House of Commons

Justice Committee

Constitutional Reform and Renewal: Parliamentary Standards Bill

Seventh Report of Session 2008–09

Report, together with formal minutes, oral and written evidence

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The Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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The Reports and evidence of the Committee are published by The Stationery Office by Order of the House.

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Committee staff

The current staff of the Committee are Fergus Reid (Clerk), Dr Rebecca Davies (Second Clerk), Ruth Friskney (Adviser (Sentencing Guidelines)), Hannah Stewart (Committee Legal Specialist), Ian Thomson (Group Manager/Senior Committee Assistant), Sonia Draper (Committee Assistant), Henry Ayi-Hyde (Committee Support Assistant), Gemma Buckland (Public Policy Specialist, Scrutiny Unit) and Jessica Bridges-Palmer (Committee Media Officer).

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Report

Constitutional reform and renewal: Parliamentary Standards Bill

1. The Parliamentary Standards Bill was introduced in the House of Commons on 23 June 2009. It is expected to complete all of its Commons stages by 1 July and is intended to establish a system of independent regulation of Members' salaries, expenses, allowances and financial interests.

2. The response to recent revelations about Members' allowances has been a combination of particular proposals to reform the way Members' resources are dealt with, proposals for reviewing the balance of power between the executive and Parliament in terms of initiating parliamentary proceedings, new ways for the public to participate in parliamentary activity and wider constitutional reforms.

3. We started an inquiry into constitutional reform and renewal in June. The purpose of this report is to bring to the attention of the House—while proceedings in committee are taking place on the Parliamentary Standards Bill—the written evidence relating to the Bill which has been provided by the Clerk of the House and by several independent experts as well as the oral evidence given by the Clerk of the House, the Clerk of the Journals and Speaker's Counsel on 30 June 2009. This evidence session took place while the first day of proceedings in committee continued. We also received and are publishing a memorandum from the Secretary of State for Justice and Lord Chancellor prepared by First Parliamentary Counsel responding to the memorandum from the Clerk of the House.

4. We wish to draw special attention to the advice given by our witnesses on the possible implications of the Bill for parliamentary privilege, freedom of speech in parliament and the boundary between the courts and Parliament.

5. The Government's memorandum said "it is…impossible to end self-regulation without affecting privilege in some way". However, the creation of a body to administer allowances and pay need not affect privilege because these matters are not proceedings in Parliament. On the evidence of the Clerk of the House and Speaker's Counsel, the clauses affecting privilege may not be necessary to the primary purpose of the Bill. In the light of this, we welcome the Government's decision not to pursue Clause 6 of the Bill and we believe that Clause 10, in particular, could also be withdrawn at this stage. This would allow more measured consideration of issues of privilege than has been possible with second reading and committee stage taking place on consecutive days. It would still enable an independent body to be set up in good time to implement the recommendations of the Committee on Standards in Public Life in the autumn. The very tight timescale for consideration of Clause 10 and other clauses involving privilege and judicial review, if they are retained, is likely to lead to extensive debate in the House of Lords. (The Government intend that the provisions of this Bill shall in due course apply to the House of Lords.)

6. We note the evidence given on the merits of having a Parliamentary Privilege Act and consider that this is an appropriate time for this proposal to be further considered

Formal Minutes

Tuesday 30 June 2009

Members present:

Sir Alan Beith, in the Chair

Sian James	Dr Nick Palmer
Alun Michael	Andrew Turner
Julie Morgan	

Draft Report *Constitutional Reform and Renewal: Parliamentary Standards Bill*, 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 6 read and agreed to.

Resolved, That the Report be the Seventh Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

Oral and written evidence was ordered to be reported to the House for printing with the Report.

[Adjourned till Tuesday 7 July at 4.00 pm

Witnesses

Tuesday 30 June 2009

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List of written evidence

Oral evidence

Taken before the Justice Committee

on Tuesday 30 June 2009

Members present

Sir Alan Beith, in the Chair

Mrs Siân C James
Alun Michael
Julie Morgan
Dr Nick Palmer
Mr Andrew Turner

Witnesses: **Dr Malcolm Jack**, Clerk and Chief Executive, **Andrew Kennon**, Clerk of the Journals, and **Michael Carpenter**, Speaker's Counsel, House of Commons, gave evidence.

Q1 Chairman: Dr Jack, Mr Kennon and Mr Carpenter, welcome. We are particularly grateful to you, Dr Jack, presumably with the help of some of your colleagues, for responding so quickly to our request for written evidence relating to the Parliamentary Standards Bill. This evidence clearly was widely used, and extensively referred to, in yesterday's proceedings. We have the difficulty today that the Bill is proceeding while this goes on, although some of the clauses about which there has been the greatest argument have been deferred by the programme motion to tomorrow, but we are where we are and we therefore have to do what we can. I think we have your agreement, which again I warmly welcome, to enable us to print the transcript of proceedings overnight thus putting it into the hands of Members when they take part in the committee stage tomorrow. We are very grateful indeed for that. I wonder if I could start on the basis that I think it would help everybody both inside and outside the House by asking you to answer two very general questions. One is to set out what you think the purpose of parliamentary privilege is and secondly to indicate why it is considered important that proceedings in Parliament should not be called into question in any court?

Dr Jack: Chairman, first of all, thank you very much for inviting us here this afternoon. We are very pleased to be able to give evidence on this subject of all subjects. Perhaps I can wrap it up in a bit of history as well, if the Committee will indulge me for a moment, because I think it is quite important to get a bit of perspective, and that will come to answering your two general questions, possibly conflated into one. As far as the Bill is concerned and what the House is concerned with and what your Committee is concerned with at the moment is a sort of boundary dispute, if I can put it that way, between Parliament on the one hand and the courts on the other. The boundary dispute was a different one when privilege started. I am sure the Committee knows that very well. The boundary then was between Parliament and the Crown; Parliament and the Executive. In the early history of privilege the two principal and important privileges were freedom from arrest (because as Members know the King was quite fond of arresting Members who displeased him) and freedom of speech, which of course was always an early part of the privileges of both Houses, although today I am principally talking about the Commons because of the nature of the Bill at the moment. Freedom of speech eventually got codified in Article IX of the Bill of Rights of 1689 and I think this brings us very much to your question about proceedings. The Bill of Rights said that "freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." There has been a lot of wise examination of the meaning of the various phrases in Article IX, but I think it is interesting that very early on that both speech/debate and proceedings were encapsulated in Article IX so when we are talking about proceedings we are also talking about debates. Of course for Members of the House, debating is really the principal way in which they take part in proceedings. It is not the only way—they move amendments, they vote and so on—but the principal part of their participation in proceedings is through debate. Article IX really brings together the words spoken in Parliament and the proceedings, the things that are done, the passing of bills, making of select committee reports, whatever it happens to be, those two aspects. Going on a little bit with the history—and I will not detain the Committee too long on this because I know that we are concerned with the present, but I think it is quite instructive—throughout the 19th century you have the sort of to-ing and fro-ing between Parliament and the courts, principally the House of Commons and the courts. I have got with me a very interesting quotation from as early as 1839 when Lord Denman was presiding in the case of *Stockdale v Hansard* and he said: "While not interfering with the internal proceedings of the House, the court could enquire as to whether privilege was properly asserted." We begin to have a distinction in this second part of the struggle, which I have very much simplified, in privilege history between Parliament and the courts, of the courts saying, "Look, there are internal proceedings of the House and things that the House does internally, it makes its standing orders, it has its debates, it controls its precincts and so on, and we do not want to get involved in those, but we are concerned with the ambit, we are concerned with the outline, the boundaries, and it is our business to determine that." I think originally—and Speaker's Counsel will

correct me if I am wrong—the courts completely ignored the *lex parliamenti* so there was no such thing and eventually they came to decide that there was such a thing, but in fact they could regulate it, at least as I say from the outside. During the 19th and 20th centuries there was this establishment of a sort of balance between Parliament and the courts where matters within Parliament—and we use this term "exclusive cognisance" which covers part of it because debates of course in the House are also covered by the internal proceedings that the judge was referring to—are not to be interfered with by the courts but the boundaries, as I say, are the domain of the courts. There are a number of cases of the courts not wanting to get into the exclusive cognisance area in the 19th century. This sort of tension goes on right into the 20th century. Once again just to give another example Lord Denning said in 1973 in another case, the *Pickin* case, that the courts could ensure that there was no abuse of parliamentary privilege. In other words, the courts would define whether the ambits of privilege were being properly followed or not. Out of all this, and there is still some uncertainty about where this boundary is, both Parliament and the courts have recognised that, for mutual, I would not say "survival" but for mutual comfort, it is better not to go into the area of the other and so, as Members know very well, for example, the House has its *sub judice* rule and it does not debate matters which are before the courts although it reserves the right to do that in the case of legislation. It recognises that there are matters that it should not try and influence through debate. The court, for its part, keeps out of certain areas of internal proceedings, although another important case in the early 1990s, *Pepper v Hart*, brought the courts into interpreting for statutory clarification what certain things said in the House meant in respect of provisions of law which were ambiguous or unclear, but that is a rather restricted category. I am sorry that was a bit of a ramble, but I think what that brings us to really is where I see the Bill and that is at least some provisions of the Bill, particularly clauses 6 and 10, to some extent upset this balance that I have described to you in favour of the courts.

Q2 Chairman: Before we come to that can I put the question as my constituent or a constituent of other Members might put it: what does it matter if parliamentary privilege is somewhat eroded? What does it matter if the courts become to some limited extent involved in considering parliamentary proceedings?

Dr Jack: I think the main reason why privilege is important is what, on the Continent, is called "functional immunity". Parliaments have to be free, and members have to be free, to debate things without fear that matters that they might raise on behalf of their constituents (your constituents whom you mention) might then be challengeable in the courts. I think that is the essence of it. If there was not that freedom, Parliament could not really function effectively. Whether bits and pieces could be taken out is perhaps something we might come on to in detail.

Q3 Chairman: You mentioned two clauses in the Bill which most excite concern on these grounds and which you have set out in your memorandum. One is clause 6 and we take as read the Government's undertaking it is not going to move clause 6. Let us then just have a look at clause 10, which you said could have a "chilling effect on the freedom of speech of Members and of witnesses before Committees and would hamper the ability of House officials to give advice to Members." The Government in its memorandum to us seeks to argue that this is—and I do not have the phrase in front of me—at least an exaggerated view of its potential effect, to put it mildly. What do you say to that?

Dr Jack: I think that clause 10 does have a rather wide qualification of Article IX. I managed this morning to have a very quick, brisk look at the evidence that you have had from the Ministry and I am sure that you will be questioning them in due course about their view. I am glad to see that the view that I and my colleagues have expressed was supported by your academic witnesses. However, I think that clause 10 does introduce a qualification which could have wide application and it is simply not clear to us how wide.

