



House of Lords
House of Commons
Joint Committee on
Parliamentary Privilege

Parliamentary Privilege

Report of Session 2013–14

*Report, together with formal minutes and an
appendix*

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The Joint Committee on Parliamentary Privilege

The Joint Committee on Parliamentary Privilege was appointed by the House of Commons on 3 December 2012 and by the House of Lords on 9 January 2013 to consider the Green Paper on Parliamentary Privilege (Cm 8318) and to report to both Houses by 25 April 2013, and subsequently, following an extension (granted on 25 March 2013 by the House of Commons and on 27 March 2013 by the House of Lords), by 28 June 2013.

Membership

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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

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Mr William Cash (Conservative)
Thomas Docherty (Labour)
Tristram Hunt (Labour)
Mr Bernard Jenkin (Conservative)
Mrs Eleanor Laing (Conservative)

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The Committee had the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament was prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee had power to agree with the Commons in the appointment of a Chairman.

Publications

The Report of the Committee was published by The Stationery Office by Order of both Houses. 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/>

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1 Introduction and background

Overview

1. Parliaments need certain rights or immunities to ensure they can operate freely and independently. As the report of a predecessor Joint Committee on Parliamentary Privilege, published in 1999, stated:

“Parliament makes the law and raises taxes. It is also the place where ministers are called to account by representatives of the whole nation for their decisions and their expenditure of public money. Grievances, great and small, can be aired, regardless of the power or wealth of those criticised.

In order to carry out these public duties without fear or favour, Parliament and its members and officers need certain rights and immunities. Parliament needs the right to regulate its own affairs, free from intervention by the government or the courts. Members need to be able to speak freely, uninhibited by possible defamation claims”.¹

2. The precise rights and immunities a parliament will have depend on the wider constitutional context, and different countries protect parliaments in different ways. But whatever the jurisdiction, it is normal for a democratic state to protect parliamentary independence. Indeed, as the Irish Government argued at the European Court of Human Rights, “parliamentary immunity has developed throughout the world not as a constraint upon the rights of the citizen, but as a fundamental liberty”.²

3. In the United Kingdom Parliament such rights and immunities are provided by means of “**parliamentary privilege**”. Privilege refers to the range of freedoms and protections each House needs to function effectively: in brief, it comprises the right of each House to control its own proceedings and precincts, and the right of those participating in parliamentary proceedings, whether or not they are Members, to speak freely without fear of legal liability or other reprisal. There are jurisdictions in which parliamentarians themselves are shielded from prosecution for crimes unrelated to their office as long as they remain Members; that is not the case in the United Kingdom.³

4. Parliamentary privilege came to public attention in the wake of the 2009 expenses scandal, when three former MPs and one member of the House of Lords accused of false accounting over their expenses sought to argue that they ought not to be prosecuted because of parliamentary privilege.⁴ On 8 February 2010, the then Leader of the Opposition, Mr David Cameron, announced that, if elected, the Conservatives would legislate to implement the recommendations of the 1999 Joint Committee on Parliamentary Privilege, in order to remove what the then Shadow Leader of the House of

1 Report from the Joint Committee on Parliamentary Privilege, Session 1998–99, HL Paper 43-I, HC 214-I (hereafter Report from the 1999 Joint Committee on Parliamentary Privilege), Executive Summary

2 *A v. The United Kingdom* [2002] ECHR 35373/97

3 Details of the privileges and immunities of each of the Inter-Parliamentary Union (IPU) member states can be found on the IPU PARLINE database on the www.ipu.org website.

4 *The Sunday Times*, 3 January 2010; see also *The Times* leader, 6 February 2010. The case brought by the four Members was decided in *R v. Chaytor and others* [2010] UKSC 52.

Commons, Sir George Young, described as the “grey area” of whether parliamentary privilege precluded criminal prosecution of Members accused of false accounting over parliamentary expenses.⁵

5. The then Leader of the Opposition’s pledge to legislate was repeated in the Conservative Party manifesto for the 2010 general election: “we will introduce a Parliamentary Privilege Act to make clear that privilege cannot be abused by MPs to evade justice”.⁶ The Coalition Programme for Government of 20 May 2010 incorporated a similar commitment; and the Queen’s Speech of 25 May 2010 announced “a draft Bill will be published on reforming parliamentary privilege”. The Government published its Green Paper on Parliamentary Privilege on 26 April 2012.⁷

6. The Green Paper describes its purpose as follows: “We believe the time is now right to take a comprehensive look at its scope and operation, to ensure that parliamentary privilege continues to operate to protect the effective functioning of our democracy.” It notes that “In doing so we are guided by many in Parliament who have considered these questions before—above all, the 1998–99 Joint Committee on Parliamentary Privilege”.⁸

7. The Joint Committee on Parliamentary Privilege (hereafter referred to as the 1999 Joint Committee) was chaired by Lord Nicholls of Birkenhead, a Lord of Appeal in Ordinary, and first met in November 1997. Its report was published on 9 April 1999⁹ and subsequently debated in the House of Commons.¹⁰ While the Joint Committee considered that Parliament needed the right to regulate its own affairs and Members needed to be able to speak freely, it proposed clarification of the scope of various privileges, and, in some cases, greater powers for the courts to examine proceedings in Parliament. It recommended that all the changes proposed in its report should be embodied in a new and comprehensive Parliamentary Privileges Act, “codifying parliamentary privilege as a whole”.¹¹

8. Neither House formally endorsed the Report. While the Government generally supported its recommendations,¹² no time was found for legislation in any of the subsequent ten parliamentary Sessions, although the Report’s recommendations on *sub judice*¹³ formed the basis of new Resolutions in each House.¹⁴ Indeed, with regard to the

5 Speech by Rt Hon David Cameron MP, *Rebuilding trust in politics*, 8 February 2010; Speech by Rt Hon Sir George Young MP to the Conservative Spring Forum in Brighton, *New Politics*, 28 February 2010

6 Conservative Party manifesto for the 2010 general election

7 Government Green Paper, *Parliamentary Privilege*, Cm 8318, April 2012 (hereafter Cm 8318)

8 *Ibid.*, Foreword

9 The Report from the 1999 Joint Committee on Parliamentary Privilege had been laid on the Table in both Houses on 30 March 1999.

10 HC Deb 27 October 1999

11 Report from the 1999 Joint Committee on Parliamentary Privilege, recommendation 39

12 In the House of Commons general debate on the Report on 27 October 1999, the Leader of House (Rt Hon Margaret Beckett MP) expressed reservations on just two of the 1999 Joint Committee’s 39 recommendations: introducing a power to fine Members and treating as a contempt premature publication of committee reports which were still under embargo after having been formally laid on the Table.

13 Report from the 1999 Joint Committee on Parliamentary Privilege, recommendation 15

14 House of Commons Resolution of 15 November 2001, CJ (258) 194 to 195, and House of Lords Resolution of 11 May 2000, LJ (233) 389

Joint Committee’s central conclusion, the current Green Paper suggests that “the case has not been made for a comprehensive codification of parliamentary privilege”.¹⁵

Developments since 1999

9. The 1999 Joint Committee noted that “Although of ancient origin, parliamentary privilege is not static or immutable”.¹⁶ Since the 1999 Joint Committee reported, both the courts and parliamentary committees have had cause to articulate their understanding of privilege in relation to specific cases and, on occasion, more broadly. Annex 1 to this Report outlines ways in which the two Houses have exercised their jurisdiction since 1999, as well as summarising key developments in case law.

10. The cases considered by the two Houses include many “standards” cases—although these are not commonly thought of as privilege matters, the two House’s internal disciplinary systems are based on the privilege of control of their own precincts and procedures. Following one set of “standards” cases in 2009,¹⁷ the House of Lords successfully exercised its power to suspend its Members, which had been questioned.

11. Other privilege cases have dealt with the protection of a witness from punishment as a result of what was said to a committee;¹⁸ attempts to influence committee members;¹⁹ attempts to intimidate a Member of Parliament; a former Minister rebuked for giving misleading evidence to a committee;²⁰ and police searches on the Parliamentary estate.²¹ Thus privilege is still regularly invoked as protection for those who participate in proceedings.

12. There have also been significant developments in the courts. In the 2002 case of *A v. the United Kingdom* the European Court of Human Rights held that the absolute freedom of speech in Parliament was proportionate, and did not violate the European Convention on Human Rights—although the Court also asserted its jurisdiction over national parliaments’ privileges.²² There have been domestic cases in which lower courts have examined proceedings in Parliament, for example to establish the proportionality of legislation for human rights purposes, but there have also been judgments which suggest the courts will be cautious in using documents such as committee reports in evidence. In certain cases

15 Cm 8318, page 15

16 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 17

17 In January 2009 *The Sunday Times* published a series of allegations that four members of the House of Lords were willing to amend legislation in return for payment: see Second Report from the House of Lords Privileges Committee, *The conduct of Lord Moonie, Lord Snape, Lord Truscott and Lord Taylor of Blackburn*, Session 2008–09, HL Paper 88–I.

18 Fifth Report from the House of Commons Committee on Standards and Privileges, Session 2003–04, *Privilege: Protection of a Witness*, HC 447

19 First Report from the House of Lords Committee for Privileges and Conduct, Session 2010–12, *Mr Trevor Phillips: Allegation of Contempt*, HL Paper 15

20 Sixth Report from the House of Commons Committee on Standards and Privileges, Session 2005–06, *Mr Stephen Byers (Matter referred on 19 October 2005)*, HC 854

21 First Report from the House of Commons Committee on an Issue of Privilege, Session 2009–10, *Police Searches on the Parliamentary Estate*, HC 62

22 *A v. The United Kingdom* [2002] ECHR 35373/97. The court held that a “rule of parliamentary immunity ... cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 [of the European Convention on Human Rights]”; the Court held moreover that “the creation of exceptions to that immunity, the application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued.”

originating outside the United Kingdom evidence derived from parliamentary proceedings has been used to establish motivation for acts outside Parliament,²³ and in one case the Judicial Committee of the Privy Council held that a Member who said that he “did not resilie” from what he had said in Parliament had effectively repeated a defamatory statement.²⁴

Conclusion

13. Parliamentary privilege is a living concept, and still serves to protect Parliament, each House, their committees, and all those involved in proceedings. Much has changed since the publication of the report of the 1999 Joint Committee: privilege evolves as Parliament evolves, and as the law evolves. Successive committees have warned against a piecemeal consideration of privilege:²⁵ we welcome the opportunity to examine privilege in the round, and to revisit the issues explored by the 1999 Joint Committee, which has been given by the 2012 Green Paper.

23 *Toussaint v. Attorney General of Saint Vincent and the Grenadines* [2007] UKPC 48

24 *Jennings v. Buchanan* [2004] UKPC 36

25 Including the Joint Committee on the Draft Bribery Bill, First Report of Session 2008–09, *Draft Bribery Bill*, HL 115–I/HC 430–I, paragraph 228; First Report from the House of Commons Committee on an Issue of Privilege, Session 2009–10, *Police Searches on the Parliamentary Estate*, HC 62, paragraph 169; Fourteenth Report from the House of Commons Committee on Standards and Privileges, Session 2010–12, *Privilege: Hacking of Members’ mobile phones*, HC 628, paragraph 72

2 General principles

The need for parliamentary privilege

14. The ancient origins of parliamentary privilege, and the archaic language that is sometimes used in describing it, should not disguise its continuing relevance and value. As we have noted in chapter 1, the work of Parliament is central to our democracy, and its proceedings must be immune from interference by the executive, the courts or anyone else who may wish to impede or influence those proceedings in pursuit of their own ends.

“Exclusive cognisance” and the rule of law

15. The corollary of Parliament’s immunity from outside interference is that those matters subject to parliamentary privilege fall to be regulated by Parliament alone. Parliament enjoys sole jurisdiction—normally described by the archaic term “exclusive cognisance”—over all matters subject to parliamentary privilege. As Sir William Blackstone famously noted in his *Commentaries on the Laws of England*, the maxim underlying the law and custom of Parliament is that “whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere”.²⁶

16. The principle of exclusive cognisance underpins all privilege, including those aspects of privilege which are now based in statute. Thus Article 9 of the Bill of Rights, the most important statutory expression of parliamentary privilege, states that “the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of Parliament”. This encapsulated a pre-existing claim to exclusive cognisance over things said or done in Parliament—the preamble to the Bill of Rights notes that King James II had sought to subvert the liberties of the realm “by Prosecutions in the Court of King’s Bench for Matters and Causes cognizable only in Parliament”.

17. A consequence of Parliament’s possession of exclusive cognisance over proceedings in Parliament is that participants, both Members and non-Members, are not legally liable for things said or done in the course of those proceedings; nor are those outside who are adversely affected by things said or done in Parliament able to seek redress through the courts.

18. Thus exclusive cognisance in certain circumstances may over-ride other generally accepted legal rights. It is, in effect, an exception to the general principle of the rule of law. This has been accepted by the courts since at least the case of *Bradlaugh v. Gosset* in 1884, in which the court held that the decision of the House of Commons in resolving not to allow an elected Member, Charles Bradlaugh, to take the oath, and the actions of the Serjeant at Arms in preventing Bradlaugh from entering the House, were subject to the sole jurisdiction of the House—even though Bradlaugh was under a statutory obligation to take the oath in accordance with the Parliamentary Oaths Act 1866.²⁷ In his judgment, Mr

26 Sir William Blackstone, *Commentaries on the Laws of England* (1765), pages 58 to 59

27 *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 24th edition, ed. Sir Malcolm Jack KCB (hereafter *Erskine May*, 24th edition), page 291

Justice Stephen held that “the House of Commons is not subject to the control of Her Majesty’s courts in its administration of that part of the statute law which has relation to its own internal proceedings”.²⁸ That ruling holds true to this day and should do so in perpetuity.

19. The tension between parliamentary privilege and the general rule of law can be uncomfortable. In his response to Government’s consultation on the Green Paper, Dr Adam Tucker, Lecturer in Law at the University of Manchester, asserted that “Parliamentary privilege undermines the rule of law. Specifically it undermines the requirement, which is central to the rule of law, that the law be general”.²⁹ But he continued: “The rule of law is not, however, an absolute principle. Its claims must be balanced against the competing claims of other principles. One of those competing principles is the separation of powers, specifically the requirement that no branch of government should interfere in the operation of another branch of government. There are occasions when insisting upon the general application of the law would cause (or risk causing) the judiciary or the executive to interfere with the proper operation of Parliament.” In the United Kingdom, Parliament’s exception to the general application of the law has, over time, become a fundamental constitutional principle, itself part of the law. The European Court of Human Rights has also acknowledged that the immunity conferred by parliamentary privilege, even though it may restrict the right of access to the courts, is proportionate.³⁰

The limits of exclusive cognisance: the “doctrine of necessity”

20. The possibility of tension between parliamentary privilege and the rule of law means that Parliament’s claim to exclusive cognisance should be strictly limited to those areas where immunity from normal legal oversight is necessary in order to safeguard the effective functioning of Parliament. It is agreed that immunity applies to that core work itself, to things said or done as part of proceedings in either Chamber or in a select committee of either House—the “proceedings in Parliament” whose immunity from challenge is enshrined in Article 9. The difficulty lies in assessing how far such immunity applies to ancillary matters, to things said or done outside proceedings themselves, but which are necessarily connected to those proceedings.

21. Both the courts and committees have in recent years adopted a test based on a “necessary connection” to proceedings, in assessing whether or not privilege extends to certain activities. Thus the “one test” adopted by the 1999 Joint Committee in assessing the value of any element of parliamentary privilege was “whether each particular right or immunity currently existing is necessary today, in its present form, for the effective functioning of Parliament”.³¹

22. In *R v. Chaytor*, Lord Phillips of Worth Matravers applied an essentially similar test:

28 *Bradlaugh v. Gosset* (1884) 12 QBD 271

29 Dr Adam Tucker response to Government consultation on the Green Paper, Cm 8318, paragraph 2

30 *A v. The United Kingdom* [2002] ECHR 35373/97

31 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 4

“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”.³²

23. In the 2005 case of *Canada (House of Commons) v. Vaid* the Supreme Court of Canada went so far as to elevate this approach into a “doctrine of necessity”:

“If the existence and scope of a privilege have not been authoritatively established, the court will be required to test the claim against the doctrine of necessity—the foundation of all parliamentary privilege. In such a case, in order to sustain a claim of privilege, the assembly ... must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly’s work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their legislative work with dignity and efficiency”.³³

24. We endorse the approach adopted in *Vaid*. Absolute privilege attaches to those matters which, either because they are part of proceedings in Parliament or because they are necessarily connected to those proceedings, are subject to Parliament’s sole jurisdiction.

25. One of the advantages of the “doctrine of necessity” is that it ensures a degree of flexibility. The working practices of Parliament change, and our understanding of what is or is not subject to Parliament’s sole jurisdiction needs to adapt and evolve accordingly.

26. It is therefore neither possible nor desirable to identify and specify every single element of parliamentary privilege. This point was made forcefully to us by Sir Robert Rogers KCB, the Clerk of the House of Commons, who said that “It is very difficult to have a shopping list that meets every possible development or eventuality”.³⁴ He then gave examples of the kind of developments that might be missed in preparing a “shopping list” of matters subject to exclusive cognisance, such as decisions of the Speaker on meetings organised by all-party groups. David Beamish, the Clerk of the Parliaments, agreed, noting that “one problem with a list is that what Parliament does evolves and you need to adapt”.³⁵

27. If flexibility is the key advantage of adopting the “doctrine of necessity”, the other side of the coin is that such flexibility leaves an element of uncertainty, at least at the outer edges of privilege. There is reasonable clarity in those key areas where elements of parliamentary privilege have been expressed in statutory form. There is no question, for instance, that “freedom of speech and debates or proceedings in parliament”, the areas set out in Article 9 of the Bill of Rights, are absolutely privileged. But the terms themselves have not been

32 *R v. Chaytor and others* [2010] UKSC 52, paragraph 47

33 *Canada (House of Commons) v. Vaid* [2005] 1 SCR 667, paragraph 4

34 Q 191

35 *Ibid.*

authoritatively defined in modern times—*Erskine May* notes that “it has been concluded that an exhaustive definition [of proceedings in Parliament] could not be achieved”.³⁶

28. There is also an exception to the general principle of necessity in the existence of certain powers that are part of the “law and custom of Parliament” (sometimes known by the Latin term *lex et consuetudo parliamenti*). These ancient powers, including a power to punish breaches of privilege, or contempts, are deemed to be inherent in the two Houses of the Westminster Parliament—though not in Commonwealth parliaments of more recent date. In the words of *Erskine May*:

“The power to punish for contempt has been judicially considered to be inherent in each House of Parliament not as a necessary incident of the authority and functions of a legislature (as might be argued in respect of certain privileges) but by virtue of their descent from the undivided High Court of Parliament and in right of the *lex et consuetudo parliamenti*”.³⁷

The role of the courts

29. In the absence of an exhaustive definition of “proceedings in Parliament”, certain matters are generally accepted as falling within the terms of Article 9, and in such cases Parliament’s sole jurisdiction may be said, in the terms used in the *Vaid* judgment, to have been “authoritatively established”. These matters include:

- the procedures adopted by the two Houses: the courts may not challenge the means by which legislation was passed or decisions reached;
- proceedings in Parliament: words spoken in the course of debate, votes cast, or decisions taken by either House;
- actions of Members, office-holders or officials which are necessarily linked to proceedings.

30. Although cases relating to such matters could in theory come before a court, our expectation is that where the existence of a privilege is authoritatively established (either by statute or, in some cases, by case law), the court will immediately decline jurisdiction, without enquiring further into the nature or origins of the privilege.

31. Yet even here there may be uncertainty, not over the existence of a privilege, but over its precise extent. For instance there may be uncertainty over the extent to which the protection afforded by Article 9 extends beyond words spoken in the course of debate to briefing or correspondence that is preparatory to that debate. In such cases of uncertainty, the decision as to whether a matter falls within Parliament’s sole jurisdiction rests, paradoxically, with the courts. This has been accepted at least since the case of *Stockdale v. Hansard* in the 1830s, in which the Lord Chief Justice, Lord Denham, while accepting in terms that “whatever be done within the walls of either [House] must pass without question in any other place”, rejected the proposition that the House of Commons, in its guise as a court, had sole jurisdiction over the *extent* of its own privileges:

³⁶ *Erskine May*, 24th edition, page 235

³⁷ *Ibid.*, pages 203 to 204

“Where the subject matter falls within their jurisdiction, no doubt we cannot question their judgment; but we are now enquiring whether the subject matter does fall within the jurisdiction of the House of Commons. It is contended that they can bring it within their jurisdiction by declaring it so. To this claim, as arising from their privileges, I have already stated my answer: it is perfectly clear that none of these Courts could give themselves jurisdiction by adjudging that they enjoy it”.³⁸

This approach was endorsed and re-stated by Lord Phillips of Worth Matravers in *R v. Chaytor*: “the extent of parliamentary privilege is ultimately a matter for the court”.³⁹

The role of statute

32. The courts can only interpret and apply the law—Parliament alone can *make* law. So underlying the generally accepted proposition that determining the extent of parliamentary privilege is a matter for the courts is the fact that, if the courts interpret privilege in a way which Parliament perceives to be wrong or damaging, Parliament has the power simply to change the law. This point was forcefully made by the Lord Chief Justice of England and Wales, Lord Judge, in oral evidence: “ultimately it is Parliament that is sovereign”.⁴⁰

33. The Lord Chief Justice’s comment accurately reflects the development of privilege not only in this country but in other jurisdictions. We have already quoted the preamble to the Bill of Rights 1689, which referred to the arbitrary rule of King James II: the Bill of Rights was explicitly enacted by the Lords and Commons “for the Vindicating and Asserting their ancient Rights and Liberties”.

34. In the case of *Stockdale v. Hansard*, already mentioned, the court held that the House’s publisher, Thomas Hansard, was not protected from an action for defamation in respect of a report published by order of the House. The long-running law-suit led ultimately to the enactment of the Parliamentary Papers Act 1840, which put the immunity afforded to such reports on a statutory basis.

35. In more recent times, the Australian Parliamentary Privileges Act 1987, perhaps the most comprehensive statutory expression of the meaning and extent of privilege, was enacted “for the express purpose of overturning the adverse court judgments” in the New South Wales case of *R v. Murphy*, where the court allowed both prosecution and defence to make “free use of the evidence given before the Senate committees for their respective purposes”.⁴¹

36. The Privileges Committee of the New Zealand House of Representatives has recently recommended legislation in response to two adverse court decisions, on a Member’s liability to legal action in respect of the “effective repetition” of statements previously made in Parliament,⁴² and on the status of briefing materials provided to a minister for the

38 *Stockdale v. Hansard* (1839) 9 Ad & E 1, pages 147 to 148

39 *R v. Chaytor and others* [2010] UKSC 52, paragraphs 15 and 16

40 Q 246

41 *Odgers’ Australian Senate Practice*, 13th edition (2012), pages 48 to 49

42 *Jennings v. Buchanan* [2004] UKPC 36

purpose of answering a parliamentary question.⁴³ The Clerk of the House of Representatives, Mary Harris, recalled the Australian experience in describing the position: “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”.⁴⁴

37. Thus there have been many examples of parliaments enacting legislation in response to adverse decisions of the courts regarding the extent of their exclusive cognisance. On the other hand, attempts by Parliament to assert its privileges short of legislation have been less successful. Responding to the actions of the court in the course of the *Stockdale v. Hansard* case, the House of Commons passed a series of resolutions asserting, among other things, “that the House had sole and exclusive jurisdiction to determine upon the existence and extent of its privileges.” The court rejected the proposition, describing it as “abhorrent to the first principles of the constitution”.⁴⁵ As mentioned above, the conflict was resolved only by the enactment of the Parliamentary Papers Act 1840.

38. The Lord Chief Justice, in oral evidence, commented on the status of resolutions as follows:

“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”.⁴⁶

39. While these comments demonstrate the respect that the senior judiciary afford to the views of the two Houses, they also illustrate the difficulty that would be faced by judges in construing resolutions of the two Houses. Ultimately the role of the courts is to apply the law, and anything short of statute could be overborne by pre-existing legal rights. A more succinct expression of the same basic point was offered by Mr Justice Blake in a recent case, in which he held that: “it has long been the law that a resolution of the House of Commons is not given supremacy akin to primary legislation by the court”.⁴⁷

40. In summary, if Parliament feels that the limits of its exclusive cognisance have been eroded to the extent that it can no longer effectively perform its core work, it can change the law. But this is a last resort, and such legislation carries the risk that statute law, and the judicial interpretation of that law will, over time, ossify privilege, taking away the possibility

43 *Attorney General and Gow v. Leigh* [2011] NZSC 106; Report from the Privileges Committee of the New Zealand House of Representatives on *Question of privilege concerning the defamation action Attorney-General and Gow v. Leigh*, I.17A, June 2013

44 Q 134

45 *Erskine May*, 24th edition, page 289

46 Q 248

47 *Izuazu (Article 8 – new rules)* [2013] UKUT 00045 (IAC)

of evolution and adaptation to changing circumstances. The Lord Chief Justice put the point as follows:

“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”.⁴⁸

“Comprehensive codification”

41. The fact that legislation to confirm the scope and meaning of parliamentary privilege is a “last resort” means that it also tends to be reactive. The flexibility that we have already identified as one of the key advantages of the doctrine of necessity militates against proactive statutory codification.

42. The 1999 Joint Committee, having undertaken an exhaustive analysis of the component parts of parliamentary privilege, was well aware of the advantages and disadvantages of codification—essentially, increased clarity as against reduced flexibility. The Joint Committee, having weighed up these considerations, concluded that “There should be a Parliamentary Privileges Act, bringing together all the changes in the law referred to above, and codifying parliamentary privilege as a whole”.⁴⁹

43. The Green Paper dissents from this key recommendation, noting that “the Government does not see enough evidence of problems in practice to justify such a significant exercise”.⁵⁰ The first, over-arching question posed in the Green Paper invites agreement with this conclusion: “Do you agree that the case has not been made for a comprehensive codification of parliamentary privilege?”

44. There is an important difference between what is here called “comprehensive codification”, and what we have described earlier in this chapter, namely the pragmatic use of statute, as a last resort, to confirm or clarify specific elements of privilege when court decisions or executive action have cast doubt upon them. In reality, and notwithstanding the recommendation of the 1999 Joint Committee, we are not aware of any country which relies on privilege having sought to bring about “comprehensive codification” of that privilege. The example most often cited, the Australian Parliamentary Privileges Act of 1987, was a direct response to the courts trespassing on parliamentary exclusive cognisance; at no stage did it purport to be a “comprehensive codification” of all aspects of privilege. Indeed, the 1987 Act explicitly retained the general constitutional basis for

48 Q 239

49 Report from the 1999 Joint Committee on Parliamentary Privilege, recommendation 39; see also paragraphs 378 to 385

50 Cm 8318, paragraph 38

privilege in Australia,⁵¹ that is to say the privileges of the United Kingdom House of Commons.

45. This point was clearly made in the evidence submitted by the President and Clerk of the New South Wales Legislative Council:

“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’ ... The Commonwealth legislation ... 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”.⁵²

46. We accordingly disagree with the 1999 Joint Committee’s recommendation seeking to codify “parliamentary privilege as a whole.” There is no precedent for such codification, and the potential consequences are impossible to predict. At the same time, our opposition to “comprehensive codification” does not mean that we rule out legislation, where such legislation is needed to resolve uncertainty and confirm the existence or extent of specific privileges.

