PRIVILEGE ASPECTS OF THE PARLIAMENTARY STANDARDS BILL
Memorandum by the Clerk of the House

Introduction

1. This memorandum addresses privilege aspects of the Parliamentary Standards Bill. Since the Bill seeks to make statutory provision in relation to matters which fall with Parliament's exclusive cognisance or may affect proceedings in Parliament, it affects the established privileges of the House of Commons, thereby upsetting the essential comity established between Parliament and the Courts.

2. I should stress that I make no comment whatever on the merits of the Bill's policy proposals; it would be improper for me to do so. My concern is only with the constitutional implications for Parliamentary privilege (including the right of free speech) and the extent to which the courts are likely to come into conflict with Parliament thereby.

3. The principal provisions in issue are Clause 6 (MPs' code of conduct), Clause 8 (Enforcement) and Clause 10 (Proceedings in Parliament) but I have in addition commented on Clause 7 (Investigations) and Clause 11 (Further functions of IPSA and the Commissioner).[1]

Clause 6

4. This Clause requires the House of Commons to maintain a code of conduct incorporating 'the Nolan principles' (and such other principles as it may determine from time to time). The 'Nolan principles' are defined as the seven general principles of public life set out the First Report of the Committee on Standards in Public Life or 'such other principles as may be adopted by the House from time to time'.

5. The House already has a code of conduct based on the Nolan principles, originally adopted by resolution of the House on 19 July 1995 and most recently revised on 13 July 2005. The latest version of the Code and the Guidance to the rules relating to the conduct of Members was published on 23 June 2009 (HC 735).

6. Since the code of conduct is approved by resolution, the maintenance of such a resolution and the content of what it approves would become, by virtue of Clause 6, a matter which is justiciable in the courts. Questions would arise as to what was meant by 'incorporating' the Nolan principles. If the exact words of the 'Seven Principles of Public Life' as set out in the Nolan First Report were reproduced in the resolution, the duty would probably be satisfied in the eyes of the court, but if there were any re-stating of those principles in other words there would be room for legal argument as to whether the principles had been incorporated. By virtue of Clause 6(2) the House would be free to adopt other principles, but only such principles as were 'similar'. The question of whether those principles were 'similar' would be a justiciable issue for the courts.

[1] There is in addition a technical issue about the laying of papers before Parliament. Clauses 3(5) and 5(5) and paragraph 25 of Schedule 1 provide that the IPSA shall lay various papers before Parliament. But papers must be laid by Members (typically Ministers) or Officers of the House (the Speaker or the Clerk of the House). This is not a matter for alteration by statute; if the IPSA are to be able to lay papers before the House, the Speaker will need to be specified as the laying authority in these three places in the Bill.

7. This might not come to court for some years – perhaps until some future addition to the Nolan principles became necessary in the light of events and on the recommendation of the Committee on Standards in Public Life. Equally, it might arise soon after enactment; in the present climate there might be no shortage of potential litigants trying to make a point.

8. The clause raises a constitutional issue by providing a basis for the judiciary to make determinations in respect of the proceedings of the House of Commons; in other words, to 'question' proceedings in Parliament, notwithstanding the provisions of Article IX of the Bill of Rights[2]. If a person (e.g. a taxpayer) is not satisfied that the code of conduct 'incorporates' the Seven Principles, or does not do so in a way with which he agrees, or adopts principles which he does not consider to be 'similar' to the Nolan principles he could bring proceedings for judicial review and the courts will then determine the issue, if necessary by interpreting and construing resolutions as if they were law. This could lead to a finding by a court that the House of Commons was under a duty to adopt an amending resolution. Under the present law, the courts will not make such a finding[3], but Clause 6 would provide the courts with a justification for doing so.

9. It is not clear why this clause is in the Bill. If its effect would be minimal, then it cannot really be needed. If it would have a significant effect, then the risk of litigation affecting the boundaries of jurisdiction between the courts and Parliament is substantial.

Clause 7

10. Clause 7(3) raises the question of who would decide on the reasonableness of the Commissioner's requests. Could a Member seek a judicial review of the Commissioner's actions? Whilst the 'reasonableness' of the requirement under Clause 7(3) is a question of law, Clause 8(5) provides that a failure to comply with the requirement may be punished by the House in exercise of its disciplinary powers, but is otherwise not to have any legal effect. If the House were to punish for a failure in respect of a requirement which was found by a court to have been unreasonable, it would be a very short step to review by the court of the exercise of disciplinary powers by the House.

Clause 8

11. Clause 8 (enforcement) raises a number of privilege and other issues. Clause 8 (2) identifies recommendations to the Committee on Standards and Privileges, which would be covered by Parliamentary privilege. But, if the Committee declined to act on a recommendation, that could presumably become the basis of legal proceedings in which the Commissioner (or anyone else) sought to require the Committee to comply. It is not enough to argue that 8(2) speaks only of 'recommend'; the extent to which a reasonable recommendation should be accepted would itself become a matter for determination by the courts.

[2] Which says that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament' [modern spelling].
[3] See, for example, R (Wheeler) v. Office of the Prime Minister and Secretary of State for Foreign and Commonwealth Affairs [2008] EWHC 1409.