Chairman: We are interrupted by a division on this Bill. We will return after the division.

The Committee suspended from 5.11 pm to 5.19 pm for a division in the House

Q4 Chairman: I think we can resume. The division is off, the debate is resumed and you were in the middle of explaining things.

Dr Jack: Members will see that clause 10(c) talks about evidence being inadmissible in proceedings against a Member of the House of Commons for an offence under section 9. Together with my colleagues we have thought up a little scenario affecting a select committee.

Q5 Chairman: You are going to do some role play for us!

Dr Jack: There will be no names in this little sketch. This is a select committee, as you are, taking evidence, and we thought perhaps from a firm concerned with exports or whatever (it does not really matter what the firm is concerned with). The players are two members of the committee, a witness and the clerk of the committee. One of the players, and I shall call that person Member A, is a paid adviser to the firm that the committee is questioning in its evidence session and he begins to ask a series of rather leading questions about what policy changes might be brought in by the Government to help firms like the one that is before the committee. The witness is the chairman of the firm. The Member has not registered his interest. Another member of the committee, Member B, starts to ask questions as well of the witness and they are fairly innocuous questions about what sort of provisions are available to a company like his, what sort of aid he can get under the existing arrangements, and the chairman of the company who, as I say is the witness, voluntarily answers all these questions as any witness would do before a committee like your own

Committee. Member A is investigated and charged under section 9 of the Bill, and that is why I referred you to 10(c), and he is found to have committed an offence and the case goes to court. Member A is the only person against whom criminal proceedings can be taken, but of course Member B and the witness and the clerk, as I shall show in a minute, could all be dragged into the case in the court because the defence counsel for Member A, who is acting in his interests, might think that it was quite a clever thing to try and cause collateral damage by impugning things that Member B said in perfect innocence in the evidence session. He might also want to know exactly what advice was given to committee members by the clerk so the clerk could be called to the court. The witness, who obviously was answering questions in complete openness to the committee, would also be called to the court to explain what his words meant. I am hoping to show in this example that the entire proceedings of a select committee could be disrupted by this provision.

Q6 Chairman: Is there any existing law under which that prosecution could have been brought?
Dr Jack: No because all these proceedings would be privileged.

Q7 Chairman: If there was an attempt to prosecute the same Member for paid advocacy under any existing law, the prosecution could only proceed without any reference to what had taken place in the committee?
Dr Jack: Yes, that is correct. I do not know whether Speaker's Counsel wants to come in on this.
Michael Carpenter: You mentioned the case of paid advocacy and I think that is the most interesting case, because I think in the other two offences, in my view, it is not necessary to adduce evidence of proceedings in Parliament for those cases, because they are not proceedings in Parliament. Of course, the section 9(1) offence is generally covered by the existing law already. Indeed there are assessments of some Members under the general law. On paid advocacy, it is not necessary to adduce evidence of proceedings in Parliament because if, for example, a Member were pursuing a particular cause as a paid advocate and he wrote a letter to a minister advocating this cause, then of course you could adduce evidence of that correspondence with the minister without offending the principle in the Bill of Rights. It is the proceedings in Parliament that you are concerned with. If I may just ask for your indulgence for another real life example that one heard of just a few days ago. That comes from Jersey where the States of Jersey passed a law about postal ballots and they made it an offence for a Member in any way to help a constituent fill in a postal ballot form or to be involved in any way in the way they filled in the form. Two Members made it quite clear during the debates on that Bill that they thought this Bill was ridiculous and that infirm and disabled people really did need help. They did not see it was sensible to have a Bill of that sort and they said they would disregard such a law. What happened is they were then prosecuted for an offence under the Act when it was passed and, although they pleaded guilty, the words that they used in debate were used by the judge in passing sentence to show the severity of what they had done. If I might strain your indulgence even further just to see how something like that could work here, there is the section 9(2) offence about failure to comply with the financial interest rules. There is a defence there of "reasonable excuse". Let us suppose a Member declared his financial interests and he wrote a letter and sent it and the letter was lost, or something like that. On the face of it he might have a reasonable excuse defence, but one cannot help feeling that, if that Member had said words in the proceedings on this Bill such that he disapproved of the whole principle of the criminal law applying, a well-briefed prosecution counsel would put those words to him in cross-examination to say, "Mr So-and-so, you say you have got this reasonable excuse; the fact is you never intended to comply with this law at all." Those are just two possible examples where it could arise. You might think they are fanciful but these fanciful things do have a strange habit of appearing in real life.

Q8 Chairman: What you have in that case is a conflict of the desirable, is it not, it is a conflict between the desirability of adducing any evidence which is relevant to securing the conviction of a person and the undesirability, you have argued earlier, of getting into a situation where the proceedings of Parliament might be undermined or circumscribed by the potential that they could be used in court proceedings. Indeed the freedom of members to oppose a piece of legislation might be circumscribed if they felt that in doing so they were at greater risk of subsequently being accused of not carrying it out.
Dr Jack: Yes, I think that is absolutely right, Chairman, and as the little scenario we sketched for you suggests that Members would not know at any time when this was going to happen, that is what we mean by the chilling effect. It is impossible to know when this sort of thing will actually arise.

Q9 Dr Palmer: Do you think it is a little bit fanciful to say that opposing a Bill, whether within Parliament or outside it, could be adduced as evidence of not intending to follow the law if it was passed? To take a controversy of recent years, foxhunting, there are numerous Members of Parliament who said that they opposed the ban on foxhunting, they have said it inside, they have said it outside the House, would you think that it is plausible that that would be used against them in court if they were actually accused of taking part in a foxhunt?
Michael Carpenter: All I can say is it did happen in Jersey, that example, I promise you it was not made up. One can never predict events in the future, I agree, but there would be other cases where people make statements of fact, adjournment debates where Members have to make points, they have to name names, they feel it is right to name names, in situations where there is not absolute certainty about what the facts are but it is important that this issue is

raised. Chairman, as you were saying, it is a conflict between two desiderata, one is that all relevant evidence should be before a court when it decides a case and the other is the freedom of speech should be preserved. I think the traditional view in this country, the United States and a lot of other countries is that at the end of the day this is the greater value, that if speech is not free in the House of Commons, it is not free anywhere. I think that is the traditional view.

Q10 Dr Palmer: Just as a follow up, in the Jersey case, were the damaging elements not that the members had actually indicated that they did not propose to adhere to the law? It was not that they said it was a bad idea; it was that they said that if it was passed they would not stick to it. That does seem rather relevant evidence; it seems odd if it cannot be mentioned.

Michael Carpenter: It goes back to this value judgment that one makes. Sometimes it is possible that a Member might say that in the heat of debate, as it were, the blood is up and you say something and then you realise, "My goodness there it is for all time printed in Hansard". It might have a "chilling" effect, and of course that expression comes from the Supreme Court cases on freedom of speech to describe, not a direct prohibition, but the sense that you must pull back, you must pull your punches for fear of the consequences.

Dr Jack: If I could just interject also, Chairman, because I think, just in passing, Speaker's Counsel has mentioned other jurisdictions. I think it is very important to understand what we are talking about is commonplace throughout democratic parliamentary systems, whether in Europe or in the Commonwealth; we are not unique by any means. All systems have immunities and they are recognised.

Q11 Mr Turner: I would like to see information which supports that, and disagrees with it actually, that would be helpful. It is all very well in the House, in the House as Mr Carpenter says sometimes you say something which you would not normally say. What matters about the Jersey case is they could have said it outside the House and that should have been enough but the question is whether people should recognise their special status within the House, and that worries me. What I was going to say was, some time ago I referred in debate to people in my constituency who, for various reasons wanted their names kept quiet. By some mistake the names were printed in Hansard, despite the fact I had not mentioned them. Now that is the reverse thing, but it is just as dangerous that somebody can say something which he would much rather not say. What actually happened was that proceedings in Parliament were defended, in that the whole set was removed and a new set was printed, costing, no doubt, thousands of pounds. It is very, very important, I would have thought, to protect the proceedings in Parliament, and I would say "does this not give a further example of that?"

Dr Jack: I think it does, Chairman. One ought perhaps also to bring a little bit of balance into this and that is, I am sure Members of the House are aware of that, in cases where privilege is used, for example to name individuals and so on, then Members should proceed with extreme caution and they are advised to do so to avoid the sort of difficulties you have mentioned. I think the exercise of privilege has to be responsibly undertaken.

Q12 Alun Michael: Can we just explore how you exercise caution in that way? There is obviously always the need to exercise a right with responsibility. I recall one occasion when a colleague was, shall we say, somewhat cavalier with comments he made about a third party who was massively offended. In that circumstance the then Leader of the Opposition looked at it and said, "You should apologise", and that was done without, actually, the discipline of the House coming into the frame. But, in a sense, if there is to be a constraint, it is the constraint of collective self-discipline, is it not, and how do you encapsulate that? Could you just explore that a little?

Dr Jack: Yes, I think that is a very interesting question and it reminds me of a case in the European Court of Human Rights, the very celebrated case of *A v United Kingdom* in 2002 which concerned an adjournment debate in the House in which the constituent of a Member claimed to be defamed, that her rights had been abused and that ended up in the European Court of Human Rights. In the judgment, which was favourable, on the whole, to the need for immunity and for the need for protection, the judges did say that national parliaments should look closely at how they dealt with, I cannot use the word abuse, carelessness, shall we say, in the exercise of privilege. Some jurisdictions in the Commonwealth, I think the Australians, have a system of redress so that an individual who does feel that they have been wrongly cited or named in Parliament has an opportunity to make that point to a parliamentary committee. I think in this day and age I am rather in favour of that, there should be such a system. I would like to see that in a Parliamentary Privileges Act but perhaps that goes to another subject, Chairman.

Q13 Chairman: Is it the case that Parliament does not have the physical or legal capacity to constrain the European Court of Human Rights if it allows material from the House proceedings to be adduced in evidence?

Dr Jack: Michael will answer that.

Michael Carpenter: Chairman, that is an interesting question. I think at international level what you are talking about is the obligation of a state to comply with its obligations under the European Convention. Of course a state consists of the executive, the legislature, the judiciary, all the branches of the state are bound by the Treaty obligation but that does not say anything about the internal allocation of functions within a state; it is the job of the state to comply with the Treaty obligation. That is the difference, I think, but within

our system traditionally, and I would say for good reason, the courts have not questioned the proceedings within Parliament. It is for Parliament itself to keep its own house in order, as it were, so that the privileges are used responsibly and for the purpose for which they were fought for.