Conclusions

47. In summary, the following general principles underlie our examination of the issues addressed in the Green Paper and in this report:

- **Absolute privilege attaches to those matters which, either because they are part of proceedings in Parliament or because they are necessarily connected to those proceedings, are subject to Parliament’s sole jurisdiction or “exclusive cognisance”.**
- **The extent of Parliament’s exclusive cognisance changes over time, as the work of Parliament evolves: it would be impracticable and undesirable to attempt to draw up an exhaustive list of those matters subject to exclusive cognisance.**
- **Where there is uncertainty in a case brought before the courts, the extent of Parliament’s exclusive cognisance will be determined by the courts.**
- **Parliament cannot establish a new privilege or extend an existing privilege by resolution; if Parliament were to consider that its privileges had been reduced to the extent that it could no longer effectively perform its core work, it could in the last resort change the law.**
- **We do not consider that comprehensive codification is needed at this time. This does not mean that we reject all legislation; but legislation should only be used**

51 Section 49 of the Commonwealth of Australia Constitution Act states that “The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.”

52 Written evidence from the New South Wales Legislative Council

when absolutely necessary, to resolve uncertainty or in the unlikely event of Parliament's exclusive cognisance being materially diminished by the courts.

3 Penal powers of the Houses

The issue

48. Chapter 7 of the Green Paper asks whether there is a need to address select committees' powers to summon witnesses, documents and records. While committees have powers to call for evidence and summons witnesses delegated to them, the power to punish contempts remains a matter for each House as a whole. The expansion of the work of select committees since the 1970s means questions of contempt are most likely to arise in the context of select committees and their witnesses, but these powers cannot be considered apart from the powers each House possesses to deal with contempt.

49. The Green Paper says:

“The Houses’ power to punish non-members for contempt is untested in recent times. In theory, both Houses can summon a person to the bar of the House to reprimand them or order a person’s imprisonment. In addition, the House of Lords is regarded as possessing the power to fine non-members. The House of Commons last used its power to fine in 1666 and this power may since have lapsed”.⁵³

Against this backdrop, the House of Commons Liaison in 2012 noted that “long-standing uncertainties about the extent and enforceability of select committees’ powers were brought to the fore” by events in 2011. The Clerk of the House of Commons had told the Committee:

“Recent events have shown to a wider audience what all insiders always knew; that there were considerable doubts about whether the House could really impose its will on those whom a committee wished to summon, or punish those who gave (unsworn) false or misleading evidence to a committee ... It is sometimes alleged that the process is unclear. It is not. What is unclear is how far it can be taken”.⁵⁴

50. There are two impediments to either House imposing its will on a contemnor. The first is institutional reluctance to take action which may seem oppressive. Well over a century has passed since either House last used its penal powers. In 1978 the House of Commons agreed its penal jurisdiction should be exercised “(a) as sparingly as possible and (b) only when the House is satisfied that to exercise it is essential in order to provide reasonable protection for the House, its Members or its officers, from such improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with the performance of their respective functions”.⁵⁵ It has abided by that decision since.

51. The second impediment is fear of successful legal challenge. While domestic courts may be unable to consider proceedings in Parliament, the European Court of Human

53 Cm 8318, paragraph 252

54 Second Report from the House of Commons Liaison Committee, Session 2012–13, *Select committee effectiveness, resources and powers*, HC 697, Volume 1: paragraph 129 and Volume II: Additional written evidence

55 Third Report from the House of Commons Committee of Privileges, Session 1976–77, *Recommendations of the Select Committee on Parliamentary Privilege*, HC 417; and Resolution of the House, 6 February 1978, CJ (234) 170

Rights has asserted its jurisdiction, relying on Article 6 of the European Convention on Human Rights which provides for the right to a fair trial “by an independent and impartial tribunal”.⁵⁶ Article 6 provides that:

“Everyone charged with a criminal offence has the following minimum rights:

- a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b) to have adequate time and the facilities for the preparation of his defence;
- c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

52. Nigel Pleming QC said, “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”.⁵⁷ The significance of this observation is that such a regime would thus engage Article 6 of the European Convention on Human Rights, which provides that “In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” The Deputy Leader of the House of Commons, Rt Hon Tom Brake MP, told us:

“The Government does not believe that the current arrangements provide the kind of safeguards that individuals have a right to expect of any body with the power of prosecution ... 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”.⁵⁸

Other jurisdictions

53. Other jurisdictions have approached the need for a parliament to compel evidence and deal with contempts in a variety of ways, ranging from delegation to the courts to assertion of Parliament’s right to proceed against and punish contempt itself.

54. While the United States Congress claims an inherent power to punish contempts, in practice the House and the Senate and their committees rely on the legal authorities to prosecute and the courts to enforce their power to subpoena. Moreover, the separation of powers and the provisions of the US constitution impose practical restrictions on the

56 *Demicoli v. Malta* [1991] ECHR 13057/87

57 Q 48

58 Written evidence from the Deputy Leader of the House of Commons, paragraph 2

power to demand evidence. For example, witnesses can plead the Fifth Amendment to justify refusal to give potentially incriminating answers to questions, and the Attorney General has declined to prosecute cases where Executive privilege was claimed.⁵⁹

55. In Australia the Parliamentary Privileges Act 1987 created a criminal offence of contempt of either House, and gave each House the power to deal with such contempts, and to impose fines or imprisonment. Each House has set in place extensive provisions to ensure that it has fair procedures to consider alleged contempts, through Resolutions in the Senate and Standing Orders in the House of Representatives. There is a review power for the courts, but this is limited to assessing whether the type of conduct complained of meets the test of section 4 of the Act, namely that it “amounts or is 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.”

56. Although the New Zealand House of Representatives’ privileges are based on statute, those privileges and the means by which they are to be exercised are not spelled out in statutory form. Instead its privileges are defined as those enjoyed by the United Kingdom House of Commons in 1865.⁶⁰ The House of Representatives has retained its jurisdiction, and has recently asserted its right to fine.⁶¹ As in Australia, its Standing Orders contain provisions intended to ensure it treats witnesses fairly.

Options for the United Kingdom Parliament

57. In evidence⁶² to the House of Commons Liaison Committee the Clerk of the House of Commons set out three options for addressing the perceived inability of the two Houses to exercise their penal powers:

- doing nothing;
- legislation (which could take various forms, discussed in more detail below);
- internal measures, such as amending Standing Orders or agreeing resolutions—in effect, parliamentary re-assertion of existing powers.

All three options carry significant risk.

Doing nothing

58. As the Green Paper notes, questions about the effectiveness of penal powers arise most pressingly in the context of committees. In considering this problem, it is important to have a clear idea of the range of activities which committees undertake. While their primary function is to scrutinise government, even that task can only be properly addressed by taking a broad view, as the requirement for Commons departmental select committees to consider where existing policy may be deficient acknowledges. In fact, committees have a legitimate role in extending their scrutiny beyond government. The

59 Q 3

60 Q 124

61 Q 141

62 *Select committee effectiveness, resources and powers*, HC 697, Volume II: Additional written evidence

recent Liaison Committee report notes the many different functions committees fill.⁶³ Committees have become a key arena in which Parliament fulfils its historical role as the grand inquest of the nation.

59. Most committee inquiries call on willing witnesses, and use the evidence-taking process as a means to explore an issue from a number of points of view. In such instances, there is little trouble in securing evidence. The Clerk of the House of Commons and the Clerk of the Parliaments, put the problem in perspective:

[Clerk of the House of Commons] “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.”

[Clerk of the Parliaments] “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 ... 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”.⁶⁴

60. There are however occasions when witnesses do not wish to supply material or to appear themselves and a committee considers it cannot do without the material or the witnesses. In these cases, the fact that the power to send the person’s papers and records is not limited has allowed committees to obtain the witnesses or information needed. Committees have used such powers to obtain privileged material,⁶⁵ or to ensure committee advisers could use confidential information to assess the quality of the Financial Services Authority reports into the collapse of RBS and HBOS.⁶⁶ These actions, in turn, have improved the information available to committees, and have provided valuable material for Parliament as a whole. **We consider that it is in the public interest to ensure that committees have the powers they need to function effectively.**

61. The Liaison Committee considered that “at the very least Parliament should set out a clear, and realistic, statement of its powers”⁶⁷. Like that Committee, **we reject the option of doing nothing to clarify Parliament’s penal powers.** While committees have been able to function effectively up until now, the growing, and increasingly public, doubt over each House’s penal powers means there is a real risk that potential witnesses will be tempted to test those powers. The two Houses must be prepared for that eventuality. It will be too late to consider these matters when a crisis arrives.

62. There is therefore a need to address Parliament’s penal powers. The question then arises whether legislation is necessary either to create, or to enforce, powers that might be

63 *Ibid.*, paragraphs 12 to 15

64 Q 219

65 House of Commons Culture, Media and Sport Committee, Formal Minutes, Tuesday 19 January 2010, published on the www.parliament.uk website

66 See House of Commons Treasury Committee correspondence with the Chair of the Financial Services Authority of 13, 15 and 17 December 2010 and 28 March and 11 July 2011, regarding FSA investigation of bank failures, published on the www.parliament.uk website

67 *Select committee effectiveness, resources and powers*, HC 697, paragraph 134

used to punish contempts against Parliament. This might involve transferring jurisdiction over allegations of contempt to the courts, either in whole or in part. The alternative is to consider whether Parliament can realistically assert existing powers to punish contempt and set out how they might be applied in a modern setting. Nigel Pleming QC called it “a fork in the road”: “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”.⁶⁸

Legislation on penal jurisdiction

63. There are advantages and disadvantages in dealing with contempt powers through legislation. Sir Malcolm Jack KCB, a former Clerk of the House of Commons, considered that a “modern statute” was more likely to convince the European Court of Human Rights than the current mix of “seventeenth century cant” and common law.⁶⁹ The Lord Chief Justice considered the powers to deal with contempt of court as a possible model, but also considered you could not “resuscitate the old process”—he considered that legislation would be required to underpin any enforcement mechanism.⁷⁰ But enshrining penal powers in statute would inevitably encroach on privilege, although the extent of that encroachment would depend on the model used.

64. As the Green Paper suggests, there are several possible approaches to legislation to ensure that contempts could be punished. Such legislation could simply provide a statutory framework for and clarification of the existing powers of Parliament. Alternatively, legislation could criminalise contempt of Parliament in general terms, or creating specific criminal offences relating to contempt. These approaches would transfer jurisdiction to the courts. As Lord Justice Beatson noted, Parliament would in effect give up some of its privileges: “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”.⁷¹

A) Criminalising contempt

65. Contempt is, as the Green Paper sets out, a broad concept, extending to any matters which constitute material interference with the effective working of a House or one of its Committees. The Green Paper canvasses the possibility of bringing greater certainty to the concept of contempt by creating specific offences, such as:

- failure or refusal, without reasonable excuse, to appear before a committee of either House;
- failure or refusal, without reasonable excuse, to answer questions asked by a committee of either House;

68 Q 48

69 Written evidence from Sir Malcolm Jack, paragraph 8. In the course of our inquiry The Constitution Society published a paper by Sir Malcolm Jack and Richard Gordon QC, entitled *Parliamentary privilege; Evolution or codification?* (Constitution Society, 2013).

70 Q 284

71 Q 282

- failure or refusal, without reasonable excuse, to produce documents requested by a committee of either House; and
- altering, suppressing, concealing or destroying documents requested by a committee of either House.

66. If the Government's approach of criminalising specific contempts were followed, only certain tightly defined contempts would be punishable by the courts, and Parliament's power to punish other contempts would remain in doubt. Indeed, the existence of legislation giving the courts jurisdiction over defined contempts would increase the doubt over how other contempts could be dealt with.

67. Where offences were created, the courts would also have to determine whether a contempt had in fact been committed. A court might be given power to evaluate the fairness of the process for compelling evidence, either in Committee or by the House as a whole. Was adequate notice given? Was the witness physically able to attend on the day chosen? Was questioning reasonable, or was it oppressive? Such a jurisdiction would be far more extensive than that given to the Australian courts.

68. Other types of judicial evaluation of proceedings could be still more problematic. The Green Paper envisages that information might be withheld because it was not relevant, or because it to give it would breach a duty of confidentiality, or legal professional privilege. As Nigel Pleming QC said: "it is fundamental to the working of both Houses that you have the fullest information with which to make your decisions".⁷² Currently Parliament and the courts each respect the other's right to decide what information is necessary in an individual case. Although Parliament sets the legislative framework, and may, in principle, be prompted by legal proceedings to consider whether that framework is appropriate, each House goes to great lengths to prevent interference with specific cases. Not only do they observe the *sub judice* rule, but Committees are careful to avoid actions which could prejudice legal processes, even when investigations are too early a stage for *sub judice* considerations to apply.

69. Permitting the courts to decide whether a Committee should have access to certain information would be a significant reduction in exclusive cognisance. Indeed, in this area at least, it would destroy the concept of "two constitutional sovereignties"⁷³ and replace it with an asymmetric system in which the courts had power to evaluate Parliamentary proceedings while Parliament was, quite properly, unable to interfere in individual cases before the courts.

70. We reject the approach of criminalising specific contempts. It would entail a radical shift of power between Parliament and the courts. It would introduce delay. It would increase uncertainty about how contempts which were not covered by criminal statute could or should be dealt with, and remove the flexibility which is the chief advantage of the current system.

72 Q 48

73 *R v. Parliamentary Commissioner for Standards ex parte Mohamed Al Fayed* [1998] 1 All ER 93

B) Legislative confirmation of penal powers

71. Sir Malcolm Jack recommended legislation on the Australian model, in which an indicative definition of contempt is set out in statute—in effect, a threshold test—along with specific penal powers (such as the power to fine up to a prescribed limit). The application of the threshold test in specific cases, and the exercise of penal powers, is left to each House. Under the Australian model the courts are precluded, as far as possible, from oversight of the exercise of parliamentary powers, although they do possess a limited power of review—specifically, the courts can consider whether the behaviour complained of is sufficiently disruptive to constitute contempt.

72. The Green Paper explored whether the doubts over Parliamentary jurisdiction could be settled simply by clarifying the House of Commons’ right to fine. David Howarth, a former MP and now Reader in Law at Cambridge University, and Nigel Pleming QC suggested a little more might be needed to make it clear that Parliament itself had a power to deal with contempts.⁷⁴ David Howarth drew a parallel with contempt of court, arguing 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”; he continued, “there is no reason why Parliament should give itself fewer powers than the magistrates court”.⁷⁵

73. Whatever the difference in emphasis, the Australian approach would give each House *statutory* authority to exercise penal powers directly, thereby clarifying and, conceivably, increasing those powers. But this approach was opposed both in the Green Paper⁷⁶ and subsequently in the evidence provided to this inquiry by the Government:

“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”.⁷⁷

74. The Green Paper also raises what is, in our view, a further objection to statutory confirmation of Parliament’s penal powers, by canvassing the possibility of statutory provisions to ensure the fair exercise of such powers.⁷⁸ We consider it would be perverse to safeguard privilege by retaining Parliament’s jurisdiction while at the same time setting out the internal processes of Parliament in statute. Either the courts could review those processes, thus setting aside exclusive cognisance in such cases, or exclusive cognisance would render the statute unenforceable. If it were decided simply to put the power to

74 Written evidence from David Howarth and Nigel Pleming QC

75 Q 52

76 Cm 8318, paragraph 272

77 Written evidence from the Deputy Leader of the House of Commons, paragraph 2

78 Cm 8318, paragraph 262

punish for contempts on a statutory footing, Standing Orders or Resolutions of the House should set out the minimum requirements for fairness.

75. We consider that the disadvantages of legislating to confirm Parliament’s penal powers outweigh the advantages. We accordingly recommend against such legislation.

Parliamentary assertion of powers

76. It is unfortunate that Parliament’s restraint has led to doubt about the continuing existence of its powers. They are a part of United Kingdom law and have been so for centuries. In this section we consider the third option, which would involve the two Houses re-asserting their historic penal jurisdiction and setting up procedures for exercising that jurisdiction.

77. The first and most important challenge is to assert the continuing existence of each House’s jurisdiction over contempt. This is, fundamentally, a test of institutional confidence. We urge the two Houses to rise to this challenge. As the Clerk of the House of Commons has said, the question is not whether the Houses’ penal powers exist; it is whether they can be enforced.⁷⁹ Desuetude is not a legal doctrine in England and Wales, and there is no need for statute to confirm what already exists. The power to fine (based on the power possessed by the United Kingdom House of Commons) has only recently been asserted and used in New Zealand.⁸⁰ The mechanisms for committal by warrant from the Speaker to the governor of a prison have not been rescinded.

78. The second challenge is to ensure that the process for using those powers is fair. Modern concepts of fairness in the judicial process have radically changed since either House last used its penal powers. While there is an external imperative, in that the United Kingdom could potentially be challenged in the European Court of Human Rights, we consider that this is a secondary consideration. Parliament itself would expect to comply with modern expectations of fairness and due process, which are very different to those which applied in the late nineteenth century.

79. The remainder of this section explores the procedures that we consider the two Houses should follow in exercising their penal jurisdiction. The likelihood is that the two Houses would define these procedures in different ways: the House of Commons typically relies upon detailed rules set out in Standing Orders, while the House of Lords uses Standing Orders to articulate general principles, leaving detailed implementation to guidance prepared by committees, and subsequently agreed by the House. Moreover, House of Lords Committees have seldom raised allegations of contempt: the only such allegation to be referred to the House of Lords Committee for Privileges in recent times, relating to Mr Trevor Phillips, derived from a Joint Committee.⁸¹ The following paragraphs are accordingly predicated on Commons procedures. **If the House of Commons were to adopt our proposals on how its penal jurisdiction should be exercised, we would expect the House of Lords to adopt similar procedures, adapted to the conventions prevailing in that House, in due course.**

79 *Select committee effectiveness, resources and powers*, HC 697, Volume II: Additional written evidence

80 Q 141

81 *Mr Trevor Phillips: Allegation of Contempt*, HL Paper 15

Fairness

80. One of the requirements of fairness is that the public have reasonable access to the rules and expectations of each House. For this reason, we suggest that the two Houses not only assert their continuing penal jurisdiction but set out formally and publicly the kinds of behaviour likely to constitute contempt. There are already suggestions as to a fair process in the Resolutions and Standing Orders of the Australian and New Zealand Parliaments, and in the current proceedings of the House of Commons Committee of Privileges.⁸² We recommend this approach and the draft House of Commons resolutions and standing orders in Annexes 2 and 3 to this Report draw upon these requirements. They contain much more detail than is contained in this report, and are presented as a preliminary outline of a fair system.

81. All those participating in proceedings need to know about these safeguards. Sending copies of resolutions, guidance and Standing Orders to witnesses, the great majority of whom appear willingly, may appear unduly threatening. Instead, the key points should be included in guidance for witnesses, together with information about where the full text can be found.

Procedure in Committee

82. Although we recommend that Standing Orders should be far more explicit about the standard of fairness for normal committee inquiries, those standards must recognise that a Committee is not a court and the consequences of a committee inquiry for the individual or organisation whose evidence may be sought will be limited. In many cases, that individual or person may need simply to supply information, and the inquiry will not be directly concerned with them. The Resolution we attach makes it clear that an outside body which sought to penalise a witness for evidence given to a Committee would be committing a contempt.

83. Even when a Committee's inquiry results in criticism of an individual or an organisation, the inquiry process should give them an opportunity to put their case. While a Committee's findings may be uncomfortable reading for those criticised, a Committee will not take direct action against them. A Committee report may suggest that illegal conduct has occurred, or that specific conduct should be culpable; it cannot of itself create any legal liability. If a report prompts a disciplinary body to take action, that action will have to comply with the body's own powers and processes. The fact that proceedings in Parliament cannot be questioned in courts or similar bodies outside Parliament provides further protection for witnesses, whether or not they appear willingly.

84. Moreover, although Committees generally conduct their work transparently, they are willing to keep material confidential when that is appropriate. For example, the House of Commons Public Administration Select Committee took evidence in private from the police and the Crown Prosecution Service when it was assessing whether it could conduct

⁸² See, for example, Australian Senate Resolutions on Parliamentary Privilege and, in New Zealand, the Standing Orders of the House of Representatives relating to Select Committees and Parliamentary Privilege.

an inquiry into the so-called “cash for honours” affair without compromising criminal investigations.⁸³

85. Where a Committee is simply seeking evidence as part of the normal inquiry process, the standards of fairness should include the opportunity for witnesses to ask for matters to be dealt with in private, to give a clear account of their side of the story and to respond to any potentially damaging allegations made by other witnesses. In most cases, this is already common practice, but we recommend that such good practice should be formalised as part of Standing Orders.

Exemptions from the power to summon

86. The Green Paper asks whether there should be exemptions from any power to summon for MPs, civil servants and judges. Although we consider legislation inappropriate, we address these points briefly here, since it would be possible for each House to restrict Committees’ ability to summon certain categories of witness. Indeed, such a restriction already exists. Constitutionally, Ministers cannot be compelled to attend by an individual Committee, because as Members of one or other House of Parliament they can be compelled only by the House to which they belong. In practice, political pressure is likely to be effective in ensuring attendance, although there have been occasions on which Committees have unsuccessfully sought to secure attendance from MPs or members of the House of Lords who are not Ministers.

87. Reducing Committees’ powers to call for civil servants would rebalance the relationship between the legislature and the Executive in the Executive’s favour. The Osmotherly rules, which guide officials in their dealings with Committees of the two Houses,⁸⁴ are a creation of the Executive, not of Parliament. As a matter of principle, we see no reason why civil servants should be in a different position from other members of the public.

88. As far as judges are concerned, Committees have respected the independence of the judiciary, and there is no reason to expect this respect will diminish. We see no reason formally to exclude the judiciary from Parliament’s power to summon.

Complaints of contempt

89. The new Standing Orders should also set out fair processes for dealing with complaints of contempt. There are concerns that under the current system the House, which is the aggrieved body, itself decides whether a contempt has been committed, and if it has, what punishment is appropriate. This is unavoidable: in the same way, the court system has to deal with instances of contempt of court. It is right that the House as a whole should continue to decide on whether a contempt has been committed and, if so, what punishment would be appropriate. The involvement of the House has indeed been a safeguard for those accused of contempt: the House of Commons has twice refused to

83 Second Report from the House of Commons Public Administration Committee, Session 2007–08, *Propriety and Peerages*, HC 153

84 The Cabinet Office guidance to officials on Departmental Evidence and Response to Select Committees (“the Osmotherly rules”) is published by the Cabinet Office on the www.gov.uk website.

uphold findings that journalists who published reports based on Committee proceedings should be punished.⁸⁵

90. There need to be safeguards to make sure that complaints of contempt are considered fairly. The first safeguard is the expectation that except in rare cases, analogous to contempt in the face of the court, the two Houses should exercise their powers only after investigation by the relevant Privileges Committee.

Process in the House of Commons

91. The House of Commons already has specific procedures to deal with privilege complaints. There are safeguards against frivolous allegations of breaches of privilege: the Committee of Privileges does not have power to inquire at will, it can only deal with complaints which are referred to it; decisions as to whether to refer a matter of privilege to the Committee of Privileges are taken by the House as a whole; and Members require the permission of the Speaker to raise a matter of privilege. The exception to this process is that formal complaints of leaks from select committees are automatically referred to the Committee of Privileges.

92. The current method of referring a matter to the Committee of Privileges puts hurdles in the way of frivolous or ill-judged complaints, but it also has disadvantages. It seems unfair that the decision is taken after a debate in which Members who will ultimately decide on the outcome if a contempt is found analyse the matter before the investigation takes place.

93. Since most complaints are likely to relate to proceedings in select committees, we recommend that reports from select committees containing allegations of contempt should automatically stand referred to the Committee of Privileges. The House of Commons Liaison Committee should be consulted before any such complaint is made, as a means of checking a select committee which might agree a Report in haste, and subsequently decide that the behaviour complained of did not, on reflection, amount to a serious interference with the select committee's work.

94. When the Speaker of the House of Commons considers it is appropriate to allow a matter of privilege to be raised in other circumstances, the House should continue to decide whether or not to refer a contempt alleged by an individual Member. Debate should be limited to the Member's complaint and, if appropriate, a single speech opposing the referral.

95. If the Committee of Privileges finds that a contempt has been committed, members of the Committee to which the contempt related and Members of the Committee of Privileges should be barred from voting when the House comes to consider the matter, as should any member of the Liaison Committee consulted. The division results should not be

⁸⁵ When the First Report from the House of Commons Committee of Privileges, Session 1975–76, HC 22, was debated on 17/18 December 1975, the House decided—by 64 votes to 55—that, while regretting the leakage of information from the Select Committee on a Wealth Tax and its publication by *The Economist*, no further action need be taken CJ (232) 64; in the debate on 20/21 May 1986 on the First Report from the House of Commons Committee of Privileges, Session 1985–86, *Leak of Draft Report of Environment Committee on Radioactive Waste*, HC 376, a motion to agree with the Committee of Privileges' recommendations was amended—by 158 votes to 124—so that the House took note of the Committee's Report, with the rider that the House believed that "it would be proper to punish an honourable Member who disclosed the draft report of a select committee before it had been reported to the House; but considers that it would be wrong to punish a journalist merely for doing his job" CJ (242) 374.

announced until the lists have been checked and any improper votes discounted. The motions before the House should be amendable, but amendments to increase the penalty recommended by the Committee (which had heard the evidence) should not be admissible.

Committee investigations of complaints of contempt

96. The processes for investigating a complaint of contempt should be more rigorous than those in normal committee inquiries, but the precise process required may depend on the nature of the complaint, and on the punishment which the Committee of Privileges considers appropriate. If the Committee considered it would at most admonish contemnors, it would be dealing with a fundamentally different type of inquiry from one in which fines or imprisonment were contemplated.

97. Although Sir Malcolm Jack considered that “the possibility of hauling people to the bar of the House and admonishing them would provide a theatre of the absurd”,⁸⁶ the present Clerk of the House noted that admonishment could be done by resolution and suggested that, if it was clear that it was based on fair processes, admonishment would have a considerable reputational (and in some cases, financial) impact.⁸⁷ Admonishment could take the form of a resolution of the House, without any requirement for the contemnor to appear in person. We note the House of Commons Committee on Standards and Privileges announced that it would only consider recommending admonishment in the case of the alleged contempt against the Culture, Media and Sport Committee. It has already developed fair procedures to deal with such cases, as set out in its minutes for 3 July 2012.⁸⁸ These involve sharing evidence with those under investigation; hearings in which witnesses may be accompanied by legal advisers; and an opportunity to respond to potential criticism by the Committee.

98. If the Committee of Privileges wished to retain the option of imposing a stronger penalty than admonishment, then it would be appropriate to allow greater rights of intervention by legal advisers, and to ensure that the person investigated, or his or her legal advisers, had the opportunity to put questions to any witnesses. The draft Standing Orders in Annex 3 address these points.

Conclusion

99. This Report itself begins the process of reasserting Parliament’s penal powers, by clarifying our view on those powers and setting out fair procedures which can be followed if those powers need to be invoked.

100. We recommend that the two Houses should build on our work to set out clearly the powers they reserve the right to exercise, what is expected of witnesses, and the means by which they will consider allegations of contempt, including procedural safeguards to ensure that witnesses are treated fairly.

86 Written evidence from Sir Malcolm Jack, paragraph 11

87 *Select committee effectiveness, resources and powers*, HC 697, Volume II: Additional written evidence

88 The Formal Minutes of the House of Commons Committee on Standards and Privileges are published on the www.parliament.uk website.

4 The appointment of lay members to Select Committees

The Committee on Standards

101. The Green Paper asks whether there should be legislation to clarify that the privileged status of proceedings in the Committee on Standards would not be affected by the granting of full voting rights to the lay members appointed to that the Committee.

