights.

The Green Paper makes clear the Government agrees that Members – whether Members of the Committee itself, or those under investigation – need certainty when participating in the Committee's discussion that those discussions will remain privileged. I agree. I trust that the Joint Committee will put this beyond a doubt, whether or not it considers other legislation on privilege is necessary. I cannot overstate how important I think it is that the lay members of the new Committee Standards should be able to participate on the same basis as MPs do.

*12 February 2013*