Q14 Chairman: In the case you cited, Dr Jack, the outcome was that proceedings were adduced and the court showed deference on the basis that some degree of immunity was shown and desirable.
Dr Jack: Yes, it went much further than that, it absolutely supported the right. The UK was joined by nine other countries in the pleading before the Court, so it was a European-scale reaction; it certainly was not only British. I was just wondering if I might bring in Andrew Kennon who is the Clerk of the Journals coming back to Mr Michael's question about how we try to deal with mitigating bad effects, if I can put it that way.
Andrew Kennon: Several times recently I have been consulted by Members who want to talk in a debate, maybe an adjournment debate, about a particular case. I have advised them to be cautious for precisely those reasons. In two other cases recently where people have been disappointed about what a Select Committee has said in a report, I have encouraged the Committee to publish that letter from the witness to show that they have put the other side of the story on the record.

Q15 Chairman: There is another problem which you referred to about clause 10, which is whether you open the gate very widely or open the gate only narrowly. There is an argument for opening it narrowly but it could result in a situation in which evidence favourable to the person accused, probably a Member of Parliament, could not be adduced while evidence unfavourable to him could, which would almost certainly fall foul of Article 6 of the European Convention on Human Rights?
Dr Jack: Yes, I think that is right. I am not sure what stage it has reached, Chairman, but I believe that the House has had a report from the Joint Committee on Human Rights.

Q16 Chairman: Part of the consequence is within their remit, but it is also relevant to what we are looking at.
Dr Jack: Quite.

Q17 Chairman: There are arguments to say if we are going effectively to abrogate the provision of the Bill of Rights we should do it only in the narrowest possible way but there are counter-arguments to say once you do it, you have to do it sufficiently widely to ensure that no injustice arises from having done so.
Dr Jack: Yes, that is right. I think similar considerations have arisen in connection with corruption offences in the draft Bribery Bill.

Q18 Chairman: Yes, will you say something about the experience because we went through a similar process in relation to the Defamation Act in 1996 and again currently in relation to the Bribery Bill. Are we creating a chain of precedents which will pull us too far along this road?
Dr Jack: That is my view, that is the view that I put to the Joint Committee and that is only part of the picture actually. I think if you start to make exceptions to parliamentary privilege for one reason or another, under one Act or another, eventually you will undermine the whole principle.

Q19 Chairman: The earlier decisions to do this are now being adduced in support of the current proposals.
Dr Jack: Yes.

Q20 Chairman: Even though they were controversial at the time.
Dr Jack: Yes, that is right.

Q21 Chairman: And probably opposed by some of the people who are opposed to the present proposals. Have there been any particularly adverse experiences from the steps that were taken in the Defamation Act, for example?
Dr Jack: The Defamation Act has been regarded as a complete failure in privilege terms, and indeed the Joint Committee on Parliamentary Privilege recommended that it should be repealed.

Q22 Chairman: Would it be helpful simply to indicate what the basis of that concern was?
Dr Jack: I think there were a number of factors which arose. It is the narrow point, it is the inability to limit the prosecution in a case where a Member himself was involved. I think Michael will come in here.
Michael Carpenter: Chairman, it is the principle in Article 6, it is the equality of arms principle, both sides, whether the proceedings are criminal or civil, should have an equal right to call witnesses the Convention says to examine witnesses on the same basis, and under the same conditions, as witnesses who are called against them. That is the problem when you allow in evidence partially, you do create a risk of unfairness. The other basic question one has to ask oneself is, is the admission of this evidence really necessary? The United States has some experience of this in a case called *United States v Brewster* that went to the United States Supreme Court. It was a case of a senator, I think, who was accused of bribery and the Supreme Court eventually decided those proceedings were sustainable provided they did not adduce evidence of his debates and speech in the Senate. All the business about the handing over of money, the secret meetings, all that kind of thing, all became admissible in evidence. I think it is true to say in the law on corruption in this country you do not have to prove that the corrupt design was carried out, you simply have to show it was entered into. As far as corruption is concerned I would have thought in many cases it simply is not necessary –
it is nice for the prosecution but it is not necessary—
to adduce evidence of what happened in the proceedings. Similarly, in this instance, in relation to

the section 9(1), that is pretty much a restatement, with slight variations, of existing law, basically a fraud offence or possibly a section 17 Theft Act offence. Section 9(2), if the Bill goes through, the registration of financial interests, etc., will not be a proceeding in Parliament, so it will be outside. Although committed by Members it will not be a proceeding in Parliament. The only issue is really the paid advocacy offence and whether it is a necessary ingredient of the criminal offence of paid advocacy that you have got to admit evidence of what is said in debate. I would submit that it is not always necessary because there will be cases where you could show, for example, that a Member engaged in paid advocacy by writing to a Minister, did all kinds of things, which were not actually proceedings in Parliament and then you could admit evidence of that and there would be no difficulty.

Dr Jack: Chairman, I have turned up the report of the Joint Committee on Parliamentary Privilege and the two basic flaws that it found in the Defamation Act are that it undermines the basis of privilege because privilege belongs to the House as a whole and not to individual Members in their own right, although an individual Member relies and asserts it. The second thing was, I think, practical complications about where more than one Member was involved; in the sort of example which I gave in the Committee already. I think for those reasons the Joint Committee came to the conclusion that really it was unworkable and ought to be repealed.

Chairman: I think we have now moved into the territory covered by some of the other clauses.

Q23 Alun Michael: I wanted to pursue a reference you made, Chairman, to the Bribery Bill and so on, and the question of whether salami-slicing of privilege was a problem. How do you envisage that a Parliamentary Privileges Act, to which you referred in passing, would work?

Dr Jack: I have got one in my hands. Here is the Australian Parliamentary Privileges Act of 1987. It is quite interesting that this Act came about really for very similar sorts of reasons that we are discussing this afternoon, namely that there were a series of encroachments by the courts on proceedings of parliament to the point where it was felt the only solution was to have an Act. So the Australians have an Act and the Act deals with all these matters and defines proceedings and so on, so there is an Australian Act to hand for our own use.

Q24 Alun Michael: What is the starting point? It seems to me that one of the issues is whether you have the sort of Act that tries to cover all sorts of eventualities in different parts of the legislation and the other alternative is to have a definition of parliamentary privilege from which you define exceptions. I wonder if you would like to comment on that.

Andrew Kennon: The Joint Committee firstly was suggesting that these phrases, that the judges mull over, about "proceedings in Parliament" and "place out of Parliament" ought actually to be defined. As a result of the Australian experience those phrases have been tested and there are some definitions that they have come up with. They cover both the freedom of speech element and the proceedings in parliament itself. The process of producing that Act in a modern form, with all the backing of the Joint Committee behind it, would set a modern framework within which we could operate.

Q25 Alun Michael: I can understand the point of the framework but could you also comment on the question of whether you start off by asserting the privilege and then say where that privilege is limited, or start from some different conceptual basis?

Andrew Kennon: I am struggling with that, I am afraid, Mr Michael.

Q26 Alun Michael: If the stimulus for looking at parliamentary privilege is to say that over a period of time it has frayed at the edges, if you like, in response to particular circumstances and there is a need for clarification, one of the ways is to say that x, y and z are covered by privilege and a, b and c are not. The alternative is to assert the privilege and say, "But there are exemptions, there are areas where privilege cannot be claimed", which means that everything is within privilege unless it is defined as being outside. Does that help?

Andrew Kennon: I imagine one would go for the narrow, more restrictive approach. That would be based very firmly on the two purposes: freedom of speech in debate; and the House's ability to run its own proceedings.

Dr Jack: All these matters are defined in the Australian Act. There is a very succinct definition of "proceedings" in that legislation.

Michael Carpenter: In the example that Mr Michael mentioned, of course, we have the assertion of privilege in Article IX, so there is the statement of principle and I personally am a great fan of "if it ain't broke, don't fix it." You have the statement; what is now at issue is what exceptions are there already and what exceptions ought there to be in the future. The logical thing would be to build on what one has, that there is that statement and it is time-honoured.

Q27 Alun Michael: In other words, are you saying that a Parliamentary Privileges Act would assert the current situation without getting into fresh definitions but merely deal with exceptions then?

Michael Carpenter: That would be a way of doing it. That would also fit in with the existing case law because that would all fit with that approach, but it is very much a question for those moving the Bill and how they choose to frame it.

Q28 Alun Michael: That is understood. Perhaps I got this wrong but I understood Dr Jack to be an advocate of a Privileges Act, in which case it would be interesting to know how you would see it working.

Dr Jack: Now I think I understand slightly better. I would certainly agree that I would start off with Article IX. I would assert the principle and then build the definitions around that, as the Australian Act does. I should just mention, Chairman, to keep

our vision wide that the Commonwealth is very much concerned with this whole system as well. Article IX is the basis of privilege in all Commonwealth parliaments.

Q29 Alun Michael: In any parts of the Commonwealth have they found an alternative to the word "privilege", which perhaps carries some connotations that are not entirely appropriate nowadays?
Dr Jack: I am not sure that they have.
Michael Carpenter: I think in the United States the Constitution does not use the word "privilege", it talks of the "freedom of speech and debate", which has a ring to it. Of course, it was very much based on the English model of Article IX.

Q30 Julie Morgan: Are there any other examples like the Australian example or is that the only one?
Michael Carpenter: Of an Act?

Q31 Julie Morgan: Yes.
Dr Jack: I immediately think of the Australian one within the Commonwealth. I think there are Canadian examples as well. We can certainly find out.

Q32 Julie Morgan: That would be interesting to know.
Michael Carpenter: There are other examples of this principle. In the Protocol on privileges and immunities of Members of the European Parliament, for example, there is a statement about the freedom of speech and debate. I am not quoting exactly but it is that sort of thing. It is the same idea.

Q33 Dr Palmer: Just as an observation, I do not find entirely persuasive the idea that because someone might have committed other offences that some offences should not have the potential to be dealt with by the courts, so that if somebody was conducting paid advocacy he probably was doing it in other contexts as well. There is a matter of opinion there. Going back to an earlier question, is it not possible that the individual who felt themselves to be disadvantaged by a misuse of privilege would have a case under the ECHR that his or her rights were being infringed because a Member of Parliament was using his position to buttress a company against which that individual had a claim? Might we not get into trouble if there were circumstances under which we said it is not against the law to have paid advocacy without declaring it?
Michael Carpenter: I think one would have to see what the cause of action was. The person would have to have a cause of action. It is not quite like the *A v United Kingdom* case where the person did have a cause of action in defamation, the problem was she could not make that claim stick because she could not adduce the evidence. Here there might not even be a cause of action. I am trying to think. There might well not be. There is the general point that perhaps I ought not to make as a lawyer that in a way there is the question of exposure to the public of paid advocacy and that has a sort of sanction effect of its own, and the House's own disciplinary rules on that matter. It need not follow that the criminal law is the only way of dealing with it.