102. The Procedure Committee of the House of Commons, in considering the issue of lay members, heard arguments suggesting that the addition of lay members would not call the Committee's privileges into question, or that the courts would not take such a case. Nevertheless, the Committee concluded that if lay members were to be given voting rights, legislation should set the matter beyond a doubt. The Committee believed that appointing lay members in the absence of such legislation would carry a "strong element of risk", in that it could "lead to conflict between the House and the courts and might have a chilling effect on how the Committee conducts its work even before such a challenge emerged".⁸⁹

103. The current position is that lay members take part in proceedings of the Committee on Standards, but may not move any motion or amendment to any motion or draft report, and may not vote. They do have other, unique, rights: the Committee is not quorate unless at least one lay member is present, and lay members present when a report is agreed have the right to append their views to that report.⁹⁰ This secures the position of lay members while avoiding the risk that giving them the power to vote might cast doubt on whether the Committee's proceedings were covered by Parliamentary privilege.

104. While this approach avoids the risk of challenges to the Committee's jurisdiction, it does set lay members apart from the other Committee members. Rt Hon Kevin Barron MP, the Chair of the Committee on Standards, wrote to our Chairman to support legislation granting lay members full voting rights, saying "I cannot overstate how important it is that lay members should be able to participate on the same basis that MPs do."⁹¹

105. The Green Paper argues as follows:

"We note the arguments put by Professor Bradley and Lord Nicholls, and note too, the assertion from the then Clerk of the House Sir Thomas Erskine May in 1876 that it was "not an illegal act" to appoint lay members with full voting rights (in this case known as Referees) to Committees on Private Bills. It is not clear to us that the character of the Committee is necessarily sufficiently altered by the granting of full voting powers to its lay members as to call into question whether its proceedings remain privileged.

89 Sixth Report from the House of Commons Procedure Committee, Session 2010–12, *Lay membership of the Committee on Standards and Privileges*, HC 1606, paragraph 50

90 House of Commons Standing Order No 149

91 Written evidence from Rt Hon Kevin Barron MP

However, we have also carefully considered the points raised by the Procedure Committee and the then Clerk of the House. Given their views, the Government agrees that Members need certainty when participating in the Committee’s discussions—either as members of the Committee, or as the subject of its investigations—that those discussions will remain privileged and therefore beyond the reach of the courts”.⁹²

106. The Green Paper accordingly proposes a draft clause specifying that lay members of the House of Commons Committee on Standards (and only that Committee) may be given the power to vote, without affecting the protection afforded by Article 9 of the Bill of Rights.

Implications of legislation

107. The House of Lords has taken a different view on the issue of voting rights for non-Members, and the Clerk of the Parliaments pointed out that the Government appeared to have overlooked the fact that non-Members may already sit with the House of Lords Committee for Privileges and Conduct in hearing peerage claims.⁹³ He continued:

“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”.⁹⁴

108. Legislating in the way suggested by the Government also raises broader constitutional issues. As the Clerk of the House of Commons said, the draft clause:

“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”.⁹⁵

109. The Clerk of the House therefore confirmed that his answer to the question, “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”.⁹⁶

Conclusion

110. While legislation along the lines proposed by the Green Paper would be possible, we find the arguments put forward by the Clerk of the House and the Clerk of the Parliaments against such a course of action to be conclusive.

92 Cm 8318, paragraphs 241 to 242

93 Written evidence from the Clerk of the Parliaments; see also House of Lords Standing Order 77

94 Written evidence from the Clerk of the Parliaments, paragraph 28

95 Written evidence from the Clerk of the House, paragraph 40

96 Written evidence from the Clerk of the House, paragraph 39

111. There are procedural rules in place to ensure lay members can play a full part in the House of Commons Committee on Standards, and it would be inappropriate to legislate to confer the protection of parliamentary privilege upon certain classes of individuals sitting on specified committees. Moreover, such legislation would cast doubt on the position of the House of Lords Committee for Privileges and Conduct, which would include non-Members when deciding a peerage claim. We therefore oppose legislating to confer voting rights on lay members of the House of Commons Committee on Standards.

5 Judicial questioning of proceedings in Parliament

Introduction

112. In this chapter we review the relationship between Parliament and the courts, focusing on the extent to which the courts currently allow parliamentary proceedings to be used as evidence.

113. It is important to note at the outset the different roles and different modes of operation of the courts and the legislature. Parliament is a forum for debate, which takes place in a political atmosphere, whether in the House or in committees. The legislation enacted by Parliament is the result of a political process. Legal judgments, in contrast, are carefully reasoned and impartial statements of a court's findings in relation to specific facts, and in the case of judgments by the higher courts of the meaning or effect, in the context of those facts, of statute or common law. Both courts and Parliament are necessary, but they operate in fundamentally different ways: the challenge is to set the boundaries between them in a way which enables each to function effectively without encroaching on the proper responsibilities of the other.

114. The Green Paper asserts 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”. After analysing the circumstances in which proceedings in Parliament may be used in court, the Green Paper concludes by stating the Government's view that “the current situation, whereby the courts can use proceedings in Parliament as long as they are not questioned or impeached, is perfectly satisfactory”.⁹⁷

Comity

115. Underlying the present relationship is the principle of comity between Parliament and the judiciary. This principle was articulated by Lord Simon of Glaisdale in 1974:

“It is well known that in the past there have been dangerous strains between the law courts and Parliament—dangerous because each institution has its own particular role to play in our constitution, and because collision between the two institutions is likely to impair their power to vouchsafe those constitutional rights for which citizens depend on them. So for many years Parliament and the courts have each been astute to respect the sphere of action and the privileges of the other”.⁹⁸

116. But the general principle of comity, which nobody would challenge, does not prevent constant evolution and occasional tension. David Howarth noted that the level of comity has fluctuated over the years, citing the “two extremes” of *Stockdale v. Hansard*, in the 1830s, where the courts directly challenged the House of Commons, and *Bradlaugh v.*

⁹⁷ Cm 8318, paragraphs 48 and 88

⁹⁸ *Pickin v. British Railways Board* [1974] AC 765

Gosset, half a century later, where the courts were almost exaggeratedly respectful of parliamentary exclusive cognisance.⁹⁹

117. The Clerk of the House of Commons was confident that “at the highest levels of the judiciary there is an ... understanding of the different roles of Parliament and the courts.”¹⁰⁰ The evidence we have heard bears out this claim, and there has been no recent judicial challenge to parliamentary privilege comparable to that of the New South Wales courts in the 1980s, which led to the passage of the Australian Parliamentary Privileges Act 1987 (see paragraph 35).

Judicial questioning of proceedings in Parliament

118. While developments in the United Kingdom have been less dramatic than those in Australia in the 1980s, there has been a significant increase in recent years in the number of references made in court to parliamentary proceedings. Such references fall into three main areas.

119. First, there is the principle, deriving from the 1993 decision in *Pepper v. Hart*,¹⁰¹ that the court, in seeking to resolve ambiguity in primary legislation, may rely upon statements made by the minister in Parliament as an aid to interpretation. The degree of latitude allowed to the courts in making such references has varied over the years. As David Howarth described it:

“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”.¹⁰²

120. This impression, that practice in applying the *Pepper v. Hart* principle has been tightened up, was confirmed by the Lord Chief Justice: “We envisage ... 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”.¹⁰³

121. The second main area where parliamentary proceedings are admitted as evidence is where they are referenced as a matter of history, or as part of a narrative, to explain what happened, without the content as such being questioned. Such references to parliamentary material are uncontroversial.

122. The third and more problematic area is judicial review cases. The Green Paper notes that in such cases the courts “have admitted Ministerial statements to Parliament to demonstrate what Government policy is”.¹⁰⁴ The reality is that the courts have, in several

99 Q 42

100 Q 196

101 *Pepper (Inspector of Taxes) v. Hart* [1993] AC 593

102 Q 31

103 Q 251

104 Cm 8318, paragraph 84. This summary derives from the rule established in *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

recent cases, gone much further, not least by praying in aid reports from select committee. The Clerk of the Parliaments drew attention to a 2011 case involving the Home Office, in which the judge cited a report by the House of Lords Delegated Powers and Regulatory Reform Committee, relying heavily on the Committee's conclusions in developing his own argument. For instance, the judge noted that "the committee accepted that the department had ... arguable grounds for concluding that its consultation was adequate".¹⁰⁵

123. In a still more recent case the Court of Appeal drew attention to a report by the House of Lords Merits of Statutory Instruments Committee in the following terms: "The Committee did not suggest that the Regulations were unlawful but I regard their concern as supportive of the conclusion I have reached".¹⁰⁶

124. Do such references constitute 'questioning' of proceedings in Parliament, thereby contravening Article 9 of the Bill of Rights? The Lord Chief Justice was clear that they did, noting that once an opinion expressed by a Select Committee was admitted as evidence, "the other side must then contend that the opinion of the Committee was wrong, and that is questioning what the Committee has decided".¹⁰⁷ We agree with the Lord Chief Justice that, in an adversarial system, the admission of evidence derived from committee reports in submissions from one party will necessarily lead to its questioning by the other party, thus contravening Article 9.

125. In a 2008 case, Mr Justice Stanley Burnton (as he then was) extended a similar line of argument to include judgments:

"If it is wrong for a party to rely on the opinion of a Parliamentary Committee, it must be equally wrong for the Tribunal itself to seek to rely on it, since it places the party seeking to persuade the Tribunal to adopt an opinion different from that of the Select Committee in the same unfair position as where it is raised by the opposing party. Furthermore, if the Tribunal either rejects or approves the opinion of the Select Committee it thereby passes judgment on it".¹⁰⁸

The effects of such questioning

126. The mischief that flows from such questioning of proceedings in Parliament is not just the breaching of Article 9, but the blurring of the constitutional separation of Parliament and the courts. In his judgment in *Wilson v. First County Trust*, Lord Nicholls helpfully explored the nature of parliamentary debate:

"Different members may well have different reasons, not expressed in debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the legislation. Ministerial statements, especially if made *ex tempore* in response to questions, may sometimes lack clarity or be misdirected. Lack of cogent justification in the course of parliamentary debate is not a matter which 'counts against' the legislation on issues of proportionality. The court

105 Written evidence from the Clerk of the Parliaments, footnote 7; the reference is to *R (Pelling) v. Secretary of State for the Home Department and others* [2011] EWHC 3291.

106 *R (on the application of Reilly) v. Secretary of State for Work and Pensions* [2013] EWCA Civ 66

107 Q 253

108 *Office of Government Commerce v. Information Commissioner* [2008] EWHC 737 (Admin)

is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The latter would contravene article 9 of the Bill of Rights".¹⁰⁹

127. Even though the courts have been careful to consider the proper boundaries of privilege, judicial notice of parliamentary proceedings may in principle affect what is said in Parliament. Indeed, the Government's *Guide to Making Legislation* warns that Ministerial statements should be cleared with Parliamentary Counsel as "parliamentary material may be used to assist in the interpretation of legislation".¹¹⁰ David Howarth also hinted at the possibility that political statements made in Parliament could become a "substitute" for "clear drafting" of legislation.¹¹¹ He also noted that "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".¹¹² This raises the possibility of a chilling effect, in that Ministers may be deterred from presenting policies and decisions clearly and honestly before Parliament, for fear of judicial review.

128. The Lord Chief Justice made a broader point, that questioning the conclusions of a Select Committee unavoidably opens the door to questioning the process whereby those conclusions were reached: "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'".¹¹³

129. But though he accepted that mistakes had been made by the courts, The Lord Chief Justice felt that they were rare and should be treated simply as mistakes of limited significance:

"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 ... 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".¹¹⁴

Options

130. We considered whether formal steps are required to ensure that such mistakes do not occur in future. As we have already noted, the Australian Parliament, when faced with (much more damaging) questioning of proceedings in Parliament by the courts, reacted by enacting the Parliamentary Privileges Act 1987, section 16(3) of which provides that:

109 *Wilson v. First County Trust Ltd* [2003] UKHL 40

110 Cabinet Office, *Guide to Making Legislation*, paragraph 6.37, available on the www.gov.uk website

111 Q 34

112 Q 38

113 Q 262

114 Q 265

“(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
- (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.”

131. This is far more restrictive than current practice in the United Kingdom, and we are not persuaded that the problems being experienced in the United Kingdom would justify such a drastic limitation of the ability of the courts to question proceedings in Parliament.

132. On the other hand, we do not concur with the recommendation of our predecessor Joint Committee, that “article 9 should not be interpreted as precluding the use of proceeding in Parliament in court for the purpose of judicial review of governmental decisions”.¹¹⁵ Such an unlimited disapplication of Article 9 in respect of judicial review cases could lead to all the damaging consequences outlined above.

133. A middle way might be to leave the courts to develop their interpretation of Article 9, in respect of the admissibility of parliamentary proceedings, while requiring them to notify Parliament whenever it is proposed to refer to such proceedings in evidence. A requirement not just to notify the House of Commons, but to seek leave to refer to privileged material, existed until 31 October 1980, when the House resolved that “the practice of presenting petitions for leave to refer to parliamentary papers be discontinued”.¹¹⁶ No such requirement was ever imposed by the House of Lords, and the Commons requirement does not in reality seem to have been uniformly observed.

134. More generally, Lord Justice Beatson commented that the decision as to whether or not to introduce a requirement for prior notification would depend on “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”.¹¹⁷ We are not persuaded that the problem is yet serious enough to justify such a step.

Conclusions

135. We are grateful for the Lord Chief Justice’s assurance that recent instances of judicial questioning of proceedings in Parliament are best “treated as ... mistakes”, rather than a challenge to Parliament. We emphasise that such mistakes may have serious consequences: even if they are acknowledged to be mistakes, and do not establish a precedent, their frequency in judicial review cases risks having a chilling effect upon parliamentary free speech.

¹¹⁵ Report of the 1999 Joint Committee on Parliamentary Privilege, paragraph 55

¹¹⁶ House of Commons Resolution of 31 October 1980, CJ (236) 823; see Annex 1, paragraphs 35 to 36

¹¹⁷ Q 268

136. In conclusion:

- We welcome the clarification by the Lord Chief Justice as to the extent of the *Pepper v. Hart* principle, namely, that those instances in which proceedings, including Committee reports, are questioned, are best “treated as ... mistakes”.
- We consider that the comments of Mr Justice Stanley Burnton, in *OGC v. Information Commissioner*, represent an accurate statement of the legal limitations upon the admissibility of Select Committee reports in court proceedings, including judicial review cases. Such reliance by the courts upon Select Committee reports is not only constitutionally inappropriate, but risks having a chilling effect upon parliamentary debate.
- We do not at this stage believe that the problem of judicial questioning is sufficiently acute to justify either legislation prohibiting use of privileged material by the courts, along the lines of section 16(3) of the Australian Parliamentary Privileges Act 1987, or the introduction of a formal and binding system of notification when reference to privileged material is contemplated.
- We trust that less formal means than those above, building on the current good relations between the judiciary and the parliamentary authorities, will address recent problems. But in this matter, as in others covered in our Report, Parliament should be prepared to legislate if it becomes necessary to do so in order to protect freedom of speech in Parliament from judicial questioning.

6 Disapplication of Article 9

Criminal cases

137. The Government’s commitment to publish a Green Paper originated in a statement in the Coalition Agreement that the Government would work to “prevent the possible misuse of Parliamentary privilege by MPs accused of serious wrongdoing”. At the heart of the Green Paper, accordingly, are draft clauses that would allow the prosecuting authorities to disapply Article 9 of the Bill of Rights in such a way as to allow evidence relating to proceedings in Parliament to be admitted as evidence in criminal trials.¹¹⁸

Article 9 of the Bill of Rights 1689

That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.

138. The impetus for the Government’s commitment to address this issue was that three MPs (David Chaytor, Elliot Morley and Jim Devine) and one peer (Lord Hanningfield), charged with false accounting with respect to their parliamentary expenses, had challenged the jurisdiction of the courts, on the basis that their expense claims were covered by parliamentary privilege. That case had not been considered in court at the time of the general election in May 2010, but by the time the Green Paper was actually published almost two years later, in April 2012, the Supreme Court had conclusively rejected the arguments put forward by the four Members. The Supreme Court decided that “neither article 9 nor the exclusive cognisance of the House of Commons poses any bar to the jurisdiction of the Crown Court”.¹¹⁹ Thus the primary impetus for the commitment made in the coalition agreement had, to a large extent, been negated.

139. Nevertheless, the Green Paper sets out the Government’s continuing concern: “it would be wrong if MPs or peers accused of serious criminal offences could use parliamentary privilege to avoid criminal prosecution, where these are not related to the key elements of freedom of speech and debate”.¹²⁰ The Green Paper therefore proposes that proceedings in Parliament could be used as evidence in criminal cases, with certain exceptions which it suggests should balance the requirement that “parliamentary privilege cannot be used to evade the reach of the courts where criminality is suspected”, with the need to protect free speech and debate in Parliament by “minimising any chilling effect to free speech in parliamentary proceedings”.¹²¹ These exceptions are detailed in the draft schedule on pages 39 to 41 of the Green Paper, and generally cover what are described as ‘speech offences’.

140. We recognise that there is a tension between the public interest in bringing to justice those accused of criminal offences, and the public interest in the absolute protection afforded to freedom of speech in Parliament. As the Clerk of the Parliaments observed:

¹¹⁸ Cm 8318, pages 37 to 41

¹¹⁹ *R v. Chaytor and others* [2010] UKSC 52

¹²⁰ Cm 8318, paragraph 93

¹²¹ *Ibid.*, paragraph 101

“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 conduct may go unpunished. Historically, there has been consensus that this is a price worth paying, in the legitimate aim of ensuring the immunity of parliamentary proceedings from executive or judicial interference”.¹²²

141. The Government’s proposals suggest that this consensus no longer holds true. Yet for us to entertain any notion of diminishing a privilege which even the Green Paper acknowledges is of “fundamental importance”, we would need to see evidence that the problem being addressed—the thwarting of justice by parliamentary privilege—was so severe that it justified watering-down a long-established and fundamental protection deeply embedded in our constitution.

142. Is such a disapplication actually necessary for successful criminal prosecutions to take place? The Crown Prosecution Service stated that “it is likely that there will be a limited number of cases in which it will be necessary to adduce such evidence, but we note that allowing the use of this evidence by the prosecution may assist individuals in relevant cases being brought to justice”.¹²³

143. The Green Paper places more emphasis on tackling criminal behaviour directly linked with proceedings in Parliament such as bribery and corruption. It suggests that “to enable criminal proceedings to take place it could be necessary for the prosecution and the defence to be able to question the motives behind any statement or action, rather than simply being able to show that it was said”.¹²⁴ The Government were, however, unable to provide us with a single example of a prosecution which failed, or could not be brought, because of the protection afforded to proceedings in Parliament.¹²⁵

144. The 1999 Joint Committee considered this issue, and the conflicting public interests involved: “the problem of bribery exposes a conflict between two important public interests: the need for corrupt members of Parliament and those who corrupt them to be punished in the same way as everyone else, and the need to maintain freedom of speech protected by article 9”.¹²⁶ It recommended that Article 9 should not apply to proceedings of parliament used as evidence in a prosecution for bribery.

145. We have not seen any evidence that suggests such a step is necessary today. The main mischief the 1999 Joint Committee sought to address (uncertainty over whether MPs could in fact be prosecuted for the common law offence of bribery) was addressed by means of the Bribery Act 2010. Requesting or agreeing to receive a bribe are now statutory criminal offences, irrespective of whether or not the acts for which the bribe was sought or offered are actually carried out. This makes the situation in the United Kingdom analogous to that in the United States, where the case of *US v. Brewster* established that a Senator could be prosecuted by demonstrating that an unlawful agreement was entered into, without the

122 Written evidence from the Clerk of the Parliaments, paragraph 12

123 Crown Prosecution Service response to Government consultation on the Green Paper, Cm 8318

124 Cm 8318, paragraph 113

125 Written evidence from the Deputy Leader of the House of Commons

126 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 166

need to show that the bribe led to specific conduct (which might be privileged).¹²⁷ The Government acknowledge this point in the Green Paper, but argue that “notwithstanding that some bribery cases have been successfully prosecuted in other jurisdictions through direct proof that a bribe was offered or solicited, it does not necessarily follow that prosecutors should be required to rely on such an approach in all investigations in alleged bribery”.¹²⁸

146. More generally, it is well established that “ordinary crimes” committed by Members or non-Members on the parliamentary estate can be prosecuted in the courts. As noted in *R v. Chaytor*, “for centuries the House of Commons has not claimed the privilege of exclusive cognisance of conduct which constitutes an ‘ordinary crime’—even when committed by a Member of Parliament within the precincts of the House”.¹²⁹ This means that the protection enjoyed by Members of the House of Commons and House of Lords is significantly narrower in scope than the personal immunity conferred upon members of the legislature in many non-Westminster style jurisdictions.¹³⁰ In such systems, the aim is to protect a member’s work, and the functioning of the legislature, through shielding the member from arrest, detention or prosecution without the consent of the chamber to which they belong. Such immunity, designed to protect against arbitrary power, has never been conferred upon parliamentarians in the United Kingdom.

147. Lord Rodger of Earlsferry in his judgment on *R v. Chaytor*, described “ordinary crimes” as those which do not relate “in any way to the legislative or deliberative processes of the House of Commons or of its Members, however widely construed”.¹³¹ Thus the courts have already established a distinction approximating to that in the Green Paper, between ‘ordinary crimes’, which by definition cannot be part of proceedings in Parliament, and those which relate to such proceedings, approximating to what the Green Paper describes as ‘speech offences’.¹³²

148. The Green Paper’s proposal was attacked by several witnesses.¹³³ Both the Clerk of the House and the Clerk of the Parliaments strongly opposed the idea in principle, with the Clerk of the Parliaments noting that:

“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”.¹³⁴

149. He then illustrated the effect of the Government’s proposals by giving the hypothetical example of a debate on the 2011 riots:

127 *United States v. Brewster*, 408 US 501 (1972)

128 Cm 8318, paragraphs 107 and 108

129 *R v. Chaytor and others* [2010] UKSC 52

130 For example, Article 26 of the French Constitution provides that “Aucun membre du Parlement ne peut faire l’objet, en matière criminelle ou correctionnelle, d’une arrestation ou de toute autre mesure privative ou restrictive de liberté qu’avec l’autorisation du Bureau de l’assemblée dont il fait partie”.

131 *R v. Chaytor and others* [2010] UKSC 52

132 Cm 8318, paragraphs 119 to 124

133 QQ 65 (Sir Malcolm Jack), 185 to 189 (Rosemary Laing)

134 Written evidence from the Clerk of the Parliaments, paragraph 15

“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.”

He continued:

“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”.¹³⁵

150. Malcolm Peacock, the Clerk of the Legislative Council of the Parliament of Western Australia, described an alternative scenario, in which a Member of Parliament might decide not to talk about his personal experience of private commercial business practices for fear that it might open him up to investigation for corporate crimes.¹³⁶ Another example might be a Member deciding not to talk about a personal experience with drugs for fear he might incriminate himself.

151. David Howarth also argued that disapplying Article 9 would be “very unwise”, highlighting the risk “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”.¹³⁷

152. More generally, a retrospective waiver would mean that no-one, at the time they were speaking, could be confident that their words might not subsequently be used against them in a criminal prosecution. This strikes at the very heart of the purpose of Article 9, as described by Lord Browne-Wilkinson in his judgment in *Prebble v. Television New Zealand*:

“the important public interest protected by such 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. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect”.¹³⁸

153. Michael Carpenter, Speaker’s Counsel in the House of Commons, argued that the effect of the proposal would be to put “every Member, in effect, under caution”.¹³⁹ We agree: the Government’s proposals would have a dramatic chilling effect upon free debate in Parliament.

154. In his written evidence, the Deputy Leader of the House of Commons indicated that the Government’s view on this issue has changed since the Green Paper was published:

¹³⁵ Written evidence from the Clerk of the Parliaments, paragraph 17

¹³⁶ Clerk of the Legislative Council of the Parliament of Western Australia, response to the Government consultation on the Green Paper Cm 8318, paragraph 5.9

¹³⁷ QQ 45-46

¹³⁸ *Prebble v. Television New Zealand Limited* [1995]1 AC 321

¹³⁹ Q 217

“Given the importance of protecting freedom of speech, we don’t currently believe that the evidence supports a disapplication of privilege”.¹⁴⁰ **We welcome the Government’s change of heart on the disapplication of privilege in respect of criminal prosecutions.**

155. In summary, we recognise that there is a public interest in bringing those guilty of criminal offences to justice, but freedom of speech in Parliament is a fundamental constitutional principle—and for good reason. As the Green Paper acknowledges, “freedom of speech and of debate ... are clearly central to the ability of parliamentarians to reach informed decisions”. It is not in the public interest to curtail that freedom, thereby damaging the quality of debate in Parliament, without compelling evidence that such curtailment is absolutely necessary. No such evidence has been produced: indeed, there is no evidence that parliamentary privilege has been a barrier to the successful prosecution of any criminal case.

156. We believe that general disapplication of Article 9 in respect of criminal prosecutions is unnecessary and would have a disproportionately damaging effect upon free speech in Parliament. We accordingly oppose the Government’s draft clauses.

Civil cases

157. Chapter 4 of the Green Paper addresses the disapplication of Article 9 in non-criminal cases:

- in respect of breaches of court injunctions;
- in respect of tribunals of inquiry; and
- in respect of defamation cases.

Court injunctions

158. The question of breaches of court injunctions by Members of either House in parliamentary proceedings was addressed at length by the Joint Committee on Privacy and Injunctions, which concluded that no action was required at this stage. It stated, however, that:

“If the revelation of injuncted information becomes more commonplace, if injunctions are being breached gratuitously, or if there is evidence that parliamentarians are routinely being ‘fed’ injuncted material with the intention of it being revealed in Parliament, then we recommend that the Procedure Committees in each House should examine the proposals made to us for new restrictions with a view to implementing them”.¹⁴¹

159. These proposals included the possibility of creating a new self-denying ordinance along the lines of the existing *sub judice* rules: the Joint Committee did not suggest a legislative solution. The Green Paper also concludes that no legislative change is required at the present time.

140 Written evidence from the Deputy Leader of the House of Commons, paragraph 5

141 Report from the Joint Committee on Privacy and Injunctions, Session 2010–12, HL Paper 273/HC 1443

160. **There have been no significant developments in respect of breaches of court injunctions in parliamentary proceedings since the recommendations of the Joint Committee on Privacy and Injunctions were published in March 2012. We therefore see no need to re-open the issue and we endorse the conclusions reached by the Joint Committee.**

Tribunals of inquiry

161. The 1999 Joint Committee proposed a mechanism to allow both Houses to waive privilege for the purposes of a specific inquiry.¹⁴² The Green Paper questions this proposal, arguing first that the prospect of a retrospective waiver would have a chilling effect on free speech, and secondly that inquiries can ask questions for themselves if they need to have evidence on the record.¹⁴³ The Clerk of the House of Commons supported the Government's position.¹⁴⁴

162. **We do not consider that it is necessary for inquiries to consider evidence given in parliamentary proceedings, and we therefore support the Government in rejecting the introduction of a mechanism to waive privilege in such cases.**

Defamation

163. Section 13(1) of the Defamation Act 1996 provides that “Where the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, he may waive for the purposes of those proceedings, so far as concerns him, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament.”

164. Section 13 was inserted in the Bill which became the Defamation Act 1996 in order to address a problem that had arisen in the wake of the “cash for questions” affair, when a judge had stopped libel proceedings brought by Mr Neil Hamilton against *The Guardian* because Article 9 prevented the newspaper from using proceedings in Parliament to justify what it had published. Section 13 enables a person, who may be a Member of either House or of neither House, to waive parliamentary privilege so far as he is concerned, for the purposes of defamation proceedings. The essential protection of Members against legal liability for what they have said or done in Parliament remains and cannot be waived.