12. Clause 8(5) appears to make the exercise by the House of its disciplinary powers a matter of statute, since it seems to confer a statutory permission on the House to exercise those powers in the circumstances of clause 8(5). If the circumstances in which the House may exercise disciplinary powers became a question of law, it would be open to challenge before the courts. It could be argued, for example, that it is only the 'failure' under clause 8(4) (and no other) which may be punishable by the House. This would be a question requiring determination by the courts.

13. Clause 8(6) requires the IPSA to prepare a 'protocol' on 'how the following (the IPSA, Commissioner, the House of Commons Committee on Standards and Privileges, the Director of Public Prosecutions, the Commissioner of Police of the Metropolis and any other person the IPSA considers appropriate 'are going to work with each other'). It is not clear if this is meant to impose any obligation on any of the parties to observe the 'protocol'. This, again, will be a question of law to be determined by the courts. If it does impose an obligation (and there seems little point in such a protocol unless it imposes some sort of obligation), then it raises the question of whether the IPSA should be entitled to bind a Committee of the House as to how it is to conduct its own work. An analogous issue arises for the DPP in the exercise of his discretions and as to whether such discretions would be fettered.

14. Clause 8(9) appears to raise an issue of double jeopardy. A Member should not be expected to co-operate with a Commissioner's inquiry while subject to criminal proceedings.[4]

15. Clause 8(10) seeks to define the disciplinary powers of the House, albeit in a way which is not exclusive. However, to the extent that these disciplinary powers are exemplified their definition becomes an issue of law.

16. This provision could lead to litigation or constrain the House in the use of other sanctions which might be regarded as disciplinary – a formal reprimand or requirement to make an apology – are within the powers of the House but are not covered. This might also prevent the House from adopting other sanctions if required by circumstances – for instance perhaps banning a Member from the use of certain facilities of the House.

Clause 10

17. Clause 10(c) allows any evidence of proceedings in Parliament to be admissible in proceedings for an offence under clause 9. This is a very wide qualification of the principle under Article IX of the Bill of Rights that such evidence is not admitted. It would mean that the words of Members generally, the evidence given by witnesses (including non-Members) before committees[5] and advice given by House officials on questions, amendments and other House business could be admitted as evidence in criminal proceedings. This could have a chilling effect on the freedom of speech of Members and of witnesses before committees and would hamper the ability of House officials to give advice to Members.

[4] See Report of Committee on Standards and Privileges (Session 2007-08) *The Complaints System and the Criminal Law* HC 523

[5] The position of witnesses was of much concern to the Liaison Committee in the 2003 inquiry into the Draft Corruption Bill.

18. It is for consideration whether the scope of this qualification could be narrowed – as in the current draft Bribery Bill – by confining the provision to the words or actions in Parliament of the Member concerned in the specific case.[6] This reflects the compromise agreed to last time this issue was considered by a Parliamentary committee – the Joint Committee on the Draft Corruption Bill in 2003. At that time the Liaison Committee expressed concern that a wider provision might deter witnesses from speaking frankly before select committees.

19. However, even the qualification were narrowed, the accused Member would be put in the position of having his words used against him, without being given the opportunity to adduce words spoken by other Members which might tend to exculpate him. This would create a very real risk of the trial being unfair and contrary to the requirements of Article 6 ECHR.[7] This demonstrates the difficulty caused by admitting evidence of proceedings in Parliament: either the admission is on such a wide basis that it has a chilling effect on Parliamentary proceedings (by prejudicing or effectively removing the right of free speech), or it is on such a narrow basis that the fairness of trials is put at risk.

20. I have argued in evidence to the current Joint Committee on the draft Bribery Bill that there is a case for not tinkering with parliamentary privilege on a piecemeal basis but implementing the recommendation of the Joint Committee on parliamentary privilege in 1999 that there should be a Parliamentary Privileges Act. Such an act would clarify the application of provisions of Article IX; define Parliament's control of its internal affairs and replace existing statute on the reporting of parliamentary proceedings. The experience of the Defamation Act of 1996, intended to address one perceived anomaly of parliamentary privilege, has led to others. The provision of section 13 of the Act was later held to undermine the collective right of the House to immunity in respect of proceedings by allowing an individual Member to waive privilege. Other difficulties of a practical nature where more than one Member was involved led the Joint Committee to recommend repeal of the section. Other encroachments on parliamentary privilege suggest that a piecemeal approach to defining and defending the Houses' legitimate right to function effectively is no longer sufficient. The Australian model for a Parliamentary Privileges Act is at hand for adaptation to British circumstances.

Clause 11

21. Lastly, Clause 11(4) and (7) suggests that the actions of the Speaker of the House of Commons could be the subject of judicial review. Since they concern the conferring of a statutory power on the IPSA to carry out a 'registration function' pursuant to an 'agreement' under Clause 11(4), judicial review of the making of an agreement and of its scope could be expected. Conceivably, a decision of the Speaker not to make an agreement could also be the subject of an application for judicial review.

Malcolm Jack,
Clerk of the House
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[6] This follows the recommendation made in 2003 by the Joint Committee on the Draft Corruption Bill.
[7] This prescribes as a minimum right the right to call and examine witnesses on his behalf on the same conditions as witnesses against him.

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