Q34 Chairman: If I could just touch on your other principal concern which relates, for example, to both clauses 7 and 8. It is about the possibility of judicial review, the operations of this machinery, this structure which has been created, or more particularly those points at which it becomes the House that is acting by decision not to proceed with action against a Member with the same consideration to clause 6, which has now been dropped, in relation to the Code of Conduct. In general, ought the House to be concerned about its processes being open to judicial review?
Dr Jack: Yes, I think it should. In clause 7 we were particularly concerned with subsection (3) which raises the question of the reasonableness of the Commissioner's decisions and who would decide eventually what was reasonable. It would be a matter justiciable in the courts.
Michael Carpenter: I think one of the problems, Chairman, under section 7(3) is that there is no doubt that the reasonableness of the requirement by the Commissioner is a justiciable question. He is exercising his statutory power: he can only require that which he may reasonably require. Let us suppose that the Commissioner makes a requirement of a Member that proves eventually to have been unreasonable, the court find against him, and let us suppose that takes a long time to settle, but in the meantime the House has punished the Member for failure to comply with this requirement, it is a postulation of something that could happen. You would then have a situation where the court has found that the requirement ought never to have been made of the Member and yet the Member has been punished by the House for not complying with it. The learned Clerk is not suggesting that is immediately amenable to judicial review but one can see the kind of risk that is opening up there, that the court might make some comment about the exercise by the House of its disciplinary powers. There was a fear that over time this would gradually develop into a jurisprudence that led to the court having a platform from which to express views about whether it was right for the House to exercise disciplinary powers or not.
Dr Jack: Or, in the case of clause 8, whether a committee of the House should act on recommendations. For example, clause 8(2) brings in the Standards and Privileges Committee whose actions are covered by parliamentary privilege but, again, to give a hypothetical case, what would happen if Standards and Privileges concluded that it could not accept a recommendation from the Commissioner, perhaps the recommendation was too severe on the Member, the degree of punishment or whatever was being recommended, the whole matter would then have to be resolved in the courts.
Michael Carpenter: Just a little postscript to that. In the little scenario I painted, clause 8(5) provides that in those circumstances the Member may be punished. Now, there is an argument that that is

actually a statutory permission to exercise its disciplinary powers. If that argument is right then, of course, it does mean if the request was unreasonable that the House did not have the permission to discipline the Member because the conditions for permission were not provided. That is one way that one fears there could be scope for judicial review. People are very inventive as to how they develop these things. There are ways of addressing that. The problem may be with clause 8(5) itself rather than clause 7(3) because it is right that the Commissioner should have a reasonableness requirement imposed on him, but it is the link that is made between that and the exercise of disciplinary powers that is the problem as we see it.

Q35 Mr Turner: The proposal seems to me to be equivalent to something that has happened on the Isle of Wight where I think six members of the county council were accused of some error. It has taken two years and there is still no result. Four of them have been through a re-election, one of them has lost their re-election attempt and one of them has died. That seems a terribly long pattern and yet the same thing could happen to Members of the House of Commons. That worries me no end.
Dr Jack: I think the delay factor of proceedings in the courts is another factor. Yes, it could drag on for years.

Q36 Chairman: If I were to wrap up the whole view by putting to you my summary of what I think the Government's reaction to you is, and that of First Parliamentary Counsel, whose memorandum we have received, and of course it is only my summary, their case is really this: you cannot have a new system of sanctions involving an external body without disapplying some aspects of the Bill of Rights and limiting parliamentary privilege to a limited extent; that we have altered parliamentary privilege before, for example in the Defamation Act 1996, so there is nothing new in principle about this; and the risk is low because the courts will show due deference to and concern for the very issues about Parliament which we have been talking about today. If that is their case, what is the response?
Dr Jack: If I can start on the low risk. As I said, I looked very quickly at the evidence from the Ministry and it comes up quite a lot. I am not convinced at all by it.

Q37 Chairman: They used the phrase "low risk" several times.
Dr Jack: Yes, they used the phrase "low risk". It would be a low risk to drive up the motorway in the middle of the night on the wrong side of the road, but the impact would be enormous if you were involved in an accident. That is my response to the low risk point. The privileges compromise, if I can put it that way, in other Acts, I think we have touched on that a little bit. That could be something that a Privileges Act made comprehensive would sort out on the basis, as Andrew Kennon has said, of a lot of work already done by the Joint Committee, so we would not be reinventing the wheel, there would be a lot of work already done. As we have also mentioned, the defamation case is a pretty disastrous one. The Joint Committee has recommended that part of the Act at any rate be repealed, so I do not think that is a very strong example to rely upon.

Q38 Chairman: What about the likelihood that the courts would show appropriate deference to Parliament and be disinclined to make excessive use of these possibilities?
Dr Jack: I think that recent cases, and Andrew Kennon might elaborate if you wish, in the courts where the House has had to intervene, or the Speaker has intervened, do not support the evidence that the courts will not interfere with parliamentary proceedings.

Q39 Chairman: They make a comparison with national security saying that courts are generally willing to defer to the executive in its responsibility for national security. It might be similarly willing to defer to the Parliament in these matters?
Michael Carpenter: Chairman, I think that needs to be slightly unwrapped because even in the field of national security the courts will review the legality of what has been done: has the minister acted full square within the powers conferred on him. Where they will show deference is on the reasonableness or rationality of what he has done: is he or she the best person to judge the risk. That is the way they will show deference. The idea of deference does not really apply to the concept of legality, is it lawful or is it not lawful, because that is a field for the courts. I suppose another point one would make on the offences is that the Ministry of Justice memorandum refers to it not being possible effectively to prosecute offences and they say: "In particular, the offence prohibiting paid advocacy", but, as I said earlier, I think it is only in that case that any instance arises where evidence of proceedings in Parliament could possibly be relevant, because in most cases they will not be relevant to the section 9(1) offence, the false claiming offence, or the registration of interests offence because they are proceedings outside Parliament.

Q40 Chairman: So if the main features of clause 10 were withdrawn from the Bill, you are arguing that it would not impede the body that is being created from taking appropriate action against a Member?
Dr Jack: No, it would not.
Michael Carpenter: On paid advocacy you would not be able to adduce evidence of what the Member said in the House.

Q41 Chairman: But on misuse of funds from allowances, for example.
Michael Carpenter: That is the present law.
Dr Jack: Those are not matters in any case subject to parliamentary privilege. They are not proceedings, or related to proceedings in the House, or a committee.

Q42 Chairman: So we are disapplying in this legislation the Bill of Rights and parliamentary privilege to deal with something which is not covered by it?
Michael Carpenter: That is right.
Dr Jack: That is right.
Michael Carpenter: It is a sort of a portmanteau provision which has that effect because at the moment, as we know, the police are assessing some cases and, of course, they are doing it under the existing law. There is obviously the potential for prosecuting those offences. If false claims are made and people engage in deception that is already covered by the law. That is the *United States v Brewster* example where the corrupt bargain was made and that is prosecutable. What you cannot do in order to prove that is adduce evidence of what was said on the floor of the House or on the floor of the Senate.

Q43 Chairman: But the Prime Minister's reasoning for bringing forward the Bill, and the Prime Minister's words on this, are primarily related, are they not, to public anger about allowances and expenses?
Dr Jack: Yes, of course that is right.

Q44 Chairman: That covers some other things as well.
Dr Jack: Which are basically not covered by privilege anyway.

Q45 Dr Palmer: Is the fact that a Member has taken part in a vote covered by privilege?
Dr Jack: Yes, that is a proceeding in the House.
Dr Palmer: I can suggest one scenario where a Member claims the allowance for having been here overnight and the fact that he or she did not vote in any vote on that day is adduced in evidence, that would be relevant I would guess.
Chairman: It is also a case where equality of arms under Article 6 means that once it could be adduced that he was not there he could then adduce the fact that he had raised in the House later the fact that the bell did not ring in this building and that was why he was unaware the vote was taking place and missed it.

Q46 Dr Palmer: Issues of privilege would come in, they would be relevant to court proceedings so even in an allowance question in that case. That is a slightly strained example.
Dr Jack: We do not deny that there may be such cases, it is really a question of whether it is worth infringing or chilling debate for that narrow point.
Michael Carpenter: On the example Dr Palmer mentioned, I do not think people would seriously argue at the moment that privilege bars prosecution of, say, Members who make false claims because, as I say, there are currently not strictly investigations but it is being looked at. There are all kinds of other ways of proving offences. This is really not a matter for a lawyer but a politician: is it really necessary to infringe this rather cherished principle for this purpose?

Q47 Dr Palmer: I just want to come back to the other issue about section 8 and the IPSA and the possibility of judicial review. As I understand it, the position is that the sanctions, the punishment envisaged here, are still in the power of the Committee on Standards and Privileges which may be influenced by a recommendation from IPSA and that recommendation might subsequently be overturned by judicial review. That is the concern, if IPSA says, "I think Member X has behaved badly", the Committee on Standards and Privileges suspend Member X for a month and subsequently judicial review finds that the IPSA recommendation was unsound. I am not sure that differs much from the current situation where IPSA does not exist but, let us say, the *Daily Mail* alleges that Member X has behaved badly and the Committee on Standards and Privileges looks at the case, punishes X and then later on the Member successfully sues the *Daily Mail*. In both cases it is an external body expressing an opinion, but do you see a difference in principle?
Michael Carpenter: Chairman, if I may field that one. I think that illustrates quite neatly the difference between clause 8(2) and clause 8(5), because clause 8(2) is not really saying anything about the basis of the powers for the Committee on Standards and Privileges to act. As I said earlier, I think clause 8(5) might be saying something, because it says that the failure may be punished by the House of Commons. If that is interpreted as a kind of statutory permission then there might very well be an issue as to whether the conditions of that permission had been fulfilled. If the Commission had acted unreasonably you would not have the conditions for that permission to operate, whereas contrarily with clause 8(2). If I may say so, with respect, Dr Palmer is right to say it is simply like some other actor who says something should be done and then the Committee on Privileges does something. It is not a condition of the Committee of Privileges doing something that someone else has probably said something to it.

Q48 Dr Palmer: You are suggesting that perhaps clause 8(5) might in the future be interpreted in the reverse sense that the Committee on Standards and Privileges can only take action if they have such a recommendation, not because they just feel like it?
Dr Jack: Or in conjunction with.
Michael Carpenter: It is possible. The argument is on clause 8(5), where it is referring to the House of Commons "may be punished by the House of Commons", so not referring to the Committee. I think there is a difference between clause 8(2) and clause 8(5) in that regard. Can I put it this way, that the likelihood is stronger with clause 8(5) that there would be a link drawn between what happened before and what the House of Commons may do now than it would be with clause 8(2) because it is not really saying anything about the basis of the power of the Committee to do something, it is just a factor that is brought to their attention. There are issues, I suppose, about whether there should be a recommendation that somebody should do something and the question of whether an outside

body should tell a Committee of the House that it should do something, but that is a slightly different issue.