165. The 1999 Joint Committee considered that the enactment of section 13, seeking to remedy a perceived injustice, had created indefensible anomalies of its own which should not be allowed to continue and it recommended that section 13 should be repealed. The fundamental flaw identified by the 1999 Joint Committee was that the section undermined the basis of privilege: freedom of speech was the privilege of the House as a whole and not of the individual Member in his or her own right, although an individual Member could assert and rely on it. The 1999 Joint Committee also noted the anomaly that section 13 was available only in defamation proceedings and not in any other form of civil action or any

142 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraphs 94-96

143 Cm 8318, paragraphs 196 and 197

144 Written evidence from the Clerk of the House of Commons, paragraph 30

criminal action.¹⁴⁵ As the Joint Committee pointed out, since the exercise of section 13 is a matter of individual choice, where two people are involved in the same action one may choose to waive privilege and the other not.

166. The 1999 Joint Committee recommended that the mischief sought to be remedied by section 13 of the Defamation Act 1996 should be cured by a different means: the replacement of section 13 with a short statutory provision empowering each House to waive Article 9 for the purpose of any court proceedings, whether relating to defamation or to 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.¹⁴⁶ Lord Lester of Herne Hill supported the approach of the 1999 Joint Committee,¹⁴⁷ as did Dr Adam Tucker¹⁴⁸ and Geoffrey Lock, a former Head of the Research Division in the House of Commons Library.¹⁴⁹

167. In contrast, John Hemming MP, in his response to the Government consultation, said that he would keep the existing section 13.¹⁵⁰

168. The Newspaper Society opposed any discretionary power to waive privilege, the use of which would be unpredictable and retrospective. It argued that the power of waiver could create a chilling effect, by the mere threat or possibility of its use, which would be detrimental to openness of debate and press reporting of proceedings in Parliament.¹⁵¹ In its response to the Government consultation, the Legislative Council of Western Australia argued that it was preferable for privilege not to be waived for any reason, in order to avoid the potential for the waiver being used for purely political purposes.¹⁵² The Clerk of the House of Commons told us that his preference would be for the repeal of section 13, without replacement.¹⁵³ The Media Lawyers Association took the same view.¹⁵⁴

169. The Government told us:

“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.

145 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraphs 67 to 82

146 *Ibid.*, paragraph 89

147 Written evidence from Lord Lester of Herne Hill, paragraph 15

148 Dr Adam Tucker, response to Government consultation on the Green Paper, Cm 8318, paragraph 31

149 Geoffrey Lock, response to Government consultation on the Green Paper, Cm 8318

150 John Hemming MP, response to Government consultation on the Green Paper, Cm 8318

151 Written evidence from the Newspaper Society

152 Clerk of the Legislative Council of the Parliament of Western Australia, response to Government consultation on the Green Paper, Cm 8318, paragraph 6.8

153 Written evidence from the Clerk of the House of Commons, paragraph 29

154 Media Lawyers Association, response to Government consultation on the Green Paper, Cm 8318

The Government acknowledges concerns with introducing a general power of waiver for Parliament given the potential chilling effect on debate¹⁵⁵.

170. We recommend the repeal of section 13 of the Defamation Act 1996. The anomalies it creates are more damaging than the mischief it was intended to cure. There is no persuasive argument for granting either House a power of waiver or for restricting such a power to defamation cases alone. A wider power of waiver would create uncertainty, and have the potential to undermine the fundamental constitutional principle of freedom of speech in Parliament.

155 Written evidence from the Deputy Leader of the House of Commons, paragraph 10

7 Reporting and repetition of parliamentary proceedings

Background

171. As the 1999 Joint Committee noted, “parliamentary privilege does not cloak parliamentary publications with any form of protection”.¹⁵⁶ This was decided in 1839 in the case of *Stockdale v. Hansard*,¹⁵⁷ in which the court held that parliamentary privilege did not attach to the publishers of reports ordered to be printed by the House of Commons. The Parliamentary Papers Act 1840, passed in response to this decision, established that no action could be brought in court arising from the publication of the Official Report or other documents ordered to be published by either House. It also provided protection for “any extract or abstract” from such documents made by others, provided that it was published “*bonâ fide* and without malice” (section 3). Such protection for publications by order of either House is a matter of statute law, not privilege.

172. An “abstract” was defined by the 1999 Joint Committee as a “summary or epitome”.¹⁵⁸ Thus media reports of what goes on in Parliament, even if they draw on documents published by order of the House, such as Hansard, do not generally enjoy the (qualified) protection afforded by section 3 of the 1840 Act—a point confirmed by Sarah McColl, Solicitor Advocate in the BBC Editorial Legal Department, in her oral evidence on behalf of the Media Lawyers Association.¹⁵⁹ Such reports do, however, enjoy privilege at common law in respect of defamation.¹⁶⁰ If the whole debate is published the protection is absolute; if only extracts are published the protection is qualified (that is to say, it is not available if the extracts are shown to have been published maliciously). The 1999 Joint Committee, while acknowledging that the matter had never been determined, commented that it would be surprising if the common law defence of privilege in respect of defamation was not also available to broadcasters.¹⁶¹

173. This common law protection is buttressed by section 15 of the Defamation Act 1996, under which fair and accurate reports of the proceedings in public of a legislature anywhere in the world enjoy qualified privilege for defamation purposes, as does a fair and accurate copy of, or extract from, material published by or on behalf of a government or legislature anywhere in the world.¹⁶²

174. Outside the field of defamation, it does not appear that media reports of parliamentary proceedings (as opposed to extracts or abstracts) enjoy legal protection. This arises most obviously in the case of breaches of court injunctions; other examples cited by

¹⁵⁶ Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 340

¹⁵⁷ *Stockdale v. Hansard* [1839] 112 ER 1160

¹⁵⁸ Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 342

¹⁵⁹ Q 97

¹⁶⁰ *Wason v. Walter* (1868–69) 4 QB 73

¹⁶¹ Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 360

¹⁶² Defamation Act 1996, schedule 1, as amended by section 7 of the Defamation Act 2013; see also the Report from the Joint Committee on the draft Defamation Bill, Session 2010–12, HL Paper 203–I/HC 930–I

Mike Dodd, of the Press Association, were provisions in the Official Secrets Act 1989, the Sexual Offences (Amendment) Act 1992 and the Education Act 2011, all of which prohibit the publication of specific types of information.¹⁶³

175. This brief summary illustrates the patchwork quality of the different levels of protection afforded to reports, summaries or extracts of parliamentary proceedings. This patchwork includes a number of gaps and inconsistencies:

- While the burden of proving malice under common law rests with the claimant, under section 3 of the Parliamentary Papers Act 1840 it is for the defendant to prove that he has not acted maliciously.
- The protection afforded under the 1840 Act to extracts or abstracts extends to all court proceedings. But the protection under common law for reports of parliamentary proceedings extends only to defamation cases—as does the reinforcement of that protection in the Defamation Acts 1996 and 2013. It appears that reports of parliamentary proceedings (as opposed to extracts or abstracts) enjoy no protection in respect of other types of court proceedings.
- Section 3 of the 1840 Act was limited to “printing”; later amendments have extended the same level of protection to any television or sound broadcast.¹⁶⁴ It is less clear whether the common law protection in respect of actions for defamation applies to broadcasts.
- More generally, the protections derived from 19th century statute or common law do not sit comfortably with modern technology, where increasing volumes of data, rather than going through a formal “publication” process, are streamed live via the Internet. Such data are subject to instant comment or reporting via social networking sites, and their re-use, for instance by combining them with other data sources, is actively encouraged under the terms of the Open Parliament Licence.¹⁶⁵

Proposals for change

176. The 1999 Joint Committee criticised the drafting of the 1840 Act as being in a “somewhat impenetrable early Victorian style”.¹⁶⁶ The Joint Committee considered the statutory protection given to the media by the 1840 Act and the common law itself should be maintained, and 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.

177. The 1999 Joint Committee recommended that this new statute should address a number of the anomalies identified above: to reverse the burden of proof under the 1840 Act, bringing it into line with the common law;¹⁶⁷ to confirm that the common law protection in respect of defamation applies to other legal proceedings, such as for contempt of court or for breaches of the Official Secrets Act; and to clarify the status of sound and

163 Q 95

164 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 360

165 The Open Parliament Licence is published on the www.parliament.uk website

166 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 342

167 *Ibid.*, paragraph 363

video archives of proceedings, once they have been transferred to the National Film Archive. The 1999 Joint Committee also drew attention to the possible uncertainty around the status of broadcasts under common law. The Committee made no recommendation on the level of protection enjoyed by reports of parliamentary proceedings in defamation or other cases, noting that “The considerations involved in this type of issue do not concern parliamentary privilege. Nor do they relate solely, or even primarily, to members of Parliament”.¹⁶⁸

178. The Joint Committee on the draft Defamation Bill, while not concerned with the issue of parliamentary privilege *per se*, recommended in 2011 that the press be provided 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”.¹⁶⁹ This recommendation was not accepted by the Government, and the Defamation Act 2013 leaves the position of reports of parliamentary proceedings in defamation cases substantially unchanged.

179. The Joint Committee on Privacy and Injunctions, unlike the Joint Committee on the draft Defamation Bill, did not consider that absolute privilege should be extended to media reports of parliamentary proceedings. Instead the Committee recommended only “that qualified privilege should apply to media reports of parliamentary proceedings in the same way as to abstracts and extracts from Hansard”.¹⁷⁰ Thus the Joint Committee on Privacy and Injunctions did not consider that malicious publication should be protected.

180. The Government’s Defamation Bill was based on a private member’s bill presented by Lord Lester of Herne Hill in 2010. This bill would have repealed the Parliamentary Papers Act 1840 in its entirety and given absolute immunity in respect of defamation cases to fair and accurate reports of proceedings in Parliament. In evidence to this Committee, Lord Lester again urged that the protection afforded to fair and accurate reports of proceedings in parliament in respect of actions for defamation only be made absolute—in other words, that the “without malice” qualification be removed in this specific case.¹⁷¹ Such a change would leave qualified privilege attaching to fair and accurate reports of proceedings in Parliament in other circumstances, including breaches of court injunctions; Lord Lester noted that such a change would bring the law on reports of proceedings in Parliament into line with that on reports of court proceedings.

181. The Newspaper Society, in evidence to us, called for far wider changes than those proposed by the 1999 Joint Committee to be made to the Parliamentary Papers Act 1840 and other relevant legislation. It wished to protect all reports at any time in any form.¹⁷² Mike Dodd, of the Press Association, suggested to us that absolute privilege should be afforded to all fair and accurate reports of proceedings in Parliament, including media reports on breaches of injunctions. He justified his position by reference to freedom of speech: “The reason I find this situation unsatisfactory is that in the end, your freedom of

168 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 375

169 Report from the Joint Committee on the draft Defamation Bill, Session 2010–12, HL Paper 203–I/HC 930–I, paragraph 51

170 Report from the Joint Committee on Privacy and Injunctions, Session 2010–12, HL Paper 273/HC 1443, paragraph 241.

171 Written evidence from Lord Lester of Herne Hill, paragraph 8

172 Written evidence from the Newspaper Society

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".¹⁷³

182. The Green Paper sets out the Government's opposition to the recommendation of the Joint Committee on the Draft Defamation Bill, and thus to the extension of absolute privilege to reports of proceedings in Parliament:

"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".¹⁷⁴

183. The Green Paper also rejects the recommendation of the Joint Committee on Privacy and Injunctions, stating that it "would appear not to recreate the further conditions which would currently seem to apply to fair and accurate media reports not covered by the 1840 Act under the common law—namely that privilege does not extend to the publication of material which is not of public concern, or the publication of which is not for the public benefit."¹⁷⁵ This additional qualification of privilege, by reference to the public benefit, echoes the terms of section 15(3) of the Defamation Act 1996, but does not appear to have any foundation in common law. The judgment in *Wason v. Walter*, which expressed the common law protection afforded to reports of parliamentary proceedings, also confirmed the "paramount public and national importance that proceedings of the Houses of Parliament shall be communicated to the public".¹⁷⁶ Thus the "public benefit" of reporting proceedings in Parliament has been established as a general principle, and does not need to be demonstrated in each individual case.

184. The Green Paper includes only two draft Clauses on publication and broadcasting of parliamentary proceedings: the first would reverse the burden of proof, so that the plaintiff rather than the defendant would have to show that the publication complained of had not been made *bonâ fide* and without malice. The second would provide absolute protection for broadcasts made by or under the authority of either House of Parliament, and qualified protection for broadcasts not made under the authority of either House. Subsection (5) of this second draft clause provides that the protection afforded to broadcasts is extended to the dissemination of "images, texts or sounds (or any combination of them) by any electronic means".

173 Q 95

174 Cm 8318, paragraph 311.

175 *Ibid.*, paragraph 312

176 Quoted by Lord Lester of Herne Hill in his written evidence at paragraph 4

185. It will be clear from the preceding paragraphs that the limited Government proposals do not fully implement the recommendations of the 1999 Joint Committee, and they fall far short of the recommendations of the Joint Committee on the draft Defamation Bill and of some witnesses to this inquiry.

186. The Government's approach was welcomed and the Green Paper's analysis echoed by the Clerks of the two Houses. The Clerk of the Parliaments said that extending absolute privilege to reports of things said in Parliament 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".¹⁷⁷ The Clerk of the House agreed, while Speaker's Counsel highlighted the risk that "Members would be used as a channel, wittingly or unwittingly, for the creation of a record that could then be published with impunity".¹⁷⁸

The views of the Committee

187. We do not accept the argument that full freedom of expression in Parliament is dependent on a similar freedom being enjoyed by the media. The fundamental purpose of affording absolute privilege to proceedings in Parliament is to protect those proceedings themselves, so that the democratically elected representatives of the people can engage in free and fearless debate on issues of public concern. Such debate is a cornerstone of any democratic society. But Parliament's work can be done irrespective of whether or not it is reported—the two Houses and their committees can and do conduct sittings in private, and the illicit reporting of such proceedings may be deemed to be a contempt. So while the freedom to report of parliamentary debates in the media is of vital importance in a democratic society, it raises different issues, and it can be protected in different ways.

188. We also agree with the 1999 Joint Committee that the protection afforded to the reporting of parliamentary proceedings is not fundamentally a matter of privilege at all—a fact established by the case of *Stockdale v. Hansard*. This is confirmed by Lord Lester of Herne Hill's evidence, in which he states that the protection afforded in defamation cases "is not in fact a matter of Parliamentary Privilege which ... 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".¹⁷⁹

189. It is unfortunate that the Government, having chosen not to address the recommendation of the Joint Committee on the draft Defamation Bill by arguing that it had "broader implications beyond the law of defamation", then rejected that recommendation on the basis of irrelevant arguments relating to breaches of court injunctions, not to defamation law.¹⁸⁰ It would have been preferable if the Government could have expressed a principled position on the point of defamation law without

177 Q 226

178 *Ibid.*

179 Written evidence from Lord Lester of Herne Hill, paragraph 9

180 Government Response to the Report from the Joint Committee on the Draft Defamation Bill (Cm 8295), paragraphs 91 and 92; Cm 8318, paragraph 311

involving the wider issue of parliamentary privilege. But as things stand the Government has passed responsibility to us to take a view on these issues.

190. On balance, we do not support extending absolute privilege to all reports, including media sketches and summaries, of proceedings in Parliament. This is not because we see any great likelihood that Members would, in such circumstance, be commonly used by the media to “launder” defamatory information, though we acknowledge that risk, but because we consider that the existing protection of qualified privilege—that is, that all fair and accurate reports are protected, unless they can be proved by the claimant to have been made maliciously—already provides a robust defence of press freedom. To claim otherwise would be to argue that those reporting parliamentary debates should, in so doing, have *carte blanche* to publish malicious and defamatory stories about individuals, while leaving them no legal remedy.

191. At the same time, we acknowledge that the media need clarity and certainty. The Parliamentary Papers Act 1840 provides qualified protection for all “extracts and abstracts” of parliamentary publications (including broadcasts), but as we have already said these terms do not appear to cover media reports or editorial comment. The wording of the 1840 Act reflects a time when the re-publication by newspapers of large verbatim extracts from Hansard was commonplace; the style of reporting today is very different, to such an extent that the wording of section 3 of the Act is largely obsolete.

192. The Green Paper says that “the Government is not aware of circumstances in which any media organisation has been prevented from publishing reports of parliamentary proceedings by doubts over the extent of the current protection in law”¹⁸¹—but that claim is contradicted by the clear evidence provided to this Committee by the BBC and the Press Association. Indeed, the Government’s draft clause fails to address one obvious restriction on press reporting, described to us by Mike Dodd: “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”.¹⁸² The Government’s draft clause would give no protection to a reporter who, on the basis of a live broadcast, transcribed words said in the House, and then sought to re-publish those words online—the words spoken would not enjoy any protection under the 1840 Act until the online version of Hansard was published, under the authority of the House, some hours later. This state of affairs seems indefensible.

193. It is therefore clear to us that there is uncertainty, and that this uncertainty significantly inhibits press reporting of the work of Parliament. We accordingly endorse the recommendation of the Joint Committee on Privacy and Injunctions that qualified privilege should attach, in all circumstances, to fair and accurate reports of things said or done in Parliament.

194. We welcome the Government’s proposal to extend the protection afforded by the 1840 Act to all “dissemination of images, text or sounds (or any combination of them) by any electronic means”. In our view this definition is likely to be sufficiently broad to cover

¹⁸¹ Cm 8318, paragraph 313

¹⁸² Q 103

all forms of media, though it could usefully be supplemented by the addition of a delegated power which would allow the Secretary of State to update the definition as appropriate, without further primary legislation. But this change, in isolation, is insufficient, since subsection (1) of the Government’s draft clause would limit such protection to broadcasts of proceedings in Parliament, thus replicating the out-dated model of the 1840 Act, where protection is only afforded to the extract or abstract from Hansard, rather than to the reporting of what has been said or done.

195. We endorse the recommendation of the 1999 Joint Committee that the Parliamentary Papers Act 1840 should be replaced by modern statutory provisions.

196. We recommend that these new provisions should:

- **confirm that publications and broadcasts made under the authority of either House enjoy absolute privilege, and that any proceedings initiated in respect of such publications or broadcasts shall be stayed upon production of a certificate signed by the Speaker or Clerk of either House;**
- **establish that qualified privilege applies to all fair and accurate reports of parliamentary proceedings in the same way as to abstracts and extracts of those proceedings;**
- **provide that in all court proceedings in respect of such fair and accurate reports, extracts or abstracts, the claimant or prosecution shall be required to prove that the defendant acted maliciously;**
- **confirm that the term “broadcast” includes dissemination of images, text or sounds, or any combination of them, by any electronic means;**
- **provide for a delegated power, subject to affirmative procedure, allowing the Secretary of State to update the definition of “broadcast” in light of further technological change, without the need for primary legislation.**

“Effective repetition”

197. The decision of the Judicial Committee of the Privy Council, which at that time was the highest judicial authority for New Zealand, in *Jennings v. Buchanan*¹⁸³ has caused us some concern. In that judgment, delivered by the late Lord Bingham of Cornhill, it was decided that Mr Jennings, a New Zealand MP, could be sued for defamation because he had told a newspaper that he “did not resile” from the remarks he made in the New Zealand House of Representatives about a New Zealand Wool Board official identifiable as Mr Buchanan. *Jennings v. Buchanan* was a New Zealand case, and is not binding in the British courts, though it would be highly persuasive.

198. The Judicial Committee ruled that—

“A statement made out of Parliament may enjoy qualified privilege but will not enjoy absolute privilege, even if reference is made to the earlier privileged statement. A degree of circumspection is accordingly called for when a Member of Parliament is

183 *Jennings v. Buchanan* [2004] UKPC 36

moved or pressed to repeat out of Parliament a potentially defamatory statement previously made in Parliament”.¹⁸⁴

199. The Clerk of the New Zealand House of Representatives told us that the New Zealand House of Representatives Privileges Committee had recommended legislation to deal with the effective repetition problem from *Jennings v. Buchanan*, because it potentially inhibited public discussion of what went on in Parliament, but that nothing had happened.¹⁸⁵ Dr Rosemary Laing, the Clerk of the Australian Senate, told us that “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”.¹⁸⁶

200. In a recent United Kingdom case, Mr Justice Tugendhat struck out claims for slander and libel brought against a witness to a select committee, Lord Triesman, who had subsequently given evidence to a Football Association inquiry into allegations he had made at the select committee hearing concerning the reasons for the failure of England’s bid to host the World Cup in 2022. The plaintiff alleged that Lord Triesman had adopted by reference and/or confirmed and/or repeated his statements made to the select committee.

201. This case demonstrates that the principle stated in *Jennings v. Buchanan* is far from universal—each case is decided on very specific facts. The transcripts of the FA’s inquiry showed that Lord Triesman had been careful not to go beyond what he had previously said to the select committee: for example, “my evidence in respect of this issue is set out in the transcript of the statement that I made to the Culture, Media and Sport Committee”. Moreover, the judge ultimately ruled that the occasion (Lord Triesman’s evidence to the FA’s inquiry) was itself one of qualified privilege, and that there was no case in malice that could be left to a jury at trial.¹⁸⁷

202. These cases appear to have left Members of both Houses unsure of the extent to which they can subsequently repeat or refer to statements made by them in Parliament (statements which, as proceedings in parliament, are themselves protected by absolute privilege). The Government, on the other hand, told us in evidence that there was no uncertainty:

“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 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 ... 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”.¹⁸⁸

¹⁸⁴ *Jennings v. Buchanan* [2004] UKPC 36, paragraph 20

¹⁸⁵ QQ 133, 135; see Report of the New Zealand House of Representatives Privileges Committee, *Question of privilege relating to the exercise of freedom of speech by members in the context of court orders*, May 2009, 1.17A, pages 6 and 7

¹⁸⁶ Q 182; see 134th Report (2008) from the Australian Senate’s Committee of Privileges and Report No. 3 (2006) from the Western Australia Legislative Assembly Procedure and Privileges Committee, *Effective repetition: decision in Jennings v. Buchanan*

¹⁸⁷ *Dato Worawi Makudi. v. Lord Triesman* [2013] EWHC 142 (QB)

¹⁸⁸ Written evidence from the Deputy Leader of the House of Commons, paragraph 12

203. The Government's comments are, in our view, untenable: they go wider than the fact-specific judgment in *Jennings v. Buchanan* and, in so doing, could have the effect of inhibiting Members of Parliament from pursuing campaigns or raising issues of public concern outside the House. It is right that absolute privilege should be reserved to proceedings in Parliament; but Members do not work only in the Chamber—their public duties extend to their relationships with constituents, to speeches, and to interactions with the media, and it is not right that they should be inhibited in performing these duties by fear of court proceedings. It is essential that the same qualified privilege that we have outlined above, in our recommendations regarding the replacement of the Parliamentary Papers Act 1840, should apply to parliamentarians themselves, in repeating or commenting on speeches made in Parliament.

204. In practice, this would mean that a Member who, for instance, published on his website links to his contributions to debates, whether in the online version of Hansard or the webcast of the sitting, would enjoy absolute privilege—while the specific link might be to the Member's personal speech, that speech would be part of a file in which the entire day's sitting or webcast (both issued under the authority of the House) was contained. If, on the other hand, the Member reproduced the verbatim text of a speech (that is, an extract from Hansard), the protection would be qualified, so any claimant would have to prove malice in order to bring a successful suit. In normal circumstances (for instance, a collection, whether printed or online, of the Member's speeches on a variety of subjects), it would be very unlikely that malice could be proved.

205. On the other hand, we acknowledge the risk that, just as conferring absolute privilege upon reports of proceedings could encourage the media to channel defamatory or other unlawful content through Members, thereby opening the door to unlimited publication, so extending absolute privilege to the repetition by Members outside Parliament of statements made by them in the course of proceedings might create a temptation for Members to make reckless or defamatory statements in the course of debate, with a view to repeating them outside. This could bring parliamentary proceedings themselves into disrepute.

206. So while we share the concern of our colleagues in New Zealand and Australian legislatures at the potentially chilling effect of Lord Bingham's judgment in *Jennings v. Buchanan*, we do not under-estimate the complexity of legislating to extend Members' absolute privilege of freedom of speech beyond actual proceedings in Parliament. Every case will be unique, and cases where Members simply refer neutrally to speeches made in Parliament may shade into others where they "have nothing to add", "do not resile from" or "re-affirm" those speeches. We doubt that legislation to codify these imperceptible differences of emphasis is either feasible or desirable.

207. We recommend that the statutory provisions which we have proposed in respect of the reporting of parliamentary proceedings should also confirm, for the avoidance of doubt, that Members of either House enjoy the same protection as non-Members in repeating or broadcasting extracts or abstracts of proceedings in Parliament.

8 Miscellaneous issues

Applicability of legislation to Parliament

208. In 1934, in a case brought by the author and (later) Independent Member of Parliament for Oxford University A P Herbert,¹⁸⁹ Lord Chief Justice Hewart ruled that the court would not hear a complaint that alcohol was being sold in the precincts of the Palace of Westminster without the necessary licences, on the grounds that the matter fell within the exclusive cognisance of Parliament. That decision was never challenged in a higher court, and ever since, the Green Paper notes, there has been uncertainty as to “the extent to which statute law applies to either House of Parliament”.¹⁹⁰

209. The Clerk of the Parliaments described this uncertainty in more detail:

“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 ... 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 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”.¹⁹¹

210. Parliament has accordingly acted for many years, albeit not entirely consistently, on the presumption that laws do not apply to Parliament unless Acts specifically state that they do. The Chairman of Committees of the House of Lords summarised the situation in a written answer on 16 January 1995:

“United Kingdom health and safety legislation is not considered as applying to the Palace of Westminster, having regard to the 1935 decision in *R. v. Graham-Campbell ex parte Herbert* [1 KB 594]. This decision indicates that the courts will not, in the absence of express provision or necessary implication, treat the provisions of an Act of Parliament as binding on the two Houses themselves, so far as those provisions would affect the internal affairs of the Houses. The Palace authorities do, however, try to comply fully with the relevant legislation as if it were binding on them in the same way as on the Crown”.¹⁹²

211. The 1999 Joint Committee, applying the test of necessity in judging whether or not a matter was subject to Parliament’s sole jurisdiction, was highly critical of the legacy of the decision in *R v. Graham-Campbell*:

“Parliamentary Privilege exists to enable Members to discharge their duties to the public. It cannot be right that this privilege should have the effect that Parliament

189 *R v. Graham-Campbell ex parte Herbert* [1935] 1 KB 594

190 Cm 8318, paragraph 202

191 Written evidence from the Clerk of the Parliaments, paragraph 22

192 HL Deb, 16 January 1995, WA 33–34

itself, within the place it meets, is not required to comply with its own laws on matters such as health and safety, employment, or the sale of alcohol”.¹⁹³

212. The courts have also cast doubt on the apparent legal implications of the decision in *Graham-Campbell*. In *R v. Chaytor* the Supreme Court considered the case in passing, noting that “Following [*Graham-Campbell*] there appears to have been a presumption in Parliament that statutes do not apply to activities within the Palace of Westminster unless they expressly provide to the contrary. That presumption is open to question”.¹⁹⁴

213. This comment is interpreted in the Green Paper as follows:

“In light of the *Chaytor* judgment, the line likely to be taken by the courts in future appears to be reasonably clear. Courts remain respectful of parliamentary privilege and exclusive cognisance; but statute law and the courts’ jurisdiction will only be excluded if the activities in question are core to Parliament’s functions as a legislative and deliberative body”.¹⁹⁵

214. This over-simplifies the position. The difficulty lies not with the likely attitude of the courts, were a similar case to be brought, but with the fact that no such case has yet been brought, while in the meantime, for 75 years, legislation has mostly been drafted on the presumption that the case was correctly decided. This has led to inconsistency and muddle. In the words of the Lord Chief Justice:

“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’.”¹⁹⁶

215. A similar situation existed in Canada until it was clarified by the 2005 judgment of the Canadian Supreme Court in *Canada (House of Commons) v. Vaid*. In that decision, as described in Chapter 2, the court applied a “doctrine of necessity” in assessing whether or not exclusive cognisance applied in a specific area. The court accordingly found that Parliament’s exclusive cognisance was limited to matters closely and directly connected with its core functions as a legislative and deliberative body, and did not extend to matters such as the employment rights enjoyed by ancillary staff. The court found further that in matters of general administration the Canadian House of Commons was subject to federal law.¹⁹⁷

216. The 1999 Joint Committee recommended that the legacy of the *Graham-Campbell* judgment be resolved by legislation. On the one hand, the Joint Committee recommended a general provision to the effect that the privilege of each House to administer its own internal affairs applies only to activities directly and closely related to proceedings in

193 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 250

194 *R v. Chaytor and others* [2010] UKSC 52 paragraph 78

195 Cm 8318, paragraph 216

196 Q 240

197 *Canada (House of Commons) v. Vaid* [2005] 1 SCR 667

Parliament; on the other, it recommended legislation to clarify that in future there should be a principle of statutory interpretation that in the absence of a contrary intention Acts of Parliament should bind both Houses.¹⁹⁸

217. The Clerk of the Parliaments expressed qualified support for these recommendations: “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.”¹⁹⁹ On the other hand, the Green Paper notes that implementing the 1999 Joint Committee’s recommendations “would probably require a prior definition of what is meant by the phrase ‘proceedings in Parliament’”—something the Government have ruled out.²⁰⁰ The Clerk of the House of Commons cited the Supreme Court’s comments in the *Chaytor* judgment, and the hazards of legislating to clarify the situation, as reasons for concluding that “there is no need for legislation to clarify the extent of Parliament’s privilege to organise its internal affairs”.²⁰¹

218. The Lord Chief Justice did not think that there was “very much difficulty” about the current situation and noted that, should the issue come before a court, the matter would be clarified and it would be up to Parliament to legislate should it disagree with that decision.²⁰² We agree that the courts, taking account of the decision of the Canadian Supreme Court in *Vaid*, might well overturn the judgment in *Graham-Campbell* should a similar issue come before them. But it has been over 75 years since *Graham-Campbell*, and the matter has not yet been clarified. We are therefore reluctant to rely upon the courts to address the problem, as the opportunity may not arise for some time.

219. Moreover, a decision of the courts along the lines of the *Vaid* judgment would not resolve the existing legacy of inconsistent statutory provisions. Indeed, the 1999 Joint Committee pointed out that even a retrospective legislative provision confirming that all existing legislation applied to Parliament would have “unforeseeable practical repercussions”.²⁰³

220. Whatever the merits of the *Graham-Campbell* decision in the context of the internal administration of Parliament in the 1930s, we agree with the 1999 Joint Committee that today, applying the test of necessity, “it cannot be right that ... privilege should have the effect that Parliament ... is not required to comply with its own laws on matters such as health and safety, employment, or the sale of alcohol”.²⁰⁴

221. In the meantime, it is essential that Parliament should be absolutely clear, at the time it passes new legislation, which provisions apply to Parliament and which do not. This would provide the courts with clarity on Parliament’s intentions and help avoid a situation in which Parliament suddenly found itself subject to provisions in legislation from which it had understood itself to be exempt.

198 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 251

199 Written evidence from the Clerk of the Parliaments, paragraph 26

200 Cm 8318, paragraph 210

201 Written evidence from the Clerk of the House of Commons, paragraph 33

202 QQ 242, 246

203 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 251

204 *Ibid.*, paragraph 250

222. In fact an agreement was reached in 2002 which should have achieved precisely this level of clarity. As the Clerk of the Parliaments told us, guidance was issued by the Treasury Solicitor to departments, asking them “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 and to instruct the draftsman accordingly”.²⁰⁵ The Clerk of the Parliaments commented that “unfortunately, this policy, though endorsed at the time by the Treasury Solicitor and Parliamentary Counsel, has not been consistently observed”.²⁰⁶

Conclusions

223. We accept the principle that legislation of general application should apply to the staff and premises of Parliament, unless that legislation specifies otherwise. The legacy of the *Graham-Campbell* means that the contrary presumption has been adopted as a principle of legislative drafting, namely that legislation does not extend to Parliament unless it states expressly that it does so. This has led, over many years, to manifold inconsistencies in statute law.

224. It does not seem practicable to resolve these inconsistencies without a sweeping retrospective change to the law, which could have unforeseeable consequences. The legislative approach recommended by the 1999 Joint Committee, while avoiding retrospective change, would have represented an elegant and effective solution going forward.

225. Unfortunately the Government’s proposals in the Green Paper, which appear to be based largely on wishful thinking, suggest that there is little prospect of legislation to resolve this issue. In the absence of legislation, the safest way forward, however undesirable it may be as a statement of principle, is to reiterate and formalise the current presumption that legislation does not apply to Parliament unless it expressly provides otherwise.

226. We recommend that the two Houses be invited to adopt resolutions stating that the House of Commons and the House of Lords should in future be expressly bound by legislation creating individual rights which could impinge on parliamentary activities, and that in the absence of such express provision such legislation is not binding upon Parliament.

227. We further recommend that the Government take steps to ensure that all Departments comply with the official guidance issued by the Treasury Solicitor in 2002, which asked them to consult the House authorities on whether any proposed legislation that is to apply to the Crown, or its servants, should apply also to the two Houses.

Privileges contained in House of Lords Standing Orders

228. The Green Paper deals with a few privileges of the House of Lords, which are expressed in, though they do not necessarily derive from, the House’s Standing Orders.²⁰⁷ These matters, affecting the House of Lords only, have been considered by the House of

²⁰⁵ Written evidence from the Clerk of the Parliaments, paragraph 25; letter from the Treasury Solicitor, dated 21 March 2002, printed as an Appendix to this Report

²⁰⁶ Written evidence from the Clerk of the Parliaments, paragraph 25

²⁰⁷ Cm 8318, paragraphs 328 to 342

Lords Procedure Committee, which reported in March 2013 that it concurred with the Government's assessment that the three Standing Orders discussed in the Green Paper were obsolete. On 24 April the House of Lords agreed with the Committee's recommendation that the three Standing Orders, on printing and publication of proceedings (27 February 1699), concerning examining witnesses *in perpetuum rei memoriam* (3 July 1678) and no oath to take away the privilege of Peerage (30 April 1675), be repealed.²⁰⁸ The Standing Orders were accordingly repealed on 9 May 2013.

Registers of Members' Interests

229. In 1990, in *Rost v. Edwards*, Mr Justice Popplewell in the High Court determined that the Register of Members' Interests was not a proceeding in Parliament. Although notice was given of intention to appeal, the case was settled and so the judge's decision was not reviewed.²⁰⁹ Nevertheless, doubt was cast on the correctness of the decision in *Prebble v. Television New Zealand* in 1995.²¹⁰ Indeed, a year later the Defamation Act 1996 specifically listed any communication with "any person having functions in connection with the registration of members' interests" as a proceeding in Parliament.²¹¹

230. The 1999 Joint Committee, while indicating that it would not be appropriate to comment "on the correctness of this decision", argued that, if correct, it should be reversed: "we are in no doubt that, if this decision is correct, the law should be changed. As the law now stands, it is open to a court to investigate and adjudicate upon an alleged wrongful failure to register. That ought to be a matter for Parliament alone".²¹² The Joint Committee accordingly recommended that, as part of its proposal for a Parliamentary Privileges Act, one of the items included in the indicative list of matters deemed to be "proceedings in Parliament" should be "the maintenance of any register of the interests of the members of a House and any other register of interests prescribed by resolution of a House".²¹³

231. The Green Paper simply states that the current law is "unambiguous that the registers are not proceedings in Parliament."²¹⁴ No further comment is made—nor is there any acknowledgement that the law, even if unambiguous, may be wrong.

232. Speaker's Counsel was scathing in his summary of *Rost v. Edwards*, which he described it as a "chapter of accidents", in which the Law Officers had had no opportunity to intervene.²¹⁵ He did not indicate how Parliament could reverse the decision—and the Clerk of the House, in his written evidence, simply said that "I look forward to Popplewell J's decision being reversed in due course".²¹⁶

208 Fifth Report from the House of Lords Procedure Committee, Session 2012–13, HL Paper 150, paragraphs 8 to 17

209 *Rost v. Edwards* [1990] 2 QB 460; *Erskine May*, 24th edition, page 234

210 *Prebble v. Television New Zealand* [1995] 1 AC 321

211 Defamation Act 1996, s. 13(5)(e)

212 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 123

213 *Ibid*, paragraph 129

214 Cm 8318, paragraph 54

215 Q 208

216 Written evidence from the Clerk of the House of Commons, paragraph 18

233. It is clear to us that the decision in *Rost v. Edwards* represented an inappropriate encroachment on an area that should be subject to Parliament's exclusive cognisance. We note that the decision was not definitive, and that it has been criticised in other judgments. In the event that a similar case were to come before the courts, we consider that there is a strong possibility that the decision in *Rost v. Edwards* would be reversed. We would expect the two Houses to intervene should such a case arise.

234. In the meantime we agree with the 1999 Joint Committee that, if legislation on parliamentary privilege is contemplated, it should clarify that the Registers of Members' Interests, and other Registers prescribed by resolution of either House, are proceedings in Parliament for the purposes of Article 9 of the Bill of Rights.

Members' correspondence

235. Correspondence with constituents and constituency case-work in general do not form part of the "proceedings in Parliament" under the absolute privilege afforded by Article 9 of the Bill of Rights. In 1958 the House of Commons rejected the opinion of its Committee of Privileges that a letter written by a Member to a Minister concerning a nationalised industry was a proceeding in Parliament.²¹⁷

236. The 1999 Joint Committee decided that in principle the exceptional protection of absolute privilege should remain confined to the core activities of Parliament unless a pressing need was shown for an extension,²¹⁸ and considered that there was insufficient evidence of difficulty to justify so substantial an increase in the amount of parliamentary material protected by absolute privilege. Members are not in the position that, lacking the absolute immunity given by Article 9, they are bereft of all legal protection. In the ordinary course a Member enjoys qualified privilege at law in respect of his constituency correspondence. In evidence to the 1999 Joint Committee the then Lord Chief Justice of England (Lord Bingham of Cornhill) and the then Lord President of the Court of Session (Lord Rodger of Earlsferry) both stressed the development of qualified privilege at law and the degree of protection it provides to those acting in an official capacity and without malice:

"So long as the member handles a complaint in an appropriate way, he is not at risk of being held liable for any defamatory statements in the correspondence. Qualified privilege means a member has a good defence to defamation proceedings so long as he acted without malice, that is, without some dishonest or improper motive".²¹⁹

237. The Clerk of the House of Commons, in considering the status of Members' correspondence, concluded that it would be a matter for the courts to decide in a case whether something done, said or written was actually a "proceeding in Parliament" and thereby entitled to the absolute protection afforded by Article 9. He suggested that, rather than fix our contemporary application of the term, the wiser course for the health of parliamentary democracy in the long run would be to apply a pragmatic test in each case of

217 Further written evidence from the Clerk of the House of Commons; *Erskine May*, 24th edition, page 217. The *Strauss* case was the subject of the House of Commons Fifth Report from the Committee of Privileges, Session 1956–57, HC 305, which was debated on 8 July 1958 (HC Deb columns 208–345).

218 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraphs 103 to 112

219 *Ibid.*, paragraph 110

how closely what the Member (or witness, or parliamentary official) did or wrote was connected to actual proceedings in the House or its committees. He resisted interpretations that took as their starting point a formulation such as that of the Canadian 19th century judge 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.²²⁰

238. The Clerk of the House’s view was that, in general, 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. He pointed out that Article 9 was not the only factor, since “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”.²²¹

239. Arguments for extending special protection to Members’ correspondence were advanced by some of the House of Commons Members who gave evidence to the Committee established following the searches of the parliamentary offices of Damian Green MP in November 2008.²²² The Rt Hon David Davis MP suggested that while a broad and absolute parliamentary privilege could allow a Member of Parliament to keep the involvement of a whistleblower secret, in the absence of statutory protection for a public servant disclosing information to a Member of Parliament, too narrow a view of privilege could lead to the perverse consequence that the only way to protect any leaked secret information would be to make public use of it in parliamentary proceedings.²²³

240. In its consideration of the hacking of Members’ mobile phones, the House of Commons Standards and Privileges Committee questioned whether the established position remains appropriate, though without reaching a firm conclusion:

“We agree with the Clerk of the House that the question of whether Members’ performance of their constituency-related duties is part of the work of Parliament is ‘difficult.’ It has become increasingly difficult as the proportion of time spent by MPs on constituency-related work has grown. But the principle is well established: unless a Member’s constituency-related work is carried out on the floor of the House, in one of its committees, or through the tabling of a motion, question or amendment, it is not a proceeding in Parliament and it is not, therefore, protected by privilege. Such was the conclusion of the Joint Committee in 1999, which was itself founded on previous findings of the House, of committees of the House and of the courts. The question that remains is whether a principle that is founded on a set of circumstances far removed from those that now apply, and which were codified in a statute more than four centuries ago, remains entirely fit for purpose. That is a question that goes far beyond the scope of this Report”.²²⁴

220 Further written evidence from the Clerk of the House of Commons, citing Justice O’Connor in *R v. Bunting* [1885] Ontario Reports page 563

221 Further written evidence from the Clerk of the House of Commons; *Erskine May*, 24th edition, page 270

222 *Police Searches on the Parliamentary Estate*, HC 62, paragraphs 158 to 162

223 *Ibid.*, paragraph 161

224 *Privilege: Hacking of Members’ mobile phones*, HC 628, paragraph 47

241. The Minister, in contrast, told us that “The Government is not aware of evidence which suggests that MPs do not have sufficient protection to carry out their work ... The Government believes that the current position is appropriate which enables the courts to determine the boundaries of privilege in individual cases”.²²⁵

242. We recognise and welcome the willingness of the courts to give consideration to the appropriate role of a Member of Parliament in acting on behalf of a constituent. Although we can envisage circumstances in which it might become necessary to legislate in order for stronger statutory protection to be given to Members’ correspondence with, or case-work on behalf of, their constituents, we do not see any need for change at the present time.

Briefings by officials

243. The New Zealand Supreme Court ruled in *Attorney General and Gow v. Leigh*²²⁶ that only qualified privilege attached to a briefing given by a civil servant to a Minister prior to the Minister answering a question in the House of Representatives. The Attorney General and the Speaker of the House of Representatives had argued that absolute privilege should apply, because of the necessary connection between the briefing supplied by the official and the parliamentary proceeding itself.

244. It would not be appropriate for this Committee to comment on the New Zealand Supreme Court’s legal analysis in *Attorney General and Gow v. Leigh* (which is not in any case binding in the United Kingdom). But with respect to the effect of that decision, we note the view of the Clerk of the House of Representatives, that the judgment will in practice have “a chilling effect on the way in which officials think about what they can say to a Minister in briefings”.²²⁷ We also note that the Committee for Privileges of the House of Representatives has now recommended legislation in response to the judgment.²²⁸

245. Briefings provided by officials to Ministers, to assist them in answering parliamentary questions, play a necessary, indeed fundamental, part in proceedings in Parliament. If an Urgent Question is tabled in the morning, and the Minister is required to answer it a few hours later, we find it difficult to believe that absolute privilege attaches to the question itself, and to the answer, but not to the briefing supplied by officials in the intervening hours. The same principles apply even when briefing is not required with such urgency. Such briefing is necessarily antecedent to a parliamentary proceeding, and should enjoy the same protection as is afforded to the draft of a speech or question, whether prepared by a Member personally or by a researcher acting on the instructions of that Member.

246. This does not mean that absolute privilege would apply in the event of briefing supplied by officials in these circumstances being published, for example by the Department concerned. In such an event, the act of publication not having been undertaken “by order or under the authority of the House of Lords or of the House of

225 Written evidence from the Deputy Leader of the House of Commons

226 *Attorney General and Gow v. Leigh* [2011] NZSC 106

227 Q 132

228 Q 133; Report from the Privileges Committee of the House of Representatives on *Question of privilege concerning the defamation action Attorney-General and Gow v. Leigh*, I.17A, June 2013

Commons”, it would not be protected by the provisions of the Parliamentary Papers Act 1840.

247. The Minister echoed the concerns raised by the Clerk of the New Zealand House of Representatives, noting that the decision in *Attorney General and Gow v. Leigh* “could potentially have a chilling effect on the content of briefing by officials if officials could be legally liable for that content”.²²⁹

248. We regret the decision of the New Zealand Supreme Court in *Attorney General and Gow v. Leigh*. In our view, briefings supplied by officials to Ministers in order to enable them to answer parliamentary questions are necessarily antecedent to proceedings in Parliament, and should enjoy the same protection as drafts of speeches or questions. We recommend that they should continue to do so in the United Kingdom.

Jury service

249. According to the Canadian textbook on *House of Commons Procedure and Practice*:

“Since the House of Commons has first claim on the attendance and service of its Members, and since the courts have a large body of individuals to call upon to serve on juries, it is not essential that Members of Parliament be obliged to serve as jurors. This was the tradition in the United Kingdom long before Confederation and this has been the Canadian practice since 1867. The duty of Members to attend to their functions as elected representatives is in the best interests of the nation and is considered to supersede any obligation to serve as jurors. It has also been recognized in law”.²³⁰

250. In the United Kingdom the Criminal Justice Act 2003 removed the exemption of Members of the House for Commons and the House of Lords from the requirement to perform jury service in England and Wales.²³¹ The 2012 edition of the Australian *House of Representatives Practice* attributes the excusal of its Members to the House’s prior claim on their services.²³² David McGee’s *Parliamentary Practice in New Zealand* notes that the law in New Zealand goes still further and provides that Members of Parliament there are not to serve on any jury in any court on any occasion: “Rather than being exempt from serving on juries, members are now disqualified from doing so”.²³³

251. Lords entitled to receive writs of summons to attend the House of Lords, officers of the House of Lords, and Members and officers of the House of Commons are excusable as

229 Written evidence from the Deputy Leader of the House of Commons

230 *House of Commons Procedure and Practice*, 2nd edition (2009), ed. Audrey O’Brien. In Canada, jury selection comes under the jurisdiction of the provinces. Examples of provincial statutes include the Jury Act 1980 (New Brunswick); and the Jury Act 1998 (Saskatchewan).

231 Section 321 and Schedule 33, Criminal Justice Act 2003 repealed schedule 1 to the Juries Act 1974, which codified in statute the traditional parliamentary privilege of exemption from jury service.

232 *House of Representatives Practice* (2012), page 748. This exemption is incorporated in the Jury Exemption Act 1865 which provides that Member of Parliament are not liable, and may be summoned, to serve as jurors in any Federal, State or Territory court.

233 *Parliamentary Practice in New Zealand*, 3rd edition, ed. David McGee (2005), page 638, referring to the Juries Act 1981

of right from jury service in Scotland,²³⁴ as are Members of the Scottish Executive and junior Scottish Ministers²³⁵ and Members of the National Assembly for Wales.²³⁶ In Northern Ireland, Members of the Northern Ireland Assembly, Officers and servants of the Northern Ireland Assembly, Members of the Scottish Parliament, Lords entitled to receive writs of summons to attend the House of Lords and Members of the House of Commons are excusable as of right from jury service.²³⁷ Members of the European Parliament do not have to perform jury service in either Scotland or Northern Ireland.²³⁸

252. We have no reason to believe that, in practice, Members are treated with anything other than the greatest consideration by HM Courts and Tribunals Service in England and Wales, which will readily grant requests to defer jury service to suitable dates, for example when Parliament is not sitting, or (in the case of elected Members) arrange for them not to have to serve on a jury in their own constituency. Indeed, an amendment to the Practice Direction (Jury Service: Excusal) by the Lord Chief Justice in 2005 specifically drew attention to the needs of jurors with public service commitments such as Members of the two Houses.²³⁹ Nevertheless we consider it objectionable in principle for a Member of the legislature to be in the position of having to seek permission of another branch of government in order to perform his or her parliamentary duties, which might cover, for example, participating in a vote of confidence in a Government uncertain of its majority. We recognise that some Members will have a strong preference to perform what they conceive to be their civic duty, if the occasion arises, so we do not advocate a complete exemption or disqualification for Members.

253. We recommend that Government should bring forward legislation providing that Members of either House should be among those who have a right to be excused from jury service in England and Wales. We welcome the fact that Lords entitled to receive writs of summons to attend the House of Lords, and Members of the House of Commons, are excusable as of right from jury service in Scotland and in Northern Ireland. We see no reason to restore (nor, in Scotland, to retain) the exemption for officials of either House of the Westminster Parliament.

Freedom from arrest

254. The Green Paper agrees with the 1999 Joint Committee that the privilege of freedom from arrest in civil matters ought to be formally abolished.²⁴⁰ In his written evidence, the Clerk of the House of Commons told us it did not appear to him that there would be any untoward consequences for Parliament from taking such a step,²⁴¹ although he noted that a privilege of freedom of arrest in civil matters has not been of practical significance since 1870 (when imprisonment for debt was abolished). He suggested any legislation required

234 Part III of Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980

235 Section 85 of the Scotland Act 1998

236 Paragraph 20 of Schedule 12 to the Government of Wales Act 1998

237 Juries (Northern Ireland) Order 1996 (S.I., 1996, No. 1141)

238 Part III of Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 and Juries (Northern Ireland) Order 1996 (S.I., 1996, No. 1141)

239 Amendment No. 9 to the Consolidated Criminal Practice Direction (Jury Service), 22 March 2005

240 Cm 8318, paragraph 318; Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 327

241 Written evidence from the Clerk of the House of Commons, paragraph 45

to extinguish the privileges relating to freedom of arrest, exemption from compulsory attendance as a witness and the service of court documents in the precincts of Parliament ought to be very narrowly drawn and with a narrow long title, lest it became a vehicle for legislating on other matters.²⁴² The Clerk of the Parliaments agreed that freedom from arrest in civil matters was of little relevance today, but stated that, given the risks inherent in legislating on matters of privilege: “I would say, ‘Better not to do anything, given that the issues are not a big deal, than to open up the risk’.”²⁴³ In his written evidence, he noted that it was unclear how the Government proposed to abolish the privilege of freedom from arrest in civil matters, as the Green Paper contained no draft clauses to this effect.²⁴⁴

255. *Erskine May* explains the privilege of exemption of a Member from serving as a witness as being asserted on the same principle as other personal privileges, that is to say the paramount right of Parliament to the attendance and service of its Members.²⁴⁵ In her response to the Government’s consultation on the Green Paper the Clerk of the New Zealand House of Representatives argued that the privileges of freedom from arrest in civil matters, exemption from being compelled to attend court as a witness and a ban on serving court documents in person within the precincts of Parliament were founded in the principle that a Member’s first duty is to the House:

“For the House to operate and retain the respect of citizens, members need to be seen to be attending to their parliamentary duties. To this extent, these privileges still have relevance. Members have a duty to their electors to attend to their roles as members and are not in exactly the same position as ordinary members of the public”.²⁴⁶

256. We recognise that the privilege of freedom from arrest in civil matters is of little practical significance today, though there are still rare circumstances in which it might be applicable. In the 1960s a court held in *Stourton v. Stourton* that an order to commit a peer could in certain circumstances be not punitive, but a civil process to enforce obedience to a court order.²⁴⁷ A similar case arose in a lower court as recently as 1989.²⁴⁸ The judge in *Stourton v. Stourton*, Mr Justice Scarman, acknowledged that “each case will depend on its facts”, and it therefore remains conceivable, if unlikely, that such a scenario could arise again in the future.

257. The privilege of freedom from arrest in civil matters is of little relevance today. In any case, we think it only right that Members of both Houses are as equally subject to the law, both civil and criminal, as the people they represent. We therefore concur with the judgement of the 1999 Joint Committee that the privilege of freedom from arrest in civil matters should be formally abolished. At the same time, we acknowledge that the

²⁴² Q 203

²⁴³ Q 203

²⁴⁴ Written evidence from the Clerk of the Parliaments, paragraph 33

²⁴⁵ *Erskine May*, 24th edition, page 248

²⁴⁶ Clerk of the New Zealand House of Representatives response to Government consultation on the Green Paper, Cm 8318

²⁴⁷ *Stourton v. Stourton* [1963] 1 All ER 606. See also *Erskine May*, 24th edition, page 247. In this case the court considered privilege of peerage, rather than privilege of Parliament. The underlying issue (namely, the question of whether an arrest in respect of contempt proceedings could constitute a “civil” as opposed to a “punitive” process) applies equally to the parliamentary privilege of freedom from arrest.

²⁴⁸ *Peden International Transport, Moss Bros, The Rowe Veterinary Group and Barclays Bank plc v. Lord Mancroft* (1989), unreported

likelihood of this privilege arising is remote, and that its abolition can only be achieved by legislation.

Witness summonses

258. The Green Paper links the question of Members being summoned as witnesses to that of jury service, suggesting that, as Members are no longer exempt from jury service, there is no continuing justification for the continuation of the privilege of exemption from attending court under compulsion as a witness.²⁴⁹ If the Member concerned wishes to exercise the privilege of not being compelled to respond, the Speaker will normally write to the court asking that the member be excused from attending.²⁵⁰

259. In New Zealand, the Legislature Act 1908 codified statutory provisions, dating back to New Zealand's Privileges Act of 1866, which broadly exempt Members from being compelled to appear before a court while Parliament is sitting.²⁵¹ In Canada, by contrast, the exemption is asserted by the House of Commons without statutory underpinning, as set out in a 1989 ruling by Speaker John Allen Fraser:

“the right of a Member of Parliament to refuse to attend court as a witness during a parliamentary session and during the 40 days preceding and following a parliamentary session is an undoubted and inalienable right supported by a host of precedents”.²⁵²

260. The Green Paper slightly mis-states the position, in claiming that the 1999 Joint Committee reported that there had been cases of the privilege of exemption from attending court under compulsion as a witness being used by Members in personal cases, unrelated to their membership of a House of Parliament.²⁵³ What the 1999 Joint Committee actually said was that the privilege was absolute, and may be used in a personal matter, unconnected with membership of the House. The 1999 Joint Committee asked for evidence from the Attorney General,²⁵⁴ who advised the Joint Committee that:

“Defining what kind of evidence a Member may or may not be required to give would introduce a legal test on which the courts would have to adjudicate. That exercise would, it seems to me, be inconsistent with the principle of Members having an absolute immunity from the subpoena process”.²⁵⁵

249 Cm 8318, paragraph 323

250 The 1999 Joint Committee noted that on seven occasions between September 1996 and February 1998 there had been cases when the Speaker or the Clerk had been approached so that it could be made clear formally to a court that the privilege existed and the Member in question wished to assert it (Report of the 1999 Joint Committee on Parliamentary Privilege, page 86). In 2013, the Clerk of the House had only one recent example on file, where he had referred to the privilege in replying on behalf of a Member to a summons, issued at short notice, in the context of seeking a more mutually convenient time for the Member to appear.

251 David McGee, *Parliamentary Practice in New Zealand*, 3rd edition, 2005, page 642

252 *House of Commons Procedure and Practice*, 2nd edition, 2009, chapter 3; Canadian House of Commons Debates, 19 May 1989, page 1953. The origins of the 40 day rule may be linked to the time required to travel to and from Ottawa before the advent of the railway.

253 Cm 8318, paragraph 322; Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 330

254 Sir John Morris QC MP, now Lord Morris of Aberavon QC

255 Report from the 1999 Joint Committee on Parliamentary Privilege, Volume III: Written evidence

261. Dr Adam Tucker argued in his response to the Government's consultation on the Green Paper that there was no continuing case for Members' exemption from attending court as a witness, because this rule extended beyond the appropriate operation of parliamentary privilege: "It has the effect of granting a personal privilege to Members in excess of that justified by the demands of the separation of powers".²⁵⁶ Nevertheless, in Dr Tucker's view, justified refusals to attend court as a witness would still be protected by the natural operation of the doctrine of parliamentary privilege, even without the general exemption from being compelled to attend as a witness.