Q49 Chairman: I think at that point we can thank the three of you very much indeed, unless there is anything you feel you would like to add.
Andrew Kennon: I wonder if I could just mention that we do end up in court, getting dragged into court, on cases where we think the privilege position is entirely clear, but we are vulnerable to other people deciding to cite parliamentary proceedings and the court not immediately recognising the privilege dimension. In the last couple of years in both the *Wheeler* case, which was about the introduction of legislation, and the *OGC* case, which was about citing committee reports, the House won in the end but we had to go to court and we had to defend its position. Without breaching the sub judice rule there is another case going on now which is on almost exactly the same facts as a case we won last year and we are there again. We are going to have to go into court and say that the evidence given to a select committee should not be cited in this particular judicial review application.

Q50 Chairman: You have both been in the service of the House for quite a lot of years. Is this something that is happening more frequently?
Dr Jack: I think it is happening more frequently, yes.

Q51 Chairman: Thank you very much indeed.
Dr Jack: Not at all. Thank you, Chairman.

Written evidence

Memorandum submitted by Dr Malcolm Jack, Clerk and Chief Executive of the House of Commons

PRIVILEGE ASPECTS OF THE PARLIAMENTARY STANDARDS BILL

Introduction

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

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

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

Clause 6

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

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

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

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

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

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

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

[2] Which says that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament" [modern spelling].

[3] See, for example, *R (Wheeler) v Office of the Prime Minister and Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 1409.

CLAUSE 7

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

CLAUSE 8

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

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

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

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

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

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

CLAUSE 10

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

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

19. However, even if the qualification were narrowed, the accused Member would be put in the position of having his words used against him, without being given the opportunity to adduce words spoken by other Members which might tend to exculpate him. This would create a very real risk of the trial being unfair and

[4] See Report of Committee on Standards and Privileges (Session 2007–08) *The Complaints System and the Criminal Law* HC 523.
[5] The position of witnesses was of much concern to the Liaison Committee in the 2003 inquiry into the Draft Corruption Bill.
[6] This follows the recommendation made in 2003 by the Joint Committee on the Draft Corruption Bill.

contrary to the requirements of Article 6 ECHR.[7] This demonstrates the difficulty caused by admitting evidence of proceedings in Parliament: either the admission is on such a wide basis that it has a chilling effect on Parliamentary proceedings (by prejudicing or effectively removing the right of free speech), or it is on such a narrow basis that the fairness of trials is put at risk.

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

Clause 11

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

29 June 2009

Memorandum submitted by the Ministry of Justice

PARLIAMENTARY STANDARDS BILL

I have read with interest Malcolm Jack's memorandum on the Parliamentary Standards Bill. I attach a detailed explanation of how privilege is affected by the Bill, which I hope answers his concerns and will help your Committee's consideration of these issues. I am grateful for the advice of Parliamentary Counsel on the note.

The purpose of the Parliamentary Standards Bill is to bring an end to a system of self-regulation that allowed MPs to set and amend the rules over their own expenses. It creates the Independent Parliamentary Standards Authority, an investigator, and criminal sanctions specifically for offences to do with registration of interests, paid advocacy, and false allowance claims.

But the Government recognises the importance of privilege—in particular, to ensure the freedom of speech in proceedings in Parliament and to retain the current relationship between Parliament and the courts. For this reason, the Bill makes what we have judged as the minimum necessary modifications to privilege. That is why we are content to remove clause 6 from the Bill—as I said at Second Reading today, it is not essential to achieving the key objective of putting the financial rules in the existing code into the form of a statutory code. However, given that some have argued that the issues raised by clause 6 have read-across to other provisions in the Bill, the attached note retains the analysis of this clause.

The Bill is not intended to replace "self-regulation" of the House in general with "regulation by the courts" and it does not do so. Moving to independent regulation in respect of allowances and related matters, with proper checks and balances, will require some adjustment to privilege. But we believe that most people inside and outside Parliament agree that is now necessary.

There is only one explicit provision in the Bill concerning parliamentary privilege, clause 10. We believe that this clause is necessary to ensure the effectiveness of the criminal offence provisions, and to allow the IPSA and Commissioner to do their jobs: to regulate expenses and allowances.

Otherwise, the Bill is silent on privilege. The existing protections set out by parliamentary privilege are not disapplied. So, for example, proceedings of the House of Commons or the Committee on Standards and Privileges would still be protected (subject only to the explicit provision on privilege in clause 10).

[7] This prescribes as a minimum right the right to call and examine witnesses on his behalf on the same conditions as witnesses against him.

I look forward to discussing the issues. If there are other ways to achieve the same ends, the Government is open to them. But it is clearly right that Parliament acts, and acts now, to place itself under independent regulation for expenses and allowance—and to start to regain public confidence.

Rt Hon Jack Straw MP
Secretary of State for Justice and Lord Chancellor

30 June 2009

PRIVILEGE AND THE PARLIAMENTARY STANDARDS BILL

1. This note has been prepared by the Ministry of Justice and the Cabinet Office, after taking advice from First Parliamentary Counsel, to discuss the privilege issues raised by the Parliamentary Standards Bill. It also addresses the points raised in the memorandum by the Clerk of the House dated 25 June 2009.

A. Outline of the Bill's Approach to Privilege

2. The chief purpose of the Parliamentary Standards Bill is to end the self-regulation of Parliament in areas where self-regulation has demonstrably failed. Privilege is concerned with ensuring Parliament is free to regulate its own proceedings. It is therefore impossible to end self-regulation without affecting privilege in some way. To be too conservative about privilege would derail this reform.

3. On the other hand, the Government recognises the importance of privilege—in particular, the importance of ensuring the freedom of speech in proceedings in Parliament and the importance of retaining the current relationship between Parliament and the courts. For this reason, the Bill only makes the minimum necessary modifications to privilege. The Bill is not intended to replace "self-regulation" with "regulation by the courts" and it does not do so.

4. In outline, the Parliamentary Standards Bill establishes the Independent Parliamentary Standards Authority ("the IPSA"), a Commissioner for Parliamentary Investigations ("the Commissioner") and a Speaker's Committee. The IPSA is to set an allowances scheme and financial interests rules. The Commissioner is to investigate overpayments of allowances and breaches of the financial interests rules. After an investigation, the IPSA may direct an MP to repay overpaid allowances or to update the register of interests. IPSA may also recommend that the House exercise its disciplinary functions. The Bill establishes criminal offences for certain financial misconduct.

5. There is only one explicit provision in the Bill concerning parliamentary privilege, clause 10. This clause is necessary to disapply privilege to ensure the effectiveness of the criminal offence provisions. It also disapplies privilege to ensure that the IPSA and Commissioner are not prevented from carrying out their functions by article 9 of the Bill of Rights' prohibition on the proceedings in Parliament being impeached or questioned by a place out of Parliament.

6. Otherwise, the Bill is silent on privilege. The existing protections set out by parliamentary privilege are not disapplied. So, for example, proceedings of the House of Commons or the Committee on Standards and Privileges would still be protected (subject only to the explicit provision on privilege in clause 10).[8]

B. Parliamentary Privilege

7. Parliamentary privilege is a body of law and custom which is designed to enable the two Houses of Parliament to carry out their functions effectively. The two most important planks of privilege are:

(a) freedom of speech (which has a statutory basis);

(b) exclusive cognisance—each House must have sole control over its internal affairs (which is a constitutional convention).

8. Privilege is part of a distinct body of law known as "the law and custom of Parliament". Some aspects of privilege have been set out in primary legislation.[9] The courts also play a role in both interpreting the provisions in primary legislation[10] and in giving recognition to aspects of privilege.[11]

9. The most significant provision in primary legislation concerning privilege is article 9 of the Bill of Rights which provides:

> 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.

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[8] Footnote 1 of the Clerk's memorandum refers to a purported technical problem concerning whether the IPSA can be a laying authority for the purpose of this Bill. However, this provision is well-precedented (see, for example, the Charity Commission which is a laying authority, see s 2(9) of the Charities Act 1993). Where an Act of Parliament provides for a body to lay a document there is nothing in privilege or practice of Parliament that can provide a legal obstacle to its doing so.

[9] See eg article 9 of the Bill of Rights and the Parliamentary Papers Act 1840.

[10] See eg *Pepper v Hart* [1993] AC 593 (the House of Lords considered article 9 of the Bill of Rights in deciding that Parliamentary material could, in certain circumstances, be used to aid statutory construction).

[11] See eg *R v Graham-Campbell, ex parte Herbert* [1935] 1 KB 594 (the Divisional Court interpreted Parliament's control over its internal affairs as meaning that privilege barred the courts from enquiring into whether the Commons had sold alcohol without a licence).

Article 9 means, for example, that an MP cannot be sued for defamation for words said in debate in Parliament. But its protection goes wider than this. For example, an MP cannot be prosecuted for breach of the Official Secrets Act for words said in debate. The privilege of freedom of speech also applies to other participants in Parliamentary proceedings, such as witnesses before select committees.

10. There is also the wider doctrine of exclusive cognisance which includes the principle that each House is the sole judge of the lawfulness of its own proceedings and may settle or depart from its own procedures. At least some recognition has been given to this doctrine by the courts:

> In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz, that the courts and Parliament are both astute to recognise their respective constitutional roles.[12]

11. It has been the practice that privileges of the House of Commons were confirmed by the Crown at the beginning of each Parliament and to that extent have their origins in the Royal prerogative.[13]

C. Misconceptions Relating to Parliamentary Privilege

12. There are a number of common misconceptions relating to privilege and the role of the courts which are worth dispelling.

(1) *"Privilege never changes"*

13. Privilege changes over time. Parliament takes different attitudes to the scope of its privileges. So, for example, in 1978 each House resolved to exercise its penal jurisdiction as sparingly as possible.[14]

14. Privilege has also been modified by legislation. This has involved both extending the scope of privilege and reducing it.

(a) The Parliamentary Papers Act 1840 extended privilege to protect the publication of papers by order of either House of Parliament.[15]

(b) On the other hand, Parliament used to assert an exclusive privilege to determine disputed elections. This however was transferred to the courts in 1868, now appearing in Part 3 of the Representation of the People Act 1983.

(c) Section 13 of the Defamation Act 1996 permits an MP to waive privilege for the purposes of defamation proceedings.

15. Accordingly, there is no legal objection to privilege being modified by an Act of Parliament.

(2) *"Parliament is a statute-free zone"*

16. The internal administration of Parliament is now very much a matter for statute. In particular, there is the House of Commons (Administration) Act 1978 (relating to the House of Commons Commission), the Parliamentary Corporate Bodies Act 1992 (which establishes the two clerks as corporate officers of each House) and the Parliament (Joint Departments) Act 2007 (relating to the establishment of joint departments by the Houses of Parliament).