262. The 1999 Joint Committee recognised vexatious subpoenas as a problem that assailed all public figures, from which Members of the Commons perhaps suffered more than most. The 1999 Joint Committee recommended that Members' exemption from attendance as a witness should be abolished, but a subpoena should not be issued against a Member without the leave of a master or district judge (or the equivalent).²⁵⁷

263. The Clerk of the House of Commons questioned whether the potential hazard in Members having to seek permission, either as jurors or witnesses, to be allowed to perform their Parliamentary duties instead of being in court, is one that should be accepted.²⁵⁸ John Hemming MP argued in his response to the Government's consultation on the Green Paper that it would be possible to undermine parliamentary democracy by requiring Members of Parliament to turn up in court to give evidence at times that conflict with parliamentary sessions: "It is entirely possible if the law is changed to envisage a situation where this power would be used, particularly if there was a narrow majority".²⁵⁹

264. In its response to the Government's consultation on the Green Paper, the Crown Prosecution Service suggested that removal of Members' exemption from attending court as a witness would assist in the appropriate bringing to justice of further offenders in a small number of cases.²⁶⁰ We are not aware of any evidential basis for this unlikely claim.

265. We do not recommend any change in Members' right not to respond to a court summons as a witness. There is no evidence that application of this privilege has caused any harm, and given the frequency of vexatious litigation, it is reasonably foreseeable that ending it could interfere with Members' primary duty to attend Parliament.

Service of court documents within the precincts

266. The 1999 Joint Committee considered that the rule against service of court documents such as writs and orders within the precincts of the House on a day when the House is sitting, but not otherwise, served some purpose in protecting members and others who attended either House from service of court documents within the House being used for publicity-seeking purposes. In the 1999 Joint Committee's view, such activity would be an abuse of the precincts of Parliament.²⁶¹ The 1999 Joint Committee recommended that the

256 Dr Adam Tucker response to Government consultation on the Green Paper, Cm 8318, paragraph 32

257 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 333

258 Written evidence from the Clerk of the House of Commons, paragraph 47

259 John Hemming MP response to Government consultation on the Green Paper, Cm 8318

260 Crown Prosecution Service response to Government consultation on the Green Paper, Cm 8318

261 Report from the 1999 Joint Committee on Parliamentary Privilege, paragraph 334

rule should be retained and should apply at all times, irrespective of whether Parliament is sitting. While noting that it was doubtful whether service by post on a sitting day could ever be regarded as a contempt, the 1999 Joint Committee further recommended it should be made clear that service by post was not a contempt.

267. In his response to the Government's consultation on the Green Paper, the Clerk of the Legislative Council of the Parliament of Western Australia argued that treating as a contempt the serving of court documents in person within the parliamentary precincts on a sitting day continued to be relevant, as it acknowledged the importance of a sitting of Parliament and that such a sitting should not be interrupted by processes connected with the judicial branch of government.²⁶²

268. The Clerk of the House of Commons suggested that, as modern practice in serving documents by post seemed perfectly adequate, we might concur with the 1999 Joint Committee that there is no need to allow the serving of court documents in person within the precincts of the Palace on any day.²⁶³ John Hemming MP did not think there was that much of a problem with the serving of documents "as long as it does not undermine the security of proceedings".²⁶⁴

269. Given the efficacy of service of court documents by post, we agree with the 1999 Joint Committee that service of witness summonses in person within the precincts of Parliament ought to continue to be treated as a contempt.

Members' access to the precincts of Parliament

270. On the first day of every session, the House of Lords passes the following Order about Stoppages in the Streets:

"That the Commissioner of Police of the Metropolis do take care that the passages through the streets leading to this House be kept free and open and that no obstruction be permitted to hinder the passage of Lords to and from this House during the sitting of Parliament; or to hinder Lords in the pursuit of their parliamentary duties on the Parliamentary Estate; and that the Gentleman Usher of the Black Rod attending this House do communicate this Order to the Commissioner."

Until 2005, the House of Commons used to make an Order in similar terms:

"That the Commissioner of the Police of the Metropolis do take care that the passages through the streets leading to this House be kept free and open and that no obstruction be permitted to hinder the passage of Members to and from this House during the Sitting of Parliament, or to hinder Members by any means in the pursuit of their Parliamentary duties in the Parliamentary Estate; and that the Serjeant at Arms attending this House do communicate this Order to the Commissioner."

262 Legislative Council of the Parliament of Western Australia response to Government consultation on the Green Paper, Cm 8318, paragraph 11.8

263 Written evidence from the Clerk of the House of Commons, paragraph 48

264 John Hemming MP response to Government consultation on the Green Paper, Cm 8318

271. The regular batch of Sessional Orders, which used to be passed by the House of Commons without notice on the day of State Opening, was discontinued in 2004.²⁶⁵ The Speaker persisted in putting the Question on the Sessional Order relating to the Commissioner of the Police of the Metropolis until the Government fulfilled its commitment to bring forward legislation about demonstrations and security around Parliament. The relevant provisions, which surfaced in the Serious Organised Crime and Police Act 2005, were not universally well-regarded; in 2007 the incoming Prime Minister promised a review in *The Governance of Britain* White Paper.²⁶⁶ The current legislation applying to the control of demonstrations in Parliament Square is Part 3 of the Police Reform and Social Responsibility Act 2011. The Sessional Orders had little or no legal effect; the police in the environs of the Palace can rely for their powers only on statute law. Nonetheless, there is an inconsistency in that the House of Lords still passes its Sessional Order at the start of each Session.

272. While the new legislation applies appropriate and proportionate statutory controls to demonstrations in Parliament Square, the previous non-statutory requirement to safeguard Members' access to the House of Commons has been disregarded.

273. We regret the abandonment in one House of the practice of requesting the assistance of the Metropolitan Police Commissioner in preventing the obstruction of Members in the streets leading to the House and we call for its restoration in the House of Commons.

274. While such Sessional Orders may have little or no direct legal effect, they serve as a reminder that the police and other authorities have a special obligation to ensure that Members of both Houses must have free access to Parliament when in session. This obligation may require them to make special efforts, beyond those that the police make for ordinary citizens, in order that Parliament and its proceedings are not impeded by whatever may be happening outside the precincts of the Palace of Westminster.

²⁶⁵ The House of Commons resolved on 3 November 2004 to implement the recommendations of its Select Committee on Procedure's Third Report of Session 2002–03, HC 855, paragraphs 24 and 25.

²⁶⁶ *The Governance of Britain* White Paper, Cm 7170, July 2008, paragraphs 164 to 166

9 The way forward

275. In Chapter 2 of our Report we concluded as follows: “We do not consider that comprehensive codification is needed at this time. This does not mean that we reject all legislation; but legislation should only be used when absolutely necessary, to resolve uncertainty or in the unlikely event of Parliament’s exclusive cognisance being materially diminished by the courts.”

276. We therefore disagree with the major recommendation of our predecessor Joint Committee, which reported in 1999, that the various changes it proposed to the scope and interpretation of parliamentary privilege should be embodied in a new and comprehensive Parliamentary Privileges Act, “codifying parliamentary privilege as a whole”. Times have changed, and as the summary of privilege cases in Annex 1 demonstrates, privilege has proved its ability to evolve and adapt to new circumstances. Codification would severely curtail such evolution.

277. The years since the publication of the 1999 Joint Committee’s report have also illustrated the dangers of piecemeal legislation, against which the Clerks of the two Houses warned us. By piecemeal legislation we mean legislation which, rather than addressing the specific issue of privilege, is driven by distinct and separate policy objectives, with privilege being addressed partially and tangentially. Piecemeal legislation, vulnerable to the law of unintended consequences, risks inflicting irreparable damage on the complex blend of statute and common law, and constitutional convention, which makes up privilege as we know it today.

278. Some examples from the last twenty years of proposals for piecemeal and frequently ill-thought out modification of parliamentary privilege are:

- Section 13 of the Defamation Act 1996, which provides for a waiver of Article 9 of the Bill of Rights in respect of defamation cases.
- Clause 12 of the Draft Corruption Bill of 2003, which would have provided for a waiver of Article 9 in respect of prosecutions for corruption.²⁶⁷
- Clause 15 of the Draft Bribery Bill of 2009, which would have provided for a similar waiver in respect of prosecutions for bribery (the relevant provision was omitted from the Bribery Act 2010).²⁶⁸
- The Parliamentary Standards Bill of 2009, clause 10 of which would have waived privilege in relation to the work of the Independent Parliamentary Standards Authority. Clause 10 was removed on 1 July 2009 on a vote by the Committee of the Whole House.²⁶⁹

267 See the Report of the Joint Committee on the Draft Corruption Bill, Session 2002–03, HL Paper 157, HC 703

268 See the Report of the Joint Committee on the Draft Bribery Bill, Session 2008–09, HL Paper 115-I, HC 430-I

269 HC Deb 1 July 2009 col 382

- Amendments tabled to the Justice and Security Bill of 2012 which would have extended privilege, by statute, to the Intelligence and Security Committee.²⁷⁰

279. Instead of either comprehensive codification or piecemeal legislation, we have adopted a pragmatic and evolutionary approach. We have acknowledged that legislation has a role, where Parliament feels compelled to protect core freedoms which have been threatened by the actions of either the Executive or the courts. But such legislation, like privilege as a whole, must be tested by reference to the “doctrine of necessity”: it should be limited in scope to what is strictly necessary, and it should be a last, not a first, resort.

280. We have, accordingly, been modest in our recommendations for legislation. Our main such recommendation is for the long overdue replacement of the Parliamentary Papers Act 1840—an updating of archaic legislation rather than the creation of new legislation. We have also recommended the repeal of section 13 of the Defamation Act 1996 and the restoration of the right of Members of both Houses to be excused from jury service in England and Wales, as they already are in Scotland and Northern Ireland.

281. Elsewhere we have sought to make progress either by means of internal action on the part of the two Houses—to ensure they can realistically assert those powers and rights they already possess—or by encouraging better co-operation and mutual understanding between Parliament and the courts. In particular, we call upon the two Houses to affirm, by means of resolutions and new Standing Orders, the ability of Select Committees to secure the co-operation of witnesses and others and, underpinning the work of Committees, the power of the two Houses themselves to investigate and, where necessary, punish contempts.

282. In other areas, such as the residual immunity of Members from civil arrest, we accept that legislation is the only means of resolving specific anomalies, but conclude that they are of little or no practical significance, and that legislation is therefore not a priority.

283. Finally, in the crucial area of judicial questioning of parliamentary proceedings, we welcome the evidence provided by the Lord Chief Justice of England and Wales, and accept his assurances that the judiciary will continue to respect the proper boundaries between parliamentary and judicial proceedings.

284. Yet, as the Lord Chief Justice also noted, in the last resort Parliament can legislate to protect and define its privileges. Legislation is a last resort, but if the problems we have identified in this Report, such as the uncertainty over the ability of Select Committees to perform their work effectively, or the questioning of parliamentary proceedings by the courts, are not resolved by other means, today’s Parliament should stand ready to legislate, as its predecessor did in the late seventeenth century, to enshrine the fundamental values underpinning parliamentary privilege in statute.

²⁷⁰ See, for instance, HL Deb, 9 July 2012, columns 910 to 919

Conclusions and recommendations

General principles

1. Absolute privilege attaches to those matters which, either because they are part of proceedings in Parliament or because they are necessarily connected to those proceedings, are subject to Parliament's sole jurisdiction or "exclusive cognisance". (Paragraph 47)
2. The extent of Parliament's exclusive cognisance changes over time, as the work of Parliament evolves: it would be impracticable and undesirable to attempt to draw up an exhaustive list of those matters subject to exclusive cognisance. (Paragraph 47)
3. Where there is uncertainty in a case brought before the courts, the extent of Parliament's exclusive cognisance will be determined by the courts. (Paragraph 47)
4. Parliament cannot establish a new privilege or extend an existing privilege by resolution; if Parliament were to consider that its privileges had been reduced to the extent that it could no longer effectively perform its core work, it could in the last resort change the law. (Paragraph 47)
5. We do not consider that comprehensive codification is needed at this time. This does not mean that we reject all legislation; but legislation should only be used when absolutely necessary, to resolve uncertainty or in the unlikely event of Parliament's exclusive cognisance being materially diminished by the courts. (Paragraph 47)

Penal Powers of the Houses

6. We consider that it is in the public interest to ensure that committees have the powers they need to function effectively. (Paragraph 60)
7. We reject the option of doing nothing to clarify Parliament's penal powers. (Paragraph 61)
8. We reject the approach of criminalising specific contempts. It would entail a radical shift of power between Parliament and the courts. It would introduce delay. It would increase uncertainty about how contempts which were not covered by criminal statute could or should be dealt with, and remove the flexibility which is the chief advantage of the current system. (Paragraph 70)
9. We consider that the disadvantages of legislating to confirm Parliament's penal powers outweigh the advantages. We accordingly recommend against such legislation. (Paragraph 75)
10. If the House of Commons were to adopt our proposals on how its penal jurisdiction should be exercised, we would expect the House of Lords to adopt similar procedures, adapted to the conventions prevailing in that House, in due course. (Paragraph 79)

11. Where a Committee is simply seeking evidence as part of the normal inquiry process, the standards of fairness should include the opportunity for witnesses to ask for matters to be dealt with in private, to give a clear account of their side of the story and to respond to any potentially damaging allegations made by other witnesses. In most cases, this is already common practice, but we recommend that such good practice should be formalised as part of Standing Orders. (Paragraph 85)
12. This Report itself begins the process of reasserting Parliament's penal powers, by clarifying our view on those powers and setting out fair procedures which can be followed if those powers need to be invoked. (Paragraph 99)
13. We recommend that the two Houses should build on our work to set out clearly the powers they reserve the right to exercise, what is expected of witnesses, and the means by which they will consider allegations of contempt, including procedural safeguards to ensure that witnesses are treated fairly. (Paragraph 100)

The appointment of lay members to Select Committees

14. There are procedural rules in place to ensure lay members can play a full part in the House of Commons Committee on Standards, and it would be inappropriate to legislate to confer the protection of parliamentary privilege upon certain classes of individuals sitting on specified committees. Moreover, such legislation would cast doubt on the position of the House of Lords Committee for Privileges and Conduct, which would include non-Members when deciding a peerage claim. We therefore oppose legislating to confer voting rights on lay members of the House of Commons Committee on Standards. (Paragraph 111)

Judicial questioning of proceedings in Parliament

15. We welcome the clarification by the Lord Chief Justice as to the extent of the *Pepper v. Hart* principle, namely, that those instances in which proceedings, including Committee reports, are questioned, are best "treated as ... mistakes". (Paragraph 136.)
16. We consider that the comments of Mr Justice Stanley Burnton, in *OGC v. Information Commissioner*, represent an accurate statement of the legal limitations upon the admissibility of Select Committee reports in court proceedings, including judicial review cases. Such reliance by the courts upon Select Committee reports is not only constitutionally inappropriate, but risks having a chilling effect upon parliamentary debate. (Paragraph 136.)
17. We do not at this stage believe that the problem of judicial questioning is sufficiently acute to justify either legislation prohibiting use of privileged material by the courts, along the lines of section 16(3) of the Australian Parliamentary Privileges Act 1987, or the introduction of a formal and binding system of notification when reference to privileged material is contemplated. (Paragraph 136.)
18. We trust that less formal means than those above, building on the current good relations between the judiciary and the parliamentary authorities, will address recent

problems. But in this matter, as in others covered in our Report, Parliament should be prepared to legislate if it becomes necessary to do so in order to protect freedom of speech in Parliament from judicial questioning. (Paragraph 136.)

Disapplication of article 9

19. We welcome the Government's change of heart on the disapplication of privilege in respect of criminal prosecutions. (Paragraph 154)
20. We believe that general disapplication of Article 9 in respect of criminal prosecutions is unnecessary and would have a disproportionately damaging effect upon free speech in Parliament. We accordingly oppose the Government's draft clauses. (Paragraph 156)
21. There have been no significant developments in respect of breaches of court injunctions in parliamentary proceedings since the recommendations of the Joint Committee on Privacy and Injunctions were published in March 2012. We therefore see no need to re-open the issue and we endorse the conclusions reached by the Joint Committee. (Paragraph 160)
22. We do not consider that it is necessary for inquiries to consider evidence given in parliamentary proceedings, and we therefore support the Government in rejecting the introduction of a mechanism to waive privilege in such cases. (Paragraph 162)
23. We recommend the repeal of section 13 of the Defamation Act 1996. The anomalies it creates are more damaging than the mischief it was intended to cure. There is no persuasive argument for granting either House a power of waiver or for restricting such a power to defamation cases alone. A wider power of waiver would create uncertainty, and have the potential to undermine the fundamental constitutional principle of freedom of speech in Parliament. (Paragraph 170)

Reporting and repetition of parliamentary proceedings

24. We endorse the recommendation of the 1999 Joint Committee that the Parliamentary Papers Act 1840 should be replaced by modern statutory provisions. (Paragraph 195)
25. We recommend that these new provisions should:
 - confirm that publications and broadcasts made under the authority of either House enjoy absolute privilege, and that any proceedings initiated in respect of such publications or broadcasts shall be stayed upon production of a certificate signed by the Speaker or Clerk of either House;
 - establish that qualified privilege applies to all fair and accurate reports of parliamentary proceedings in the same way as to abstracts and extracts of those proceedings;

- provide that in all court proceedings in respect of such fair and accurate reports, extracts or abstracts, the claimant or prosecution shall be required to prove that the defendant acted maliciously;
 - confirm that the term “broadcast” includes dissemination of images, text or sounds, or any combination of them, by any electronic means; and
 - provide for a delegated power, subject to affirmative procedure, allowing the Secretary of State to update the definition of “broadcast” in light of further technological change, without the need for primary legislation. (Paragraph 196)
26. We recommend that the statutory provisions which we have proposed in respect of the reporting of parliamentary proceedings should also confirm, for the avoidance of doubt, that Members of either House enjoy the same protection as non-Members in repeating or broadcasting extracts or abstracts of proceedings in Parliament. (Paragraph 207)

Applicability of legislation to Parliament

27. We recommend that the two Houses be invited to adopt resolutions stating that the House of Commons and the House of Lords should in future be expressly bound by legislation creating individual rights which could impinge on parliamentary activities, and that in the absence of such express provision such legislation is not binding upon Parliament. (Paragraph 226)
28. We further recommend that the Government take steps to ensure that all Departments comply with the official guidance issued by the Treasury Solicitor in 2002, which asked them to consult the House authorities on whether any proposed legislation that is to apply to the Crown, or its servants, should apply also to the two Houses. (Paragraph 227)

Registers of Members’ Interests

29. It is clear to us that the decision in *Rost v. Edwards* represented an inappropriate encroachment on an area that should be subject to Parliament’s exclusive cognisance. We note that the decision was not definitive, and that it has been criticised in other judgments. In the event that a similar case were to come before the courts, we consider that there is a strong possibility that the decision in *Rost v. Edwards* would be reversed. We would expect the two Houses to intervene should such a case arise. (Paragraph 233)
30. In the meantime we agree with the 1999 Joint Committee that, if legislation on parliamentary privilege is contemplated, it should clarify that the Registers of Members’ Interests, and other Registers prescribed by resolution of either House, are proceedings in Parliament for the purposes of Article 9 of the Bill of Rights. (Paragraph 234)

Members' correspondence

31. We recognise and welcome the willingness of the courts to give consideration to the appropriate role of a Member of Parliament in acting on behalf of a constituent. Although we can envisage circumstances in which it might become necessary to legislate in order for stronger statutory protection to be given to Members' correspondence with, or case-work on behalf of, their constituents, we do not see any need for change at the present time. (Paragraph 242)

Briefing by officials

32. We regret the decision of the New Zealand Supreme Court in *Attorney General and Gow v. Leigh*. In our view, briefings supplied by officials to Ministers in order to enable them to answer parliamentary questions are necessarily antecedent to proceedings in Parliament, and should enjoy the same protection as drafts of speeches or questions. We recommend that they should continue to do so in the United Kingdom. (Paragraph 248)

Jury service

33. We recommend that Government should bring forward legislation providing that Members of either House should be among those who have a right to be excused from jury service in England and Wales. We welcome the fact that Lords entitled to receive writs of summons to attend the House of Lords, and Members of the House of Commons, are excusable as of right from jury service in Scotland and in Northern Ireland. We see no reason to restore (nor, in Scotland, to retain) the exemption for officials of either House of the Westminster Parliament. (Paragraph 253)

Freedom from arrest

34. The privilege of freedom from arrest in civil matters is of little relevance today. In any case, we think it only right that Members of both Houses are as equally subject to the law, both civil and criminal, as the people they represent. We therefore concur with the judgement of the 1999 Joint Committee that the privilege of freedom from arrest in civil matters should be formally abolished. At the same time, we acknowledge that the likelihood of this privilege arising is remote, and that its abolition can only be achieved by legislation. (Paragraph 257)

Witness summonses

35. We do not recommend any change in Members' right not to respond to a court summons as a witness. There is no evidence that application of this privilege has caused any harm, and given the frequency of vexatious litigation, it is reasonably foreseeable that ending it could interfere with Members' primary duty to attend Parliament. (Paragraph 265)

Service of court documents within the precincts

36. Given the efficacy of service of court documents by post, we agree with the 1999 Joint Committee that service of witness summonses in person within the precincts of Parliament ought to continue to be treated as a contempt. (Paragraph 269)

Members' access to the precincts of Parliament

37. We regret the abandonment in one House of the practice of requesting the assistance of the Metropolitan Police Commissioner in preventing the obstruction of Members in the streets leading to the House and we call for its restoration in the House of Commons. (Paragraph 273)
38. While such Sessional Orders may have little or no direct legal effect, they serve as a reminder that the police and other authorities have a special obligation to ensure that Members of both Houses must have free access to Parliament when in session. This obligation may require them to make special efforts, beyond those that the police make for ordinary citizens, in order that Parliament and its proceedings are not impeded by whatever may be happening outside the precincts of the Palace of Westminster. (Paragraph 274)

Annex 1: Developments in Privilege since 1999

Parliamentary uses of privilege

1. Privilege has been used to protect witnesses, prevent the intimidation of a member, protect the integrity of committees by discouraging leaks, and to censure a (former) Minister for misleading a select committee. There have also been discussions of privilege in relation to subjects such as phone hacking, defamation and searches of the precincts. Committees have also considered the relationship between Parliament and the police and the courts, both in relation to searches on the Parliamentary Estate, and in relationship between the disciplinary processes of the House of Commons and the criminal justice system.

Protection of a witness

2. In 2004 the House of Commons Standards and Privileges Committee considered the case of Ms Judy Weleminsky, a member of the Board of the Children and Family Court Advisory and Support Service (CAFCASS), who had submitted written evidence to a Constitutional Affairs Committee inquiry into CAFCASS and was subsequently asked to resign from the CAFCASS Board. The evidence she had given to the Constitutional Affairs Committee formed part of the grounds for this request. The Committee found that attempts to call Ms Weleminsky to account for her evidence were a contempt and that:

“the freedom to give evidence must be absolute and any decisions as to whether to accept it and what weight to place on it must be for the Select Committee alone, not the body [to which a witness belongs], not least because it might otherwise be possible for a majority to present, unchallenged, a false or misleading face to the Committee, and thereby subvert the process of Parliamentary Scrutiny”.¹

3. The Government fully accepted the findings of the Report, the Lord Chancellor (the responsible Minister) apologised, and revised guidance was drawn up for Government officials.²

Intimidation of a Member

4. In 2009 the House of Commons Standards and Privileges Committee considered a complaint that Withers LLP had attempted to intimidate a Member in his parliamentary conduct, by seeking undertakings not to refer to the behaviour of a client in Parliament, and threatening him with legal proceedings if he repeated statements in Parliament previously made outside Parliament. The Committee found that a contempt had been

1 Fifth Report from the House of Commons Committee on Standards and Privileges, Session 2003–04, *Privilege: Protection of a Witness*, HC 447, paragraph 39

2 Sixth Report from the House of Commons Committee on Standards and Privileges, Session 2003–04, *Privilege: Protection of a Witness (Government Response)*, HC 1055

committed but as the company had apologised unreservedly they recommended no further action.³

Penal powers of the House of Lords

5. As a corollary of their right to control their own proceedings the two Houses possess certain penal powers, in respect of both Members and non-Members—powers that derive ultimately from their status as constituent parts of the medieval “High Court of Parliament.” The House of Lords had not exercised any penal jurisdiction in respect of its members since the early 19th century, and following the report of the Select Committee on the Powers of the House in relation to the Attendance of its Members in 1956⁴ the prevailing view had been that the House had no power either to suspend or expel its Members.

6. In 2009 the House of Lords Committee for Privileges reviewed the House’s disciplinary powers, following allegations against four Members of the House. The Committee was advised by the Attorney General that the House had no power to suspend a Member guilty of misconduct; but the Committee was ultimately swayed by a contrary opinion submitted by Lord Mackay of Clashfern (a former Law Lord and Lord Chancellor), to the effect that the House possesses an inherent power to discipline its Members, and that the precise means by which it chooses to exercise this power falls within the House’s exclusive jurisdiction over its own procedures.

7. The Committee accordingly concluded that:

- The House of Lords has no power, by resolution, to require that the writ of summons be withheld from a Member otherwise entitled to receive it; as a result, it is not within the power of the House to suspend a Member permanently;
- The House does possess the power to suspend its Members for a defined period not longer than the remainder of the current Parliament.⁵

8. Since the adoption of these conclusions by the House, seven Members of the House of Lords have been suspended for misconduct, for periods of up to 18 months.

Interference with a Joint Committee—the *Trevor Phillips* case

9. On 10 February 2010 the Joint Committee on Human Rights (JCHR) published a report alleging that on 8 February, the day before the JCHR was to consider a draft report directly relevant to the work of Mr Trevor Phillips as Chair of the Equality and Human Rights Commission (EHRC), he had spoken to and sought to influence members of the Joint Committee.⁶ The report concluded that Mr Phillips’ actions “could constitute a contempt

3 Ninth Report from the House of Commons Committee on Standards and Privileges, Session 2009–10, *Privilege: John Hemming and Withers LLP*, HC 373

4 House of Lords Select Committee on the Powers of the House in relation to the Attendance of its Members, Session 1955–56, HL Paper 67

5 House of Lords Committee for Privileges, *The Powers of the House of Lords in respect of its Members*, First Report, Session 2008–09, HL Paper 87

6 Seventh Report from Joint Committee on Human Rights of Session 2009–10, *Allegation of Contempt: Mr Trevor Phillips*, HL Paper 56/HC 371

of both Houses”, and recommended that they “be subject to investigation by the Privileges Committees of both Houses”.⁷ The Committees were advised that, in procedural terms, interference with a Lords member of a joint committee would constitute a contempt of the House of Lords, and interference with a Commons member a contempt of the House of Commons. Thus both Privileges Committees had a direct interest in investigating the alleged contempt.

10. The Commons committee sought and received written evidence from the chairman of the JCHR, to which evidence from Lords as well as Commons members of the Joint Committee was annexed. The committee published the evidence online, but did not make a formal Report to the House on the matter.⁸ The Lords Committee for Privileges and Conduct took up the investigation following the general election, making use of the written evidence already published, and reported in July 2010. The Committee accepted that Mr Phillips’ conduct could, in certain circumstances, have constituted a contempt. The Committee concluded that “however inappropriate and ill-advised, Mr Phillips’ actions did not significantly obstruct or impede the work of the JCHR”.⁹ The Committee did not therefore find him to have committed a contempt.

Misleading a select committee

11. Misleading the House or a Committee is also a breach of privilege. The former Secretary of State for Transport, Rt Hon Stephen Byers MP, was censured for providing an inaccurate answer to a committee while he was a Minister, and for giving an inaccurate account in a subsequent personal statement to the House, and ordered to apologise in a further personal statement.¹⁰ It is notable that Mr Byers was cross examined on his answer to the select committee in earlier court proceedings, a lapse for which the judge apologised.¹¹

Leaks from select committees

12. The House of Commons Standards and Privileges Committee investigated a number of leaks from select committees, on the basis that premature and unauthorised disclosure of Committee proceedings could constitute a contempt of the House. These breaches of confidence by Members and their staff in relation to Committee reports resulted in a range of sanctions, including suspension of a Member without pay for ten days and withdrawal from a Member’s assistant of network access and parliamentary pass for 28 days.¹²

7 The House of Commons and the House of Lords agreed motions referring the report to their respective Privileges Committees on 23 and 25 February 2010 respectively.

8 The Formal Minutes of the House of Commons Committee on Standards and Privileges for 30 March 2010 are published on the www.parliament.uk website

9 First Report from House of Lords Committee for Privileges and Conduct, Session 2010–12, HL Paper 15, paragraph 21

10 Sixth Report from the House of Commons Committee of Standards and Privileges, Session 2005–06, *Mr Stephen Byers (Matter referred on 19 October 2005)*, HC 854

11 *Weir and others v. the Secretary of State for Transport and others* [2005] EWHC 2192 at paragraph 242

12 Eighth Report from the House of Commons Committee of Standards and Privileges of Session 1998–99, *Premature Disclosure of Reports of the Foreign Affairs Committee*, HC 607; Tenth and Eleventh Reports from the House of Commons Committee of Standards and Privileges of Session 1998–99, *Unauthorised Receipt of a Draft Report*, HC 747

13. The leaks above took place before reports had been agreed, and there were suggestions that such leaks were motivated by a desire to influence a Committee's work, or the reporting thereof. In considering the unauthorised disclosure of its own recommendation for a penalty in the case of Rt Hon David Laws MP, the House of Commons Committee on Standards and Privileges decided that the leak was not a contempt as "the leak of the Committee's recommendation took place after the Committee had agreed its report, and after the document had been reported to the House. It does not appear to have been motivated by a desire to interfere with the Committee's work. The document had already been agreed. It could not have been altered".¹³

Mobile Phone Hacking

14. In 2011 the House of Commons Committee on Standards and Privileges reported on whether hacking of Members' mobile phones was a contempt of Parliament. The Committee interpreted its remit as looking at whether and in what circumstances hacking would be a contempt, rather than looking at specific allegations. The decision not to consider such allegations was based on considerations of fairness, and respect for legal and judicial process, as an application had been made for judicial review of the Metropolitan Police's handling of its original investigation.¹⁴

15. The Committee concluded that hacking could in some cases be a contempt but:

"... in any matter such as hacking for which a remedy may be available in law, the House should normally expect all steps to be taken to obtain such a remedy before a Motion is brought before the House to refer the matter to the Committee on Standards and Privileges for investigation as a possible contempt, save in exceptional circumstances, such as a failure on the part of the prosecuting authorities to act, or the existence of an immediate and severe threat to the working of Parliament".¹⁵

16. On 22 May 2012 allegations that certain individuals had misled the House of Commons Culture, Media and Sport Committee¹⁶ were referred to the Committee on Standards and Privileges, which has published an excerpt from its minutes setting out the procedure that will be followed.¹⁷ No other announcement has been made.

Criminal investigations and privilege

17. In its work on the hacking of Members' mobile phones the House of Commons Committee on Standards and Privileges recommended:

13 Seventeenth Report from the House of Commons Committee on Standards and Privileges, Session 2010–12, *Leaks relating to the case of Mr David Laws*, HC 1433, paragraph 42

14 Fourteenth Report from the House of Commons Committee on Standards and Privileges, Session 2010–12, *Privilege: Hacking of Members' mobile phones*, HC 628, paragraph 3

15 *Ibid.*, paragraph 68

16 Eleventh Report from the House of Commons Culture, Media and Sport Committee, Session 2010–12, *News International and Phone-hacking*, HC 903–I, paragraphs 274 to 280

17 The Formal Minutes of the House of Commons Committee on Standards and Privileges for 3 July 2012 are published on the www.parliament.uk website. With the appointment of lay members to the House of Commons Committee on Standards, the separate Committee of Privileges came into existence on 7 January 2013, and has inherited the same approach to the matter referred to its predecessor Committee.

“that, in a case where a person has been acquitted by a court of a charge relating to a matter which may also amount to a contempt, such as hacking, no Motion should be brought before the House to refer the matter to the Committee on Standards and Privileges, save in exceptional circumstances, such as the alleged involvement of a Member in carrying out the hacking.

We recommend that, in a case where a person has been convicted by a court of a charge relating to a matter which may also amount to a contempt, such as hacking, there should be a presumption that the House will exercise its own penal jurisdiction only when it is satisfied that to do so is essential”.¹⁸

18. The Committee has also reported to the House that in standards cases where there may be a police investigation into matters which are before the Parliamentary Commissioner for Standards or the Committee itself, criminal investigations should take precedence, and the parties should liaise to ensure that such investigations or subsequent proceedings are not prejudiced by the Commons.¹⁹

Police Searches on the Parliamentary Estate

19. The House of Commons’ control of its own precincts has also been a live issue. Here, too, the emphasis has been on protecting the House’s privilege, while ensuring the House is not a sanctuary from the law. In 2010 the House of Commons appointed a Committee on Issue of Privilege to consider police searches on the Parliamentary Estate. The Committee focussed on the circumstances of the search of Mr Damian Green’s office. It drew attention to a note from a former Clerk of the House dealing with the “unresolved imperatives” which would arise from a request for a search on the Commons Estate:

- Control of the premises is vested in the Speaker;
- The Speaker is guardian of the House’s privileges (subject to the House itself);
- The House’s privileges must not be infringed;
- Proceedings and Members taking part in them, must not be impeded;
- Privilege does not afford protection from a proper search; and
- The Palace of Westminster is not a sanctuary.

20. It noted:

“These imperatives remain and we endorse them as central to any discussion of the issues thrown up by this case. It is fruitless to attempt to cover every possible set of circumstances that might conceivably arise in the future from the interaction of the

¹⁸ *Privilege: Hacking of Members’ mobile phones*, HC 628, paragraphs 69 and 70

¹⁹ Eighth Report from the House of Commons Committee on Standards and Privileges, Session 2007–08, *The Complaints System and the Criminal Law*, HC 523

House, its Members and the criminal law, but those imperatives provide a firm starting point”.²⁰

21. The Committee endorsed the 2008 protocol on searches on the parliamentary estate, which set out that:

- in future a warrant would always be required for a search of a Member’s office or access to parliamentary papers and records;
- the Clerk of the House, Speaker’s Counsel, the Speaker’s Secretary and the Serjeant at Arms must be informed if any such warrant was to be sought;
- the Speaker might attach conditions to a search to ensure that parliamentary material would be kept confidential until any matter of privilege had been resolved;
- any data relating to individual constituents should be treated with the same degree of care as would information about a client in the case of removal from a lawyer’s office; and
- agreement to a search did not constitute a waiver of privilege in respect of any papers removed.²¹

Legislation on privilege: Parliamentary views

22. While different Committees have come to different conclusions about the desirability of legislation on privilege, there has been a consensus that privilege should be considered in the round. The Joint Committee appointed to consider the draft Bribery Bill warned “Legislating in a piecemeal fashion risks undermining the important constitutional principles of parliamentary privilege without consciousness of the overall impact of doing so”.²²

23. The Committee appointed to consider police searches on the Parliamentary estate concluded that while it had no unanimous conclusion on the wisdom or necessity of legislating on privilege, there should be a Joint Committee before any Government Bill was introduced and that before setting out to define and limit parliamentary privilege in statute, there needed to be a comprehensive review of how that privilege affected the work and responsibilities of an MP in the twenty-first century.²³ Similarly, in its March 2011 Report on the hacking of Members’ mobile phones, the Committee on Standards and Privileges noted with some understatement that “no-one can accuse successive Governments or Parliaments of rushing to implement the recommendations made by the Joint Committee in 1999”, but it went on to urge caution: “Yet now is not the time to act in haste. We recommend that sufficient time be made available for full and careful scrutiny of

20 First Report from the House of Commons Committee on an Issue of Privilege, Session 2009–10, *Police Searches on the Parliamentary Estate*, HC 62, paragraph 141

21 *Ibid.*, paragraph 145

22 Joint Committee on the Draft Bribery Bill, First Report of Session 2008–09, *Draft Bribery Bill*, HL 115–I, HC 430–I, paragraph 228

23 *Police Searches on the Parliamentary Estate*, HC 62, paragraph 169

the draft Privileges Bill, in order that the resultant Act may be as clear and robust as possible”.²⁴

24. Several Acts passed since the Joint Committee reported in 1999 have touched on parliamentary privilege. The Freedom of Information Act 2000 applies to each House of Parliament, though not to their individual members. Section 34 of the Act provides for an exemption from the Act’s requirements to be applied where one is required for the purpose of avoiding an infringement of the privileges of either House of Parliament. What those privileges are is not defined in the Act, which further stipulates that a certificate signed by either the Speaker (for the House of Commons) or the Clerk of the Parliaments (for the House of Lords) is conclusive evidence of the fact that an exemption is so required. Such certificates have been issued only seldom; and the Information Commissioner has declined to take a request for information any further in a case where such a certificate has been issued.²⁵

25. The Bill that led to the Parliamentary Standards Act 2009 was amended on the floor of the House of Commons following an intervention by the Clerk of the House whose memorandum to the House of Commons Justice Committee criticised the Bill’s Clause 10(c), which would have allowed any evidence of proceedings in Parliament to be admissible in proceedings for an offence under clause 9 of the Bill, as having a potentially chilling effect on the freedom of speech of Members and of witnesses before committees.²⁶ The wording of the Clause which became section 2 of the Fixed-term Parliaments Act 2011, in relation to motions of no confidence in Her Majesty’s Government, was amended to avoid a court having to question House of Commons proceedings in order to ascertain whether or not the provisions of the Act applied. Other examples of specific provisions designed to prevent any intrusion into parliamentary proceedings include the Equality Act 2010.

Parliamentary restrictions on freedom of speech

26. Each House has been reluctant to reduce the scope of privilege through its own internal procedures. In March 2012 the Joint Committee on Privacy and Injunctions explored whether there should be some system for preventing members referring to matters covered by injunctions, as the *sub judice* resolutions passed by each House prevent discussion of current legal proceedings, unless legislation is under consideration. It concluded:

“230. We regard freedom of speech in Parliament as a fundamental constitutional principle. Over the last couple of years a few members have revealed in Parliament information covered by injunctions. We have considered carefully proposals for each House to instigate procedures to prevent members from revealing information subject to privacy injunctions. The threshold for restricting what members can say

24 *Privilege: Hacking of Members’ mobile phones*, HC 628, paragraph 72

25 For an example of an Information Commissioner’s Decision in a case where the Speaker of the House of Commons has signed a section 34 (parliament privilege) certificate under the Freedom of Information Act 2000, see ICO Decision Notice FS 50327178 of 1 February 2011, arising out of a request relating to the work of the Parliamentary Commissioner for Standards.

26 Seventh Report from the House of Commons Justice Committee, Session 2008–09, *Constitutional Reform and Renewal: Parliamentary Standards Bill*, HC 791; Clause 10 of the Parliamentary Standards Bill was lost in Committee of the whole House in the House of Commons on 1 July 2009, by 247 votes to 250.

during parliamentary proceedings should be high. We do not believe that the threshold has yet been crossed.

231. If the revelation of injuncted information becomes more commonplace, if injunctions are being breached gratuitously, or if there is evidence that parliamentarians are routinely being “fed” injuncted material with the intention of it being revealed in Parliament, then we recommend that the Procedure Committees in each House should examine the proposals made to us for new restrictions with a view to implementing them”²⁷

Legal use of proceedings in Parliament

27. Just as there have been developments in Parliament, so too there have been developments in the courts. Some notable cases are sketched below.

Proportionality of freedom of speech

28. In 2002 the European Court of Human Rights considered the case of *A v. The United Kingdom*, which related to a central purpose of Article 9 of the Bill of Rights, namely to prevent Members’ speeches being subject to actions for defamation. A Member referred in a critical manner to a named constituent in the course of debate, and the constituent appealed to the European Court of Human Rights on the grounds that the parliamentary privilege of freedom of speech violated Article 6 of the European Convention, namely that ‘In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law’, and Article 8, on respect for private and family life except as necessary for the protection of the rights and freedoms of others.

29. The court ruled, by six votes to one, that parliamentary privilege did not impose a disproportionate restriction on the right of access to a court, or on respect for private and family life, and that Articles 6 and 8 were accordingly not violated. The President of the Court set out some more general observations suggesting that although he did not question the need for parliamentarians to be able to speak freely, that absolute freedom might need to be reconciled with other rights and freedoms, and this was not necessarily the task of a court, rather than of member states.²⁸

30. The appellants in *Jackson v. Attorney-General* sought to argue that the Hunting Act 2004 was not an Act of Parliament and therefore had no legal effect because it had been passed under the provisions of the Parliament Act 1949 which itself was not an Act of Parliament because it was passed under the provisions of the Parliament Act 1911 but was not an Act to which the provisions of that Act applied. This latter argument rested on assertions that legislation passed under the 1911 Act was in a different category from Acts of Parliament passed by both Houses and that the purposes for which the 1911 Act could be used were constrained, for example that it could not be used to amend itself or to enlarge the powers provided in it.

27 Report from the Joint Committee on Privacy and Injunctions, Session 2010–12, HL Paper 273/HC 1443, paragraphs 230 and 231

28 *A v. The United Kingdom* [2002] ECHR 35373/97

31. In the leading judgment Lord Bingham of Cornhill first considered whether the case was appropriate for a court to consider. He recognised that, had the case concerned a question of parliamentary procedure it could have been resolved only by parliamentary inquiry, but, in his view, since instead it centred on whether the 1949 Act and thus the Hunting Act 2004 were ‘enacted legislation’ and that question depended on the statutory interpretation of the 1911 Act the courts could, and, in the absence of any other appropriate body, should, resolve it.

32. On the question itself Lord Bingham rejected the proposition that the 1911 Act created a new category of legislation: ‘The 1911 Act did, of course, effect an important constitutional change, but the change lay not in authorising a new form of sub-primary legislation but in creating a new way of enacting primary legislation’.²⁹

33. In these cases, although there may be dissenting remarks, or differences of emphasis within individual judgements, the courts’ understanding of privilege has been that commonly held within Parliament.

Use of parliamentary proceedings in court

34. The Green Paper on Parliamentary Privilege says:

“Over recent decades, courts have made the following uses of “proceedings”:

Where there is an ambiguity in primary legislation, clear statements made by the minister promoting the Bill may be relied upon as an aid to interpreting that legislation (*Pepper v. Hart* 1993);

When evaluating whether primary legislation is compatible with the European Convention on Human Rights, courts may rely on ministerial statements as background information (*Wilson v. First County Trust Ltd (No 2)* 2003);

Hansard can be referenced to prove what was done and said in Parliament “as a matter of history”, provided that this is not used to suggest that the words were “improperly spoken” (*Prebble v. Television New Zealand* 1995);

In judicial reviews, courts have admitted Ministerial statements to Parliament to demonstrate what Government policy is (*ex parte Brind* 1991); and

Similarly, the Privy Council accepted that a Minister’s statement in Parliament could be relied upon to explain the motivation for executive action outside of Parliament (even to the extent that that statement was evidence that the action was an improper exercise of power) (*Toussaint* 2007).

The reason that these apparent exceptions have arisen is that none of these uses of proceedings by the court is seen to “impeach or question” proceedings; in each case, the courts are interrogating matters of fact. These uses of parliamentary materials by

29 *R (on the application of Jackson) v. Attorney-General* [2005] EWCA Civ 126

the courts are widely accepted in Parliament, Government and the courts as representing sensible, pragmatic positions”.³⁰

35. Until 1980 the practice was to petition the House of Commons for leave to use Commons material in legal proceedings, but on 31 October 1980 the House resolved:

“That this House, while re-affirming the status of proceedings in Parliament confirmed by Article 9 of the Bill of Rights, gives leave for reference to be made in future Court proceedings to the Official Report of Debates and to the published Reports and evidence of Committees in any case in which, under the practice of the House, it is required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to parliamentary papers be discontinued”.³¹

36. As the Clerk of the House noted in his evidence, this resolution contains the “very explicit rider” reaffirming the status of proceedings in Parliament confirmed by the Article 9 of the Bill of Rights. This was inserted by amendment to meet concerns that, as Mr Michael English MP said, “if we pass the resolution ... they will go beyond this narrow boundary of reference to the proceedings and start to question a statement in the proceedings”.³²

37. Since the resolution was passed, there have been several interventions, formal and informal, by the House authorities or the Attorney General on their behalf in cases where there was concern that Parliamentary proceedings might be used improperly. This depends on the House becoming aware that such material is being used in evidence, but it is by no means unusual for one or other of the parties to raise the issue with Speaker’s Counsel. The Office of Speaker’s Counsel will then contact both parties to establish means of avoiding any infringement of Article 9 and it is often possible to deal with the matter without intervening, since in a number of cases the improper use of Parliamentary material is inadvertent. The Green Paper’s description of recent cases is by no means complete, and a number of decisions (not referred to) have explained and confirmed the extent to which parliamentary material may properly be adduced in evidence.

38. The principles set out in *Pepper v. Hart* and in *Prebble* have received further judicial examination in several recent cases. The first and perhaps most important of these was the judgment of the Judicial Committee of the Privy Council in the case of *Toussaint v. A-G of Saint Vincent and the Grenadines*. In this case the Judicial Committee allowed the appellant to rely on statements made by the Prime Minister in the House of Assembly as evidence of unlawful motivation in a case of compulsory purchase. The Judicial Committee’s decision was founded on two arguments. The first was that the House of Lords had on a number of occasions stated that use could be made of ministerial statements in Parliament in judicial review proceedings to explain conduct occurring outside Parliament. This approach had been endorsed by the 1999 Joint Committee. The second was that the Prime Minister’s

30 Cm 8318, paragraphs 84 and 85

31 House of Commons Resolution of 31 October 1980 CJ (236) 823

32 HC Deb 31 October 1980 col 896

statement was relied on simply for its explanation of the motivation of the executive's action outside the House. It was not being questioned or challenged.³³

39. In *R (on the application of Bradley) v. Secretary of State for Work and Pensions* the judge distinguished between reliance on evidence given to a select committee and reliance on a report of a select committee. In refusing to take either into account, he stated that the evidence was inadmissible because reliance on it would inhibit freedom of speech in Parliament and thus contravene Article 9. The report itself was inadmissible on the grounds that the courts and Parliament were both astute to recognise their respective roles and it was therefore for the courts, not the select committee, to decide questions of law.³⁴ In *R (Federation of Tour Operators) v. Her Majesty's Treasury and Office of Government Commerce v. Information Commissioner* the court expanded on the second point to state that in general the opinion of a parliamentary committee will be irrelevant to the issues before a court because of 'the nature of the judicial process, the independence of the judiciary and of its decisions and the respect that the legislative and judicial branches of government owe to each other'.³⁵

40. In *Wilson v. First County Trust Ltd* the Court of Appeal examined Hansard to find why Parliament wished to enact a certain provision. The House of Lords rejected this approach, which they considered as different from the use of Hansard as an aid to statutory interpretation.³⁶

41. In 2004 the Judicial Committee of the Privy Council upheld the decision of the New Zealand Court of Appeal, in the 2003 case of *Jennings v. Buchanan*, to permit words spoken in Parliament to be used to establish the historical fact that they had been spoken, and its judgment (by a majority) that what amounted to repetition of a prior protected statement depended on the circumstances. In the case itself the phrase 'I do not resile' (from the statement in the House) was judged to be effectively repetition, and not a mere acknowledgment of the earlier privileged statement.³⁷

33 *Toussaint v. Attorney General of Saint Vincent and the Grenadines* [2007] UKPC 48

34 *R (on the application of Bradley) v. Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin)

35 *R (on the application of the Federation of Tour Operators) v. Her Majesty's Treasury* [2007] EWHC 2062 (Admin); *Office of Government Commerce v. Information Commissioner* [2008] EWHC 737 (Admin)

36 *Wilson v. First County Trust Ltd* [2003] UKHL 40

37 *Jennings v. Buchanan* [2004] UKPC 36

Annex 2: Draft resolutions for the House of Commons

Actions which may be treated as contempts

The House notes the need to ensure that its penal powers should be exercised in accordance with modern standards of fairness, and that those standards include the need for clear guidance. It therefore affirms the House's continuing powers to punish contemnors.

Without derogating from its power to determine that acts constitute contempts, the House declares, as a matter of general guidance, that the following conduct is 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 and consequently may be treated as contempts:

- i) Disrupting the proceedings of the House or a committee or inciting others to do so;
- ii) Refusing to produce documents or give evidence to a committee when ordered to do so;
- iii) misleading the House or a committee;
- iv) disclosure of confidential proceedings or documents without leave of the House or of the relevant committee;
- v) obstructing or intimidating a Member in relation to his or her parliamentary duties;
- vi) obstructing or intimidating a member of the House's staff carrying out the House's orders;
- vii) obstructing or intimidating a witness, or penalising a witness for evidence given to the House or a committee;
- viii) improperly influencing, or attempting to improperly influence, a Member, member of staff or witness;
- ix) attempting to bring legal proceedings in respect of proceedings in Parliament.

Exercise of penal jurisdiction

In exercising its penal jurisdiction the House will have regard to:

- a) the principle that its penal jurisdiction should be exercised:
 - i) as sparingly as possible; and

- ii) only when the House is satisfied that to exercise it is essential in order to provide reasonable protection for the House, its Members or its officers, or others involved in Parliamentary proceedings, from such improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with the performance of their respective functions;
- b) the existence of any other remedy for any act which may be held to be a contempt; and
- c) whether any such act was committed knowingly or without reasonable excuse.

Annex 3: Draft House of Commons Standing Orders

Evidence: General provisions

A. Powers to seek evidence

1. A witness may be invited to attend a committee meeting to give evidence. A witness shall be summoned to appear (whether or not the witness was previously invited to appear) only where the committee has made a decision that the circumstances warrant the issue of a summons.
2. Where a committee desires that a witness produce documents relevant to the committee's inquiry, the witness shall be invited to do so, and an order that documents be produced shall be made (whether or not an invitation to produce documents has previously been made only where the committee has made a decision that the circumstances warrant such an order.
3. A witness shall be given reasonable notice of any meeting to which the witness is either invited or summoned to appear, of these procedures and of the terms of reference of the relevant committee inquiry, or a statement of the subject of the session. Where appropriate a witness shall be supplied with a transcript of relevant evidence already taken.

B. Exercise of power to send for persons, papers, and records

1. A committee with the power to send for persons, papers, and records may order that a summons be issued to any person—
 - a) to attend before that committee to be examined and give evidence; and
 - b) to produce papers and records in that person's possession, custody or control to that committee.
2. Every summons issued under this Standing Order—
 - a) must state the time and place at which it is to be complied with by the person to whom it is addressed; and
 - b) be signed by the Chair, or acting Chair, of the committee.

C. Written submissions

1. A witness will be given the opportunity to make a submission in writing before appearing to give oral evidence.

D. Decline or deletion of evidence

1. A select committee may decline to accept, or expunge from any transcript of proceedings, such evidence or statement as it considers fit.

E. Release of submissions

1. A select committee may make a written submission available to the public at any time after receiving it.
2. Unless the Committee decides otherwise, a submission (if not either confidential or already made available) becomes available to the public on the committee hearing oral evidence in public from the witness who made the submission.
- (3) A submission accepted as evidence remains confidential unless the committee has—
 - a) made that submission public; or
 - b) given permission for the publication of the submission in question; or
 - c) agreed that witnesses shall have permission to make their submissions public.

F. Private evidence

1. A select committee may decide to hear or receive evidence in private.
2. Evidence heard or received in private is confidential to the committee unless or until it reports to the House.

Rights of witnesses**A. Access to information**

1. A committee will give a witness reasonable access to any material or other information that the witness has produced to the committee.

B. Matters of concern before giving evidence

1. A person who is to appear before a committee may raise any matter of concern with the clerk of the committee before appearing before the committee. Any such matters will be brought to the attention of the committee.

C. Application for evidence to be private

1. re providing written evidence to a committee, a person may ask for that evidence to be treated as confidential.
2. Before giving oral evidence, or at any time while being heard, a witness may ask that any or all of that evidence be heard in private.
3. A witness must give reasons for any such application.
4. Before giving evidence in private, a witness will be informed as to whether there is a possibility that the evidence may become available when the committee reports to the House or, if it may seriously damage the reputation of any person, may be made available to that person.

D. Advisers

1. A witness may apply to be accompanied by a legal or other adviser and to consult any such adviser in the course of a meeting at which the witness appears. Any such request shall include reasons why the witness considers it necessary to be accompanied by an adviser. If an application is not granted, the witness shall be notified of reasons for that decision.
2. A witness accompanied by a legal or other adviser shall be given reasonable opportunity to consult counsel during a meeting at which the witness appears, but shall address the committee directly. A committee shall not hear parties by counsel unless authorised to do so by order of the House.

E. Conduct of examination

1. A chair of a committee shall ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry.
2. Where a member of a committee requests discussion of a ruling of the Chair on this matter, the committee shall deliberate in private session and determine whether any question which is the subject of the ruling is to be permitted.

F. Objections to answer

1. Where a witness objects on any ground to answering a relevant question put to the witness, the witness will be invited to state the ground upon which objection to answering the question is taken.
2. Where a witness objects to answering a question on any ground, the committee, unless it decides immediately that the question should not be pressed, will then consider in private whether it will insist upon an answer to the question, having regard to the importance to the proceedings of the information sought by the question. The committee may decide that the public interest to hear the answer in private.
3. If the committee decides that it requires an answer to the question, the witness will be informed of that decision, and required to answer the question.
4. Where a witness declines to answer a question to which the committee has required an answer, the committee may report this fact to the House.

G. Transcripts of evidence

1. Reasonable opportunity will be afforded to witnesses to make corrections of errors of transcription in any transcript of their evidence.

H. Evidence containing allegations

1. At any stage during a select committee's proceedings, the committee may consider hearing in private evidence that contains an allegation that may seriously damage the reputation of a person. The committee may also invite that person to be present during the hearing of such evidence, whether in public or private.

2. Where a witness gives evidence reflecting adversely on a person and the committee is not satisfied that that evidence is relevant to the committee's inquiry, the committee shall give consideration to expunging that evidence from the transcript of evidence, and to forbidding the publication of that evidence.

3. Where evidence is given which reflects adversely on a person and action of the kind referred to in paragraph (2) is not taken in respect of the evidence, the committee shall provide reasonable opportunity for that person to have access to that evidence and to respond to that evidence by written submission and, if the committee thinks fit, appearance before the committee.

4. A person who is to appear before a committee will be informed of or given a copy of any evidence (other than private evidence) or material in the committee's possession that contains an allegation that may seriously damage the reputation of that person.

5. The Committee may choose to withhold the identity of the person making an allegation if it considers it appropriate to do so.

I. Opportunity to respond to allegations that may seriously damage reputation

1. When an allegation which may seriously damage the reputation of a person is made in written evidence accepted by the committee, or in oral evidence, the committee will inform that person of the allegation.

2. Any person against whom such an allegation has been made and who has been informed of that allegation—

- a) will be given a reasonable opportunity to respond to the allegation by written submission and, if the Committee considers it necessary, appearance before the committee, and
- b) may ask that further witnesses give evidence to the committee in that person's interest.

3. A response made or further evidence given under this Standing Order may be received or heard in private, if the allegation was made in private evidence.

Exercise of Penal Powers

A. Procedure for raising complaints of contempts committed in connection with committee proceedings

1. Any special report made by a committee complaining of a specific contempt, or suggesting contempt may have occurred, will stand automatically referred to the Committee of Privileges.