17. More fundamental issues concerning the workings of Parliament are also dealt with in primary legislation—for example, the Provisional Collection of Taxes Act 1968 (which provides for resolutions of the House of Commons to have statutory effect in certain circumstances) and the Parliament Acts 1911–49 (which, amongst other things, restrict the power of the House of Lords concerning certain types of bills).

(3) *"Where legislation goes, the courts automatically follow"*

18. It does not follow that where legislation establishes a statutory framework for a body, provides it with functions or places duties on it or other persons, that courts will regard the subject-matter of every aspect of that legislation as justiciable.

19. Courts frequently refuse to review decisions of ministers which relate to national security on the basis that such decisions are properly matters for the executive. Courts are likely to continue to apply a similar approach when considering matters arising under the Bill. As mentioned above, they respect the different roles of the courts and Parliament. In other words, courts will ask whether, in a particular case, it is properly a matter for the courts to review or is a matter properly left to Parliament. If the latter, courts are likely to decline to exercise jurisdiction. Nothing in the Bill undermines that principle for matters outside the Bill. If anything, clause 10 tends to reinforce this.

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[12] *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC), 332.
[13] *Erskine May* (23rd ed 2004) p 78.
[14] *Erskine May* (23rd ed 2004) p 128.
[15] This Act reversed the effect of *Stockdale v Hansard* (1839) 112 ER 1160.

20. These issues already arise:

(a) The National Audit Act 1983 establishes the Public Accounts Commission (section 2(4) and Schedule 1). That body performs statutory functions, but has the characteristics of a Commons select committee. Putting such a body on a statutory basis however has not increased the scope of the courts' jurisdiction.[16]

(b) When the Speaker was challenged for his decision to withhold services of the Commons departments—bodies with a statutory framework under the House of Commons (Administration) Act 1978—from members of Sinn Fein, domestic courts held that the Speaker was acting firmly within the internal arrangements of the House of Commons and so the decision was not amenable to judicial review.[17]

D. Commentary on the Clerk's Memorandum

21. The next section of this note addresses the specific concerns about the Bill raised in the memorandum by the Clerk of the House on the Bill.

(1) Clause 6 (MPs' code of conduct)

Clause 6 would mean that the maintenance of the Code and its content would become a matter which is justiciable in the courts

22. There are three legal requirements in clause 6: (a) to continue to have a Code of Conduct; (b) to include within that Code the Nolan principles or other similar principles; and (c) to include such other matters as may be determined by the House. The current Code already incorporates by direct quotation those principles. If the House of Commons failed to comply with those requirements, the Clerk's memorandum argues that the courts will permit judicial review of this failure.

23. However, the Ministry of Justice considers that the risks, in practice, are low:

(a) These legal requirements are easy to satisfy. The first one would only be an issue if the House decided never to have a Code. This prospect seems so remote and undesirable that it is right that there should have to be new legislation to permit this to happen.

(b) The second legal requirement is also easy to satisfy. The seven general principles are very general in nature (selflessness, integrity, objectivity, accountability, openness, honesty, leadership) and are regarded as fundamental. It is hard to see that Parliament would ever want a Code which did not contain these principles. But even if it did, courts are likely to give a great deal of deference to Parliament in deciding how it intends to meet this legal requirement.

(c) The third legal requirement is also easy to satisfy because it gives a very wide discretion to the House. For practical purposes it is desirable to authorise a code that goes wider than the principles if that is what the House wants.

24. The Clerk's memorandum notes that there is a risk of a court ordering the House of Commons to pass a resolution, for example, to make a Code of Conduct, §8. This part of the memorandum confuses the role of the courts in determining what is lawful, on the one hand, with granting a remedy—for example, an order requiring the Commons do something—on the other. So, at the moment, courts may decide that a minister has acted unlawfully and make a declaration to that effect, but not necessarily require particular action of the Government. If the Courts were to entertain an application at all, they are likely to adopt a similar approach concerning Parliament.

25. The Clerk finishes by asking what the effect of the clause is—if it is minimal why have it; if it is significant, then the risk of litigation would affect the boundaries between the courts and Parliament. This question implies that the only way of measuring the impact of legislation is by how much of an impact there will be in the courts. Although the department considers that the impact in the courts will be minimal, this does not mean that the legislation will not otherwise "have impact". In particular, it sets out a clear framework for other constitutional actors—MPs themselves and, most importantly, the public at large—by requiring some very basic principles already incorporated in the current Code to continue.

(2) *Clause 7 (investigation)*

The duty on MPs to provide information to the Commissioner is justiciable

26. This clause requires MPs to provide the Commissioner with any information the Commissioner reasonably requires. Clause 8(5) makes it clear that this is to be policed by the House of Commons only and is otherwise to have no legal effect. The Clerk is concerned that the duty to provide information will be justiciable and that this could lead to courts reaching different conclusions about whether the MP had breached that duty from the House of Commons.

[16] Similar issues arise concerning the Intelligence and Security Committee, established under the Intelligence Services Act 1994.
[17] *Re McGuinness's Application* [1997] NI 359.

27. This risk seems low. The wording of clause 8(5) provides a clear direction to courts that it is to be for Parliament to police the duty to provide information. The note assumes that courts will simply ignore clause 8(5). In the context of parliamentary privilege and clause 10, it is inconceivable that courts would not give effect to clause 8(5) in terms.

(3) *Clause 8 (enforcement)*

The Committee for Standards and Privileges could be subject to judicial review for failing to follow a recommendation

28. This risk is insignificant. The Bill does not repeal article 9 of the Bill of Rights. Nor does it disapply it (as it does for the limited purposes in clause 10). In the absence, of an explicit provision or necessary implication, a court will continue to read article 9 as applying. This would mean that it is much more likely that a court will consider that any proceedings of the Committee on Standards and Privileges would remain within the protection of article 9.

This clause makes the exercise of the House of its disciplinary powers a matter of statute

29. This concern is difficult to understand. All this aspect of clause 8(5) does is to make clear that the Bill is not intended to affect the House of Commons' exercise of its existing disciplinary powers concerning a failure by an MP to comply with the financial interests rules, the duty to provide information or a direction. This is an essential part of the scheme because it ensures that enforcement under the Bill is ultimately a matter for the House of Commons.

30. The House currently exercises its jurisdiction to punish members in respect of contempt of the House, which may be anything the House considers obstructs or impedes the House in the performance of its functions (or anything which might tend to do so). This jurisdiction extends to breaches of the present Code of Conduct since, as the House requires its members to adhere to the Code, failure to do so is a contempt. The purpose of this provision is to make clear that the House would be able to proceed against a member concerning the matters in clause 8(4).

31. The Bill does not restrict the disciplinary powers of the House for the reasons set out in paragraphs 36 and 37 below.

32. In addition, the remark in the note that "[i]f the circumstances in which the House may exercise disciplinary powers became a question of law" is puzzling because it implies that the exercise of the present House's powers are not a matter of law. They unquestionably are: the law and custom of Parliament.

The question of the legal obligations flowing from the protocol will be a question of law to be determined by the courts

33. Clause 8(6) requires the IPSA to prepare a protocol for bodies which are likely to have to work together in the new arrangements. The protocol is expressly limited to being a statement about the way in which the bodies listed are going to work together. It will not create binding legal obligations. Such a statement would not be able to modify the functions of those bodies or impose obligations on those bodies. We would expect to see something on the face of the legislation if it were otherwise. For this reason, it is very unlikely that courts would be involved in interpreting the protocol.

Double jeopardy—an MP should not be expected to co-operate with an inquiry while subject to criminal proceedings

34. The note mentions the concept of double jeopardy. That concept broadly means that someone should not be subject to criminal proceedings more than once concerning the same conduct. However, the note does not suggest that an MP should not be subject both to criminal proceedings and to IPSA proceedings concerning the same conduct. It may well be appropriate for the House to consider disciplinary measures in relation to an MP after conviction by a court. But that is not required by law or principle, subject to avoiding the danger of prejudice to the criminal proceedings.

35. So, the question is one of co-ordination—making sure that an MP is not subject to both types of proceedings at the same time in circumstances where that would be inappropriate. This is a matter best dealt with by means of a protocol. A similar thing occurs at the moment concerning the relationship between the Committee on Standards and Privileges, the Parliamentary Commissioner for Standards and the Metropolitan Police. The report cited by the Clerk[18] is that kind of statement and the sort of thing we would envisage the IPSA having.

[18] Committee on Standards and Privileges, The Complaints System and the Criminal Law (8th report, 2007-08) HC 523.

Clause 8(10) defines and restricts the disciplinary powers of the House

36. This clause does nothing of the sort. The clause sets out the disciplinary powers of the House in order to make clear the types of powers concerning which the IPSA may make a recommendation. Without this, it would not be clear what IPSA has power to recommend. The language of the drafting makes this clear—it is explicitly an inclusive definition. In addition, subsection (8) provides that the Bill does not prevent the House of Commons from exercising any of its disciplinary powers other than following an investigation by the Commissioner or recommendation by the IPSA.

37. In the very unlikely event that there was any uncertainty concerning the interpretation of clause 8(10), the Explanatory Notes make this point clear in paragraph 102 which states that the powers listed in paragraph 8(10) "are all powers which the House already possesses and they are not conferred by the Bill. The House's powers of discipline are not limited to these three instances."

(4) *Clause 10 (proceedings in Parliament)*

Whether privilege should be disapplied concerning a criminal offence

38. Clause 10 means that article 9 does not prevent evidence from being admissible in proceedings against an MP for an offence under this Bill. The Clerk makes the following points in his note:

(a) this would mean that the words of Members generally, the evidence given by witnesses before committees and advice given by House officials could be admitted as evidence;

(b) it is for consideration whether the scope of the qualification could be narrowed to include something along the lines of the draft Bribery Bill;

(c) there are Article 6 ECHR requirements to consider.

39. This clause is thought necessary to ensure that prosecutions for offences under the Bill are not derailed by parliamentary privilege. It may not be possible effectively to prosecute offences—in particular, the offence prohibiting paid advocacy—if privilege applies. For example, it may be crucial for the prosecution to be able to lead evidence that an MP advocated a cause in a debate in the Commons. This would not be possible without disapplying privilege. Similar issues may arise concerning the allowances offence and registration offence, if relevant evidence arises in proceedings in Parliament.

40. It is important to note the limitations on this modification of privilege. In particular, the criminal offences established by this Bill may only be committed by reference to conduct by a Member of Parliament. Privilege is only disapplied in proceedings against a member. There is no question then of non-member witnesses to Parliament being subject to criminal liability by this Bill. A further limitation is that the rules of evidence in criminal trials mean that courts only admit relevant evidence. This means, for example, that commentary by MPs of the alleged criminal conduct of an MP would not be admissible in court.

41. The question then is whether the draft Bribery Bill option should have been taken. That draft Bill would limit the disapplication of privilege to any evidence of "words spoken by a member of either House of Parliament in proceedings in Parliament, or any other conduct of such a member in such proceedings".