2. Where the contempt concerns the unauthorised release of committee documents, the Chair of the committee concerned will discuss the matter with the Liaison Committee or, if time does not permit this, the Chair of the Liaison Committee, before making any such Special Report.

3. In other cases, the committee concerned may authorise the Chair to discuss the matter with the Chair of the Liaison Committee, if it thinks fit.

B. Procedure for raising other complaints of contempt or breach of privilege

1. A Member shall give notice to the Speaker as soon as reasonably practicable.
2. The Speaker will decide whether the matter should have the precedence accorded to matters of privilege.
3. If the Speaker decides the matter should be given such precedence, he or she shall announce that decision to the House and the Member will be entitled to table a motion for the following day.
4. If the motion recommends that the matter be referred to the Committee of Privileges the Speaker shall allow a statement from the proposer of the motion, from a Member who wishes to oppose the motion, [and from the Leader of the House and the shadow Leader] and then shall put the question.

C. Procedure on consideration of reports from the Committee of Privileges

1. Any motion recommended in a Report from the Committee of Privileges may be placed upon the Order Paper in the name of the Chair of the committee, and such a motion must be considered no later than six sitting days after it first appears.
2. A motion has been tabled in accordance with paragraph (1) of this Order shall be amendable, but no amendment shall be offered to increase any penalty recommended by the committee.
3. Members of the Committee of Privileges, and, if the matter concerns a contempt committed in relation to a committee, members of the committee concerned, may speak in the debate upon such a motion, but may not vote on any motion or any amendment thereto.

Committee of Privileges

A. Inquiries into alleged contempts

1. The Committee of Privileges shall take the following criteria into account when inquiring into any matter referred to it:
 - a) the principle that the House's penal jurisdiction should be exercised:
 - i) as sparingly as possible, and
 - ii) only when the House is satisfied that to exercise it is essential in order to provide reasonable protection for the House, its Members or its officers, or others involved in parliamentary proceedings, from such improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with the performance of their respective functions;
 - b) the existence of any other remedy; and

- c) whether such act was committed knowingly or without reasonable excuse.

B. Committee of Privileges: contempts

1. Acts or omissions which inhibit a Committee of Privileges inquiry may be considered as a contempt by that Committee without any further reference from the House.

C. Committee of Privileges: time allowed for responses

1. In all cases, even simple or urgent cases, the Committee shall allow at least twenty-four hours for a written response to its initial inquiry and shall consider reasonable requests for longer time to be allowed.

D. Committee of Privileges: Process to be used when admonishment is contemplated

Written evidence

1. A person alleged to have committed contempt (an inquiry subject) shall, as soon as practicable, be informed, in writing, of the nature of any allegations against the person, and of the details of any evidence which has been given in respect of the person. That person will be invited to respond.

2. Responses to allegations submitted by inquiry subjects may include additional questions which the subjects of the inquiry consider should be explored with key witnesses (see below) or other relevant parties.

3. The Committee of Privileges shall inform any other relevant parties in writing of the inquiry and, if that Committee considers it necessary, seek such further evidence as the Committee sees fit.

4. The Committee of Privileges may pursue issues raised by the subjects of the inquiry in writing with key witnesses or other relevant parties.

Oral evidence

5. The Committee of Privileges shall offer the subjects of any inquiry the opportunity to give oral evidence. That Committee may also offer witnesses or other relevant parties the opportunity to give oral evidence.

6. When giving evidence, the subjects of the inquiry, witnesses and other relevant parties may be accompanied by a legal or other adviser, and may take advice from them, but shall answer in person.

7. All transcripts will be made available to the subjects of the inquiry and to witnesses and other relevant parties.

8. The Committee of Privileges will invite final written submissions from the subjects of the inquiry, and may, if necessary, seek further evidence, either oral or in writing.

Determination

9. If the Committee of Privileges intends to criticise any person or persons it shall first inform that person in writing:

- a) of the criticism;
- b) of the facts that the Committee of Privileges considers substantiate the criticism;
- c) Of any evidence which demonstrates those facts; and
- d) Of an invitation to the person or persons subject to the criticism to provide a written response.

10. The Committee of Privileges shall invite written responses to warning letters within 14 days.

11. The Committee of Privileges shall consider responses to warning letters before reporting to the House.

12. The Committee of Privileges shall report to the House.

General

13. When considering the allegations against the subjects of the inquiry, the Committee of Privileges will apply the same standard of proof as applied to allegations against Members.

14. Requests for information shall be made in writing.

15. Responses received from witnesses or other relevant parties shall be disclosed to the subjects of the inquiry.

16. Normally oral evidence will be taken in public, but it will not be broadcast. The Committee of Privileges will consider requests to take oral evidence in private.

17. Evidence given by witnesses shall be sworn

18. Evidence submitted to the Committee of Privileges (oral or written) is to be held in confidence until such time as that Committee orders or gives permission for its publication, save that the subjects of the inquiry and witnesses or other relevant parties may disclose it to any adviser or legal representative notified to that Committee. Where evidence is given in public the transcripts will be published as quickly as possible, and may be referred to.

E. Committee of Privileges: Procedure to be used in cases when fine or imprisonment may be recommended

1. A person shall be informed, as soon as practicable and in writing, of the nature of any allegations against that person, and of the particulars of the evidence which has been given in respect of the person (the inquiry subject).

2. The Committee of Privileges shall extend to that person all reasonable opportunity to respond to such allegations and evidence by:

- a) making a written submission to the Committee of Privileges;
 - b) giving oral evidence before the Committee of Privileges;
 - c) having other evidence placed before the Committee of Privileges; and
 - d) having witnesses examined before the Committee of Privileges.
3. Where oral evidence is given containing any allegation against, or reflecting adversely on, an inquiry subject, the Committee of Privileges shall ensure as far as possible that that person is present during the hearing of that evidence, and shall afford all reasonable opportunity for that person, by counsel or personally, to examine witnesses in relation to that evidence.
4. A person appearing before the Committee of Privileges may be accompanied by counsel, and shall be given all reasonable opportunity to consult counsel during that appearance.
5. The inquiry subject will be entitled to have the free assistance of an interpreter if he or she cannot understand or speak English.
6. Evidence given by witnesses shall be sworn.
7. Hearing of evidence by the Committee of Privileges shall be conducted in public, except where:
- a) the Committee of Privileges accedes to a request by a witness that the evidence of that witness be heard in private;
 - b) the Committee of Privileges determines that the interests of a witness would best be protected by hearing evidence in private; or
 - c) the Committee of Privileges considers that circumstances are otherwise such as to warrant the hearing of evidence in private.
8. The Committee of Privileges may authorise, subject to rules determined by that Committee, the examination by counsel of witnesses before that Committee.
9. If the Committee of Privileges intends to criticise a subject of the inquiry it will first send a warning letter, and such a letter will:
- a) state what the criticism is;
 - b) contain a statement of the facts that the Committee of Privileges considers substantiate the criticism and
 - c) refer to any evidence which supports those facts.
10. The inquiry subject afforded all reasonable opportunity to make submissions to the committee, in writing and orally, on those findings. The Committee of Privileges shall take such submissions into account before making its report.
11. The standard of proof shall be beyond reasonable doubt.

Legal representation: general

1. If a subject of the inquiry wishes to be supported by a legal or other adviser, the details of that adviser must be notified to the Committee of Privileges.
2. The cost of legal representation will be borne by the clients of any legal representatives, save that the Committee of Privileges may recommend to the House of Commons Commission the reimbursement of costs of representation of witnesses before that Committee, including inquiry subjects. Where the House of Commons Commission is satisfied that a person would suffer substantial hardship due to liability to pay the costs of representation, it may make reimbursement of all or part of such costs as it considers reasonable.

Procedural fairness

A. Disqualification for bias

A Member who has (whether in the House or outside the House) made an allegation identifying by name or otherwise a person as being responsible for or associated with an alleged contempt may not participate in any Committee of Privileges inquiry into that or any other alleged contempt other than as a witness.

B. Complaints of bias

1. A complaint of bias on the part of a member of a committee may be made by any Member (whether or not a member of that committee) or by any person appearing or about to appear before that committee
2. A complaint of bias must be made, in writing, to the Chair.
3. The Chair, after considering any information or comment from the Member against whom the complaint is made, will decide whether the Member is disqualified by reason of actual or apparent bias.
4. Any member of a committee who is dissatisfied with the Chair's decision on a complaint of bias may refer the matter for decision to the Speaker, whose decision shall be conclusive.

Annex 4: Call for evidence

The Green Paper was published on 26 April 2012 (Cm 8318). In it the Government set out a number of draft clauses and asked a number of detailed questions about privilege. The topics covered included:

- 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

The Government consultation closed on 30 September 2012.

The Committee will draw on the responses to the Government consultation in its work, but would welcome any additional evidence on the questions posed by the Government or the draft clauses published in the Green Paper.

The provisional deadline for submissions is Thursday 24 January 2013 after which date the Committee will consider whom to call to give oral evidence to the inquiry. The Committee will, however, consider accepting written submissions received after this date.

Appendix: Letter from Treasury Solicitor, 21 March 2002

Letter of 21 March 2002 from Juliet Wheldon CB QC, HM Procurator General and Treasury Solicitor, to the Solicitor of the Department for Work and Pensions

Application of Legislation to Parliament: Exclusive Cognisance

The Corporate Officers of the two Houses of Parliament have been looking at the way in which legislation applies to their staff and premises. The background is the Houses' realisation that where community law impinges on their activities (most acutely in the field of health and safety) it will, if it satisfies the usual test, have direct effect upon them as "emanations of the state". The parliamentary privilege of not being bound by legislation unless it expressly extends to them does not apply in these circumstances and is indeed a source of confusion. Since it is not the general practice to extend legislation implementing Community Obligations to Parliament (although there are exceptions as in the field of employment law and, prospectively, data protection), a reader of the statute book may be left under the mistaken impression that Parliament is immune from the particular provisions in question.

The Corporate Officers consider that in future the two Houses of Parliament should, as a general rule, be expressly bound by legislation which creates individual rights and which can conceivably impinge on their activities. They have concluded that the only practicable way of achieving this outcome is a policy of extension to the two Houses (in consultation with them) of legislation applicable to the Crown, or its servants, where this is appropriate. Moreover, although as I have said the background to this new approach is European legislation, they believe that it should apply whether the source of the legislation is domestic or European and indeed whether the legislation is primary or secondary.

In line with this new policy, departments are asked in future to consult the respective House authorities (treating John Vaux, Speaker's Counsel, and David Saunders, Counsel to the Chairman of Committees, as contact points) on whether any proposed legislation which applies to the Crown, or its servants, should also apply to the two Houses and to instruct the draftsman accordingly.

David Saunders has written to First Parliamentary Counsel to tell him of this new requirement and Parliamentary Counsel will therefore be alert to the issue. It is, however, important that lawyers in departments should be aware of the new policy, particularly when instructing Parliamentary Counsel on primary legislation or when themselves drafting instruments particularly those implementing EU obligations. I would therefore be grateful if you would circulate this letter within your department. Its contents will also appear on LION.

Members and interests

The Members of the Joint Committee who conducted this inquiry were:

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

Thomas Docherty declared an interest as PPS to, and (*later*) acting Deputy for, the Shadow Leader of the House of Commons.

Baroness Healy of Primrose Hill declared that her husband was a member of Parliament.

Full lists of Members' interests are recorded in the House of Commons Register of Members' Financial Interests:

<http://www.publications.parliament.uk/pa/cm/cmregmem/contents.htm>

and the House of Lords Register of Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Formal Minutes of the Joint Committee

Monday 14 January 2013

Members present:

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

Sir Menzies Campbell took the Chair, as the senior Commons Member present.

DECLARATION OF INTERESTS

Baroness Healy of Primrose Hill declared an interest that her husband was a Member of Parliament.

ELECTION OF CHAIRMAN

Lord Brabazon of Tara was elected as Chairman.

Ordered, That Mr William Cash report the election of Lord Brabazon of Tara as Chairman to the House of Commons.

CALL FOR EVIDENCE

The Committee agreed the draft Call for Evidence, with amendments.

The Committee adjourned till Tuesday 22 January at 5.00 pm

Tuesday 22 January 2013

Members present:

Lord Brabazon of Tara, in the Chair

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

INFORMAL SEMINAR ON PARLIAMENTARY PRIVILEGE

The Committee agreed to hold an informal seminar on parliamentary privilege with Professor Tony Bradley, Ben Emmerson QC, Michael Carpenter, Speaker's Counsel, Peter Milledge, Counsel to the Chairman of Committees, and Audrey O'Brien, Clerk of the House of Commons, Canada.

Adjourned till Tuesday 29 January at 5.00 pm

Tuesday 29 January 2013

Members present:

Lord Brabazon of Tara, in the Chair

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

PUBLICATION OF WRITTEN EVIDENCE

Ordered, That the following papers be reported to both Houses for publication on the internet:

- Richard Gordon QC
- Sir Malcolm Jack KCB
- Newspaper Society

ORAL EVIDENCE

Charles W Johnson III, former Parliamentarian of the House of Representatives, United States of America, gave evidence [*via videolink*].

David Howarth, Reader in Law, University of Cambridge, and Nigel Pleming QC gave evidence.

Adjourned till Tuesday 5 February at 5.00 pm

Tuesday 5 February 2013

Members present:

Lord Brabazon of Tara, in the Chair

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

DECLARATION OF INTEREST

Thomas Docherty declared an interest as PPS to, and (*later*) acting Deputy for, the Shadow Leader of the House of Commons.

ORAL EVIDENCE

Sir Malcolm Jack KCB, former Clerk of the House of Commons, gave evidence [*via video-link*].

John Hemming MP gave evidence.

Mike Dodd, Legal Editor, Press Association, and Sarah McColl, Solicitor Advocate, BBC Editorial Legal Department, Media Lawyers Association, gave evidence.

PUBLICATION OF WRITTEN EVIDENCE

Ordered, That the following papers be reported to both Houses for publication on the internet:

- Archerfield Partners LLP
- Lord Lester of Herne Hill
- Robert Whitfield.

Adjourned till Monday 11 February at 7.30 pm

Monday 11 February 2013

Members present:

Lord Brabazon of Tara, in the Chair

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

ORAL EVIDENCE

Mary Harris, Clerk of the New Zealand Parliament, gave evidence [*via video-link*].

Bernard Wright, Clerk of the Australian House of Representatives, and Dr Rosemary Laing, Clerk of the Australian Senate, gave evidence [*via video-link*].

PUBLICATION OF WRITTEN EVIDENCE

Ordered, That the following papers be reported to both Houses for publication on the internet:

- Bernard Bibby
- Simon Cramp
- Clerk of the House of Commons
- Clerk of the Parliaments.

Adjourned till Tuesday 12 February at 5.00 pm

Tuesday 12 February 2013

Members present:

Lord Brabazon of Tara, in the Chair

Lord Bew	Sir Menzies Campbell
Lord Davies of Stamford	Mr William Cash

Baroness Healy of Primrose Hill
Baroness Stedman-Scott

Mr Bernard Jenkin
Mrs Eleanor Laing
Tristram Hunt

ORAL EVIDENCE

David Beamish, Clerk of the Parliaments, Sir Robert Rogers KCB, Clerk of the House of Commons, Michael Carpenter, Speaker's Counsel in the House of Commons, and Peter Milledge, Counsel to the Chairman of Committees in the House of Lords, gave evidence.

WRITTEN EVIDENCE

The Committee agreed that the written submission from John Hemming MP would not be accepted as evidence to the Committee.

Adjourned till Tuesday 26 February at 5.00 pm

Tuesday 26 February 2013

Members present:

Lord Brabazon of Tara, in the Chair

Lord Bew	Mr William Cash
Lord Davies of Stamford	Thomas Docherty
Baroness Healy of Primrose Hill	Mr Bernard Jenkin
Baroness Stedman-Scott	Mrs Eleanor Laing
Lord Shutt of Greetland	Tristram Hunt

PUBLICATION OF WRITTEN EVIDENCE

Ordered, That the following paper be reported to both Houses for publication on the internet:

- New South Wales Legislative Council.

HEADS OF REPORT

The Committee considered the matter of the Heads of the Report from the Committee.

Adjourned till Tuesday 5 March at 5.00 pm

Tuesday 5 March 2013

Members present:

Lord Brabazon of Tara, in the Chair

Lord Bew	Sir Menzies Campbell
Lord Davies of Stamford	Mr William Cash
Baroness Healy of Primrose Hill	Thomas Docherty
Baroness Stedman-Scott	Mr Bernard Jenkin
	Mrs Eleanor Laing
	Tristram Hunt

PUBLICATION OF WRITTEN EVIDENCE

Ordered, That the following paper be reported to both Houses for publication on the internet:

- Further written evidence from the Clerk of the House of Commons.

ORAL EVIDENCE

Lord Judge, Lord Chief Justice of England and Wales, and Lord Justice Beatson gave evidence.

Adjourned till Tuesday 12 March at 5.00 pm

Tuesday 12 March 2013

Members present:

Lord Brabazon of Tara, in the Chair

Lord Davies of Stamford	Sir Menzies Campbell
Baroness Healy of Primrose Hill	Tristram Hunt
Lord Shutt of Greetland	
Baroness Stedman-Scott	

Three Commons Members not being present, the Chair adjourned the Committee till Tuesday 19 March at 5.00 pm.

Tuesday 19 March 2013

Members present:

Lord Brabazon of Tara, in the Chair

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

DRAFT REPORT

The Committee considered the matter of the Draft Report from the Committee.

Adjourned till Tuesday 16 April at 5.00 pm

Tuesday 16 April 2013

Members present:

Lord Brabazon of Tara, in the Chair

Lord Bew	Sir Menzies Campbell
Lord Davies of Stamford	Mr William Cash

Baroness Healy of Primrose Hill
 Lord Shutt of Greetland
 Baroness Stedman-Scott

Mr Bernard Jenkin
 Mrs Eleanor Laing
 Tristram Hunt

DRAFT REPORT

The Committee further considered the matter of the Draft Report from the Committee.

Adjourned till Tuesday 14 May, in the next Session of Parliament, at 5.00 pm

Tuesday 14 May 2013

Members present:

Lord Brabazon of Tara, in the Chair

Lord Bew
 Baroness Healy of Primrose Hill
 Lord Shutt of Greetland
 Baroness Stedman-Scott

Sir Menzies Campbell
 Mr Bernard Jenkin
 Mrs Eleanor Laing

DRAFT REPORT

The Committee further considered the matter of the Draft Report from the Committee.

Adjourned till Tuesday 21 May at 5.00 pm

Tuesday 21 May 2013

Members present:

Lord Brabazon of Tara, in the Chair

Lord Bew
 Lord Davies of Stamford
 Baroness Healy of Primrose Hill
 Lord Shutt of Greetland
 Baroness Stedman-Scott

Mr William Cash
 Mr Bernard Jenkin
 Mrs Eleanor Laing

DRAFT REPORT

The Committee further considered the matter of the Draft Report from the Committee.

Adjourned till Tuesday 4 June at 5.00 pm

Tuesday 4 June 2013

Members present:

Lord Brabazon of Tara, in the Chair

Lord Bew
 Baroness Healy of Primrose Hill
 Lord Shutt of Greetland
 Baroness Stedman-Scott

Mr William Cash
 Thomas Docherty
 Mr Bernard Jenkin
 Mrs Eleanor Laing

PUBLICATION OF WRITTEN EVIDENCE

Ordered, That the following paper be reported to both Houses for publication on the internet:

- David Howarth and Nigel Pleming QC.

DRAFT REPORT

The Committee further considered the matter of the Draft Report from the Committee.

Adjourned till Tuesday 18 June at 5.00 pm

Tuesday 18 June 2013

Members present:

Lord Brabazon of Tara, in the Chair

Lord Bew	Sir Menzies Campbell
Lord Davies of Stamford	Mr William Cash
Lord Shutt of Greetland	Mr Bernard Jenkin
Baroness Stedman-Scott	Tristram Hunt

Draft Report (Parliamentary Privilege), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 279 postponed.

Paragraphs (now paragraphs 280 to 284)—(*Mr Bernard Jenkin*)—brought up and read the first time.

Question put, That the paragraphs be read a second time.

Question agreed to.

Paragraphs added to the Report.

Postponed paragraphs 1 to 35 read and agreed to.

Postponed paragraph 36 read, amended, and agreed to.

Postponed paragraphs 37 to 84 read and agreed to.

Postponed paragraphs 85 to 87 further postponed.

Postponed paragraph 88 (now paragraph 85) agreed to.

Postponed paragraphs 85 to 87 (now paragraphs 86 to 88) read and agreed to.

Postponed paragraph 124.

Amendment proposed, in line, to leave out from "decided." to the end of the paragraph.—*Lord Davies of Stamford*.

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 7
Lord Davies of Stamford	Lord Bew Lord Brabazon of Tara Sir Menzies Campbell Mr William Cash Mr Bernard Jenkin Lord Shutt of Greetland Baroness Stedman-Scott

Question accordingly negatived.

Paragraph agreed to.

Postponed paragraph 125 read and agreed to.

Amendment proposed, to leave out paragraphs 126 to 136 and insert —

“Notwithstanding the comments of the Lord Chief Justice, we do not consider that the use by the courts of Select Committee reports in judicial review cases necessarily constitutes the “questioning” of those reports under the terms of Article 9 of the Bill of Rights. Parliament is the central forum of public debate under our constitution. It is not only passes legislation, but debates what should be in legislation and holds Government to account in the implementation of policy. It is right that within a democracy the courts should have freedom to refer to things said by parliamentary Committees when deciding judicial review cases, where the actions of Government are at issue. We therefore believe that the conclusions reached by parliamentary Committees on ministerial or governmental actions should be given due weight when these actions are challenged in the courts.

We do not consider that Committee conclusions should in such circumstances be open to challenge or questioning: indeed, our approach is modelled on that adopted in *Pepper v. Hart*, where ministerial statements in Parliament may be adduced in order to cast light on the meaning of obscure legislative provisions, without this being regarded as the “questioning” of proceedings. We therefore propose that if a conclusion is brought forward as evidence by one party to a case, it should not be admissible for other parties to challenge the Committee’s reasoning or to question its motivation—to do so would contravene Article 9. On the other hand, it should be open to other parties in a particular case to respond by identifying and bringing forward other relevant conclusions, for example those reached by another Committee considering the same or a similar issue, where these supported a different interpretation of the law. Where there was inconsistency between the views expressed by different Committees, it would be for the court to decide what weight to place upon those views in interpreting the facts of the case.

Our approach in part echoes the recommendation of the 1999 Committee that “article 9 should not be interpreted as precluding the use of proceedings in Parliament in court for the purpose of judicial review of governmental decisions” (though we recognise that that recommendation, though broadly worded, was concerned primarily with statements made by ministers in the course of debate) {ref: Report of the Joint Committee on Parliamentary Privilege, Session 1998-99, HL Paper 43-I, HC 214-I, paragraph 55}. We do not challenge the courts’ use of such statements in judicial review cases, but our recommendation goes further. We believe that where a Select Committee has stated a clear conclusion, for instance on the lawfulness of some ministerial action, a party to a judicial review case should be able to bring forward that conclusion in evidence, without it being questioned or impeached. Indeed we think that it would be quite artificial, and would have a distorting effect, for such a conclusion to be ignored. The fact that a Select Committee had come to such a conclusion can hardly be dismissed as irrelevant.

It has been suggested that this may, in certain circumstances, lead to an “inequality of arms”, in that only one party to a case may be able to pray in aid Select Committee conclusions. But that is no more than saying that the two parties are unequal because a fact of the case favours one rather than the other—the existence of a Select Committee conclusion being an undeniable fact. We therefore welcome the possibility of calling upon Select Committee conclusions it as a reflection of the centrality of Parliament’s scrutiny of the Executive within our constitutional arrangements.

We recommend that both Houses adopt resolutions stating their view that conclusions reached by Select Committees of either or of both Houses should be admitted as factual and supportive evidence in judicial review cases before the courts, but that it should not be open to parties to such cases, or to the court itself, to question or impeach those conclusions.”—*Lord Davies of Stamford*.

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 7
Lord Davies of Stamford	Lord Bew Lord Brabazon of Tara Sir Menzies Campbell Mr William Cash Mr Bernard Jenkin Lord Shutt of Greetland Baroness Stedman-Scott

Question accordingly negatived.

Postponed paragraphs 137 to 225 read and agreed to.

Postponed paragraph 226 read, amended, and agreed to.

Postponed paragraphs 227 to 243 read and agreed to.

Postponed paragraph 244 read, amended, and agreed to.

Postponed paragraphs 245 to 269 read and agreed to.

Paragraphs 270 to 273 (now paragraphs 275 to 278) read and agreed to.

Paragraph 274 (now paragraph 279) read, amended, and agreed to.

Paragraphs 275 to 279 (now paragraphs 280 to 284) read and agreed to.

Annexes 1 to 3 agreed to.

A letter dated 21 February 2002 from the Treasury Solicitor was appended to the Report.

Resolved, That the Report be the Report of the Committee to the House of Lords and the House of Commons.

Ordered, That the Chairman make the Report to the House of Lords and that Mr William Cash do make the Report to the House of Commons.

PUBLICATION OF WRITTEN EVIDENCE

Ordered, That the following paper be reported to both Houses for publication on the internet:

- Rt Hon Kevin Barron MP, Chair of the House of Commons Committee on Standards

[Adjourned *sine die*]

List of oral evidence

Note: oral evidence can be found on the Committee's website at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/jcpp/new-committee-publications>

Tuesday 29 January 2013

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Charles W Johnson III, former Parliamentarian, US House of Representatives QQ 1-27

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 QQ 28-59

Tuesday 5 February 2013

Sir Malcolm Jack KCB, former Clerk of the House of Commons QQ 60-70

John Hemming MP QQ 71-94

Mike Dodd, Legal Editor, Press Association, and **Sarah McColl**, Solicitor Advocate, BBC Editorial Legal Department, Media Lawyers Association QQ 95-122

Monday 11 February 2013

Mary Harris, Clerk of the New Zealand House of Representatives QQ 123-158

Dr Rosemary Laing, Clerk of the Australian Senate, and **Bernard Wright**, Clerk of the Australian House of Representatives QQ 159-190

Tuesday 12 February 2013

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

Tuesday 5 March 2013

Lord Judge, Lord Chief Justice of England and Wales, and **Lord Justice Beatson** QQ 238-286

List of written evidence

Note: written evidence can be found on the Committee's website at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/jcpp/new-committee-publications>

- 1 Richard Gordon QC
- 2 Sir Malcolm Jack KCB, a former Clerk of the House of Commons
- 3 Newspaper Society
- 4 Bernard Bibby
- 5 Archerfield Partners LLP
- 6 Lord Lester of Herne Hill
- 7 Robert Whitfield
- 8 Simon Cramp
- 9 Sir Robert Rogers KCB, Clerk of the House of Commons
- 10 Further written evidence from the Clerk of the House of Commons
- 11 David Beamish, Clerk of the Parliaments
- 12 President and Clerk of the New South Wales Legislative Council
- 13 Rt Hon Tom Brake MP, Deputy Leader of the House of Commons
- 14 David Howarth and Nigel Fleming QC
- 15 Rt Hon Kevin Barron MP, Chair of the House of Commons Committee on Standards

List of responses to the Government consultation on the Green Paper, Cm 8318

Note: These responses are published on the www.gov.uk website

Dr Adam Tucker, lecturer in Law, University of Manchester

Geoffrey Lock

John Hemming MP

Sir William McKay KCB, former Clerk of the House of Commons

Crown Prosecution Service

Dr Andrew Defty, Professor Hugh Bochel and Jane Kirkpatrick, School of Social Sciences, University of Lincoln

Mary Harris, Clerk of the House of Representatives, New Zealand

Press Association

Malcolm Peacock, Clerk of the Legislative Council, Western Australia

Media Lawyers Association