42. This wording derives from the work of the Report of the Joint Committee on the Draft Corruption Bill (2002-03) HC 705. That Joint Committee accepted the need to disapply privilege in order for the prosecution of an MP or peer for corruption to be achieved, but considered that this should be restricted to particular cases, namely to the words or action of a member who is a defendant and in the prosecution of any co-defendant. The Committee considered, in the particular context of corruption, that the balance lay against disapplying privilege in respect of witnesses and other members. The Committee's report cites evidence it received raising concerns about the circumstance where an MP commented on a corruption case against a non-MP, for example, someone in that MP's constituency, see paragraph 130.

43. But the position concerning our offences is different to that of the position in the Draft Corruption Bill. In particular—as stated—the criminal offences in the Bill can only relate to conduct of an MP. And it may be necessary in order to understand the context of what is said to consider what was said by others in the debate. Accordingly, there is not the same need to place limitations on the disapplication of privilege.

44. The point about Article 6 ECHR (right to fair trial) is unclear. That Article sets out certain procedural safeguards concerning criminal trials. The department sees no issue concerning Article 6 ECHR with the Bill as presently drafted.

Privilege cannot be successfully reformed in a piecemeal fashion

45. The note refers to the Defamation Act 1996 as an example of where an attempt to reform privilege piecemeal has led to unforeseen consequences. That Act permits an MP to waive privilege for the purposes of defamation proceedings, section 13. The note states that "[t]he provision of section 13 of the Act was later held to undermine the collective right of the House to immunity in respect of proceedings by allowing an individual Member to waive privilege". However, that was not an unintended anomaly. That was the *purpose* of section 13.

46. There are certainly arguments that it would be desirable to have a parliamentary privilege act which codifies the position on parliamentary privilege. The Australian Parliamentary Privilege Act provides something of a model for the UK. However even that Act is not without its critics. For example, there is an argument that the Australian Act in fact goes wider than article 9, a matter which was contested in the recent High Court privilege case, *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin) see §41.

5. *Clause 11 (further functions of the Commissioner)*

The Speaker of the House of Commons could be subject to judicial review in exercise of the functions of making an agreement

47. There may be some risk of the Speaker being subject to judicial review in the exercise of these functions. But, this is not new and we assess the risk as low. The Speaker has for example faced challenges concerning the exercise of his or her functions previously, for example, in the Strasbourg court over the decision to withhold Commons services from the members of Sinn Fein.[19]

48. On ordinary judicial review principles, it is much less likely that the Speaker would be subject to successful challenge for failing to make an agreement. Clause 11 sets out a discretionary power. It is very unusual for a court to *require* a Minister to exercise a discretionary power. It is similarly unlikely that the court would require the Speaker to exercise a discretionary power.

29 June 2009

Memorandum submitted by Professor Dawn Oliver, University College London

Here are some comments on the Parliamentary Standards Bill

I am afraid my general reaction is that the issues about MPs' salaries, allowances and standards are too important to be dealt with in a Bill rushed through Parliament without any prior consultations, Green Papers, etc, especially since the Committee on Standards in Public Life is considering some of the issues covered by the Bill along with others.

In particular, the implications for parliamentary privilege and Article 9 of the Bill of Rights of 1689 are serious in that there is a risk of damaging conflict between Parliament and the Courts where new statutory provisions might be alleged to open up judicial review of decisions, acts and omissions by MPs, the Speaker and others in the House of Commons. I would not myself rule out altering some aspects of parliamentary privilege, but this ought to be carefully considered before changes are made. The Clerk to the House makes important and serious points in his memorandum.

Having made those points I assume that much of the Bill will be passed, and my remaining points are on details and how some of the problems about parliamentary privilege might be avoided. I go through the Bill clause by clause.

Clause 1

All reference in the Bill to the Speaker, a Speaker's Committee for the IPSA should be removed (e.g. clause 1(5)(6).

Clause 2

No comment save that the relationship with section 8 needs looking at.

Clause 3

This clause assumes that there will be an allowances scheme. This pre-empts the CSPL recommendations, which might not recommend allowances but flat rate salaries instead.

Clause 3(4) remove requirement of consultation with bodies named in (a)–(c). leave (d)–(f)—(f) would include the bodies named in (a)–(c). It is obvious that the IPSA would consult them, but naming them departs from the tradition of not referring much in statutes to parliamentary bodies and avoids judicial review.

Clause 4

I suggest that an independent person be appointed to deal with appeals by MPs from IPSA's determinations, that person to be a senior lawyer or retired judge. This would make the system compatible with Article 6 ECHR if these matters are "civil rights and obligations". I think payment of expenses or refusal to do so does affect civil rights—the right to be reimbursed money. Even if these matters were

[19] *McGuinness v United Kingdom* (Application no. 39511/98).

considered to be "public law" once an independent "tribunal" or court would meet English common law requirements that people have access to a "court". The body could be called a "Parliamentary Standards Court" like the Election Court. That measure should avoid judicial review of the IPSA determinations.

CLAUSE 5

Remove (4)(a) and (b) and delete "other" from (c). It is obvious IPSA would consult parliamentary bodies.

(8) (9) (10) Remove all of these subclauses and other consequential references. Reference to declarations of interest should be removed from the Bill entirely, to avoid possible judicial review applications. This should be left to the House to deal with unless and until the CSPL or some other body comes up with carefully thought out proposals about parliamentary privilege and judicial review.

CLAUSE 6

This is not necessary in the Bill and should be removed to avoid judicial review problems.

CLAUSE 7

(1)(b) will apply only to financial registration if, as I suggest, declarations of interest are removed from the Bill.

(3) The Clerk to the House makes a good point on this. I suggest giving the Commissioner a right to request that an MP provide him with all relevant information in the MP's possession. It would presumably be open to the Commissioner to complain informally (ie no statutory provision required) to the Speaker or to the Standards and Privileges Committee if he believes that an MP has withheld information, in which case the disciplinary powers of the House under privilege/contempt would be automatically available. This does not need to be mentioned in the Bill.

I suggest that the Parliamentary Standards Tribunal/Court mentioned in my note on clause 4 should have jurisdiction to deal with complaints by an MP about the Commissioner's decision.

CLAUSE 8

(2) may be omitted. The House would in any event be able to exercise its disciplinary powers under existing privilege rules.

(4)(5) are unnecessary. The House has these powers anyway.

(6) amend to omit (c). Under (f) it is obvious the IPSA will consult HC bodies.

(8) is unnecessary. If omitted (10) is unnecessary. Both should be omitted.

(11) would be unnecessary if the above measures are omitted as suggested.

CLAUSE 9

(1) This is unnecessary as these are already criminal offences.

(2) No comment

(3) Should be removed as should be reference to paid advocacy earlier. Paid advocacy would I believe be a crime under the Bribery Act (I have not had time to check this).

CLAUSE 10

It is obvious that some of the powers of IPSA and the Commissioner impliedly repeal or override some aspects of parliamentary privilege and Article 9 Bill of Rights. Omit this clause because of the privilege problems making it explicit may create. These are complex and should be dealt with only once proper consideration has been given to the implications.

CLAUSE 11

(1) Omit. There should be no reference to the Speaker in the Bill. An alternative might be that the House may by resolution authorise the IPSA to perform these functions—i.e.(8), suitably amended, covers the case. It is obvious there will be consultations.

(4) ditto

But I do not think functions of the current PCS other than the register of interests and allowances should be covered in this Bill at all, e.g. paid advocacy. These should only be dealt with after proper consultation.

(7) the HC resolution will contain the terms of the delegation, so no need to lay an agreement before the HC.

(9) no need to spell out the HC procedure so omit.

29 June 2009

Memorandum submitted by Barry K Winetrobe

JUSTICE COMMITTEE 30 JUNE 2009 EVIDENCE SESSION ON THE PARLIAMENTARY STANDARDS BILL

1. I am pleased to accept the invitation of 25 June to submit comments to the Committee for the 30 June evidence session with the Clerk of the House on the constitutional implications of the just-published *Parliamentary Standards Bill*. I worked in the House's Research Service between 1981 and 2000, and for the Scottish Parliament, on secondment, from 1999–2000, and have held various academic positions in law and politics at universities in the UK.

2. My particular area of interest has been the legal, constitutional and institutional aspects of parliaments, especially the overlap between their procedural/"parliamentary" and institutional organisation and operation, and their relationships with the Executive, Judiciary and their Public. Some of the comments below may be beyond the particular remit of the evidence session, and be matters more for, say, the proposed new Committee under Tony Wright, but they provide the context and perspective for my views.

3. Briefly my comments are:

— That the efficient and effective working of the UK Parliament is a matter of the highest constitutional importance, and fundamental to a modern, accountable democracy;

— That changes to its powers, procedures, practices, organisation and operation therefore must be examined, proposed and implemented only after full, inclusive and informed consideration, and not as the result of Executive-driven "quick fixes";

— That the imbalance in the relationship between the UK Parliament, especially the House of Commons, and the Executive is harmful to the effective operation of modern parliamentary democracy;

— That Executive dominance of the House is not just a function of its parliamentary majority, but also of the inherent and institutional position and power granted to it under Standing Orders (especially S.O. no. 14(1): "*Save as provided in this order, government business shall have precedence at every sitting*"); constitutional convention and practice (especially the existence of the ministerial post of "Leader of the House", and practical adoption of the House's powers and privileges); and the historical acquiescence in that dominance and initiative by the generality of Members and senior staff;

— That genuine, effective, responsible and accountable self-regulation of a truly autonomous parliament is an essential element of a modern, democratic and accountable parliament;

— That such self-regulation has been fatally compromised in the House in the "democratic era" by Executive dominance of its institutional as well as "parliamentary" operation, and the consequent confusion in lines of initiative, accountability and control as between Executive, House (including relevant domestic, statutory and other "internal" committees), and senior House management, despite numerous reviews and reforms of the institutional operation and structure of the House;

— That an inevitable result of this current "irresponsible" quasi-self-regulation—under both Executive dominance and the protections of privilege and exclusive cognisance—is a culture of insularity and *de facto* unaccountability of the House to its public—epitomised by the self-destructive and damaging response over the last few years to the FoI/expenses issue—which *ad hoc* reforms or "outreach" programmes (often at the initiative of, or with the consent of, the Executive's representatives in the House) cannot remedy;

— That "abuses" which emerge publicly, whether by the application of ordinary laws, like the Freedom of Information Act, or otherwise, and the resulting "moral panic" (magnified in today's "information age"), tend predictably to produce "quick fix" reforms at Government rather than House initiative, which can, if not properly and effectively scrutinised, abolish or harm necessary and appropriate powers, privileges and processes relating to a parliament (as in, for example, the Defamation Act 1996 episode, or in the misconceived belief in 1997 that parliamentary privilege was a issue suitable for relatively straightforward "modernisation", a misconception that was exposed in the subsequent Joint Committee report and the decade of faltering reform attempts thereafter);

— That the usual longer-term result of these Executive-driven reactive responses is the further weakening of the Parliament, in relation to the Executive, to the detriment of the public;

— That a modern parliament needs to operate in *all areas, both procedural/parliamentary and institutional*, subject to a coherent and consistent set of core principles, which foster a culture of autonomy, accountability, accessibility and responsibility within the Parliament as a whole, including its Members (individually, and collectively in parties etc), staff and public;

— That modern self-regulation, appropriate to current expectations of public and legal accountability and to "direct" as well as "representative" democracy, may, in appropriate areas, be best applied "at arms length", for and on behalf of Parliament, rather than directly and internally within Westminster, as in the Nolan analysis and reforms on standards in the 1990s based on self-regulation with an appropriate independent, external element;

— That the central issue of Members' resourcing, including pay and allowances, should, in principle, be an appropriate matter for a "modern" self-regulatory regime, rather than one, like election petitions in past times, to be removed from Parliament and given to a wholly external body such as the courts;

— That the provisions of the present Bill may provide some of the basis for such a system of modern self-regulation, through its new bodies, processes and regulation;

— *But* that the provenance; non-inclusive and non-transparent preparation; hasty publication and hugely expedited proposed passage of the present Bill make sufficiently informed comment on, and scrutiny of, the Bill, including its practicality and its constitutional propriety (especially in wider, core issues of privilege, and by both those in Parliament and outside, on whose behalf Parliament operates) impossible, and, as such, both symbolises and perpetuates much of what is wrong with the present operation of the House;

— That necessary reform of Parliament, especially the House, should be primarily driven by the Parliament itself, in a way that is fully open, inclusive, responsible and accountable to the public, so as to avoid abuse or self-interest "trumping" democratic imperatives of enhanced efficiency and effectiveness of the public's Parliament, and

— That such a process should take full account of the Executive's appropriate interests, as one of the three key actors, *alongside Parliament itself and the public*, in the proper working of a modern, democratic and effective Parliament, but that this participation should not be, as at present, as the dominant initiator and driver of such processes.

4. On that analysis, and taking into account the current political context, my preference for moving forward would be:

— Withdrawal (or, failing which, rejection) of the present Bill, so that a more considered, informed, inclusive and effective process of review of the overall powers and workings of Parliament, especially the House of Commons, can take place, to examine the fundamental principles which should apply to *all* relevant and inter-related aspects of its procedural/parliamentary and institutional operation, and upon which detailed proposals for the reform of particular and specific aspects can be based in a logical, consistent and coherent manner;

— That such a review would take a fundamental, empirical look at the core tri-partite relationship at the heart of a modern, democratic and accountable parliament – that of Parliament, Executive and Public – from which such core principles can be derived;

— That, in relation to the particular issues of Member resourcing, and its regulation, only such changes should be made by the House at present as are necessary for the continuing operation of the system until such review processes are completed;

— That the review by the CSPL, under Sir Christopher Kelly, should be subsumed or integrated within such a wider and more fundamental review process;

— That a key component of such a review would be (a) examination of all the legal and constitutional powers and protections that are wholly, exclusively and necessary for the proper functioning of a modern, autonomous parliament, including those which are currently described within the ambit of "parliamentary privilege", "exclusive cognisance" etc, and (b) the proper foundation for their existence and for their legal recognition, review and application (such as whether founded wholly or partly in statute or "parliamentary law and practice", and the role, if any, of the courts);

— That such a review would take full account of earlier reviews, such as that of those of the 1970s and 1990s, and of the operation of similar regimes in other democratic parliaments elsewhere, especially those of the "Westminster Model";

— That, even if the Bill should proceed, the provisions of Clause 10 are, on their face, and in the absence of any supporting evidence or argument for their necessity, too broad and potentially constitutionally harmful to the operation of necessary parliamentary legal protections, and therefore to Parliament and the public themselves, not least because of the scope they may afford for "expansive" judicial interpretation and involvement;

— That the Clause, and any related provisions, should be removed, and that much narrower provisions inserted, if and only if, the two Houses are fully satisfied, after full, unimpeded and open consideration, that they are necessary at this present time for the effective operation of such new statutory provisions on parliamentary standards, if any, as are required to be enacted at this time;

— That, on the Bill's wider "governance" and regulatory provisions, full consideration should be given to the complexities, sensitivities and potential constitutional and practical problems, as well as the advantages, of the institutional design and operational regimes of "constitutional watchdogs" of an "officer of parliament" model, especially, as here, where there is much potential jurisdictional and operational overlap (on which, see, for example, the Public Administration Select Committee's, *Ethics and Standards: The Regulation of Conduct in Public Life*, Fourth Report 2006–07, HC 121, Apr 2007, and O Gay & B Winetrobe, *Parliament's watchdogs: at the crossroads*, Study of Parliament Group & Constitution Unit, UCL, Dec 2008).

5. I am happy to provide further information or comment if the Committee wishes.

29 June 2009

Memorandum submitted by Professor Patricia Leopold, University of Reading

I must apologise that none of these comments are fully argued, several are also tentative, but pressure of time has made only a skeleton response possible.

1. Introduction

1.1 I have reservations about this Bill. It has implications that go wider than its four walls. There is a risk that legislating in haste to deal with one perceived wrong could result in a piece of legislation that fails to properly consider the wider constitutional aspects of the provision. I am convinced that the Commons is right to move away from self-regulation in this area, but constitutionally it is a significant change. It will not necessarily be popular with all MPs and failing to give them adequate time to debate the matter and to accept that it is the right decision should be part of the exercise. The much more modest scheme introduced in 1996 was not well accepted by MPs in the early days, it will not help Parliament's reputation if this new scheme once it is implemented is publicly criticised by MPs. The scheme will have a greater chance of success if it is accepted by MPs in a positive way, and not by virtue of an imposition from on high. There are opportunities for MPs to be awkward. For e.g. clause 7(3); what if a MP refuses to provide such information, this would on the face of it be contempt of Parliament but the House might decide to do nothing.

1.2 Nearly 10 years ago the Joint Committee on Parliamentary Privilege[20] made proposals for reform of privilege, some of which are implicated in this Bill. That report was made after extensive evidence was taken, but it was not acted upon. This Bill does not have the benefit of research and reflection.

1.3 The memory of Section 13 of the Defamation Act 1996, introduced as an amendment at the committee stage in the Lords, should be a warning of the dangers of legislating in haste.

1.4 The Parliamentary Standards Bill will almost certainly have to be amended when the time comes to do something similar in the Lords. In addition the memory of the words of the preamble to the Parliament Act 1911[21] should be a warning that it may be difficult to do something about the Lords. The risk is that the two Houses will have different schemes for some time. The British public will not necessarily understand that each House by tradition regulates itself. However if the regulation of allowances is so important that legislation is required, then that legislation should apply to allowances in both Houses. To legislate for the Commons in this way without including the Lords is an undesirable constitutional move.

2.1 Are the new Independent Parliamentary Standards Authority and the new Commissioner to be covered by the Human Rights Act 1998? It looks as though they should both come within the definition of a public authority or a body whose functions are of a public nature but for section 6(3) of the Human Rights Act which excludes from the definition of public authority the Houses of Parliament and "a person exercising functions in connection with proceedings in Parliament". The implications one way or the other should be addressed in the course of the scrutiny of the Bill. It is surely important that the proceedings of both the IPSA and the Commissioner are "fair". It is arguable that the procedures before the existing Parliamentary Commissioner for Standards and then the Committee on Standards and Privileges are not in accordance with the requirements of the ECHR.[22] This is important given that the result of a decision by the IPSA could be a decision by the Commons Committee on Standards and Privileges that the MP be expelled from the House.

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[20] HL Paper 43-I, HC 2154 I (1998–99)

[21] "It is intended to substitute for the House of Lords as present constituted a second chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation."

[22] See chapter 5 by Drewry and Oliver in *Conduct Unbecoming* edited by Gay and Leopold, especially pages 201–209.

2.2 Clause 8(10) sets out some of the existing disciplinary powers of the House. These powers have been criticised many times, yet the Bill is on the basis of a continuation of these powers. A proper reform of self-regulation would include new proposals for disciplinary powers.

3.1 Clause 9 creates a series of new offences by MPs. I would question whether this is required. The Theft Act 1968 (as added to and amended) provides sufficient scope for the prosecution of the types of activity covered by this clause. Is it desirable to have a special set of criminal offences just for MPs? Will this help to restore public confidence? Is there not an argument that there are too many rules, making it hard for anyone to keep within the law? I would also question whether there is a need to make the prohibition on paid advocacy a criminal offence. The use of clause 10 would be sufficient without the new offences in clause 9.

4.1 Clause 10 provides possibly the greatest cause for concern with the provision that Article 9 of the Bill of Rights 1689 will in effect not apply to a variety of activities. It is Article 9 that prevents the use of the existing criminal law with respect to many criminal offences including bribery. Article 9 is then central to the new criminal provisions of the Bill and to several other matters.[23]

4.2 The decision has clearly been taken not to attempt to define this phrase, despite many suggestions from Parliament's own committees that it should be defined. The problem is that the law is unclear. For example Sir Philip Mawer in the Trend case stated that "the decision whether ….any Member who may be shown to have wrongfully claimed parliamentary allowances should face a criminal prosecution is one for the police and the prosecuting authorities, not for me…. Claiming an allowance is not a proceeding in Parliament and the provisions of parliamentary privilege do not apply."[24] In April 2008 a statement agreed between the Chairman of the Committee on Standards and Privileges, the PCS and the Metropolitan Police Commissioner stated that "other than in the limited context of participation in proceedings in parliament, MPs are in no different position in respect of alleged criminal procedure than any other person."[25] Both these statements contain reference to proceedings in Parliament. Sir Philip's suggestion that claiming an allowance is not a proceeding in Parliament was in accordance with what Popplewell J said obiter in *Rost v Edwards*[26] namely that the Register of Interests and the practice and proceedings relating to it was not a proceeding in Parliament. However the view of the Joint Committee was that, if *Rost v Edwards* was correct, then the law should be changed.[27] What this illustrates is that any statutory reform of standards of conduct should include a definition of proceedings in Parliament and of what is meant by "ought not to be impeached or questioned."[28]

4.3 There are additional reasons for this. Recent investigations into possible criminal conduct by members of both House have been abandoned partly because of the difficulty of producing evidence which could amount to asking a court to "question proceedings in Parliament", the same problem that section 13 of the Defamation Act seeks to address. The draft Bribery Bill published in March 2009 provides in clause 15 that the words or conduct of a MP or peer will be admissible in a prosecution for bribery notwithstanding Article 9, but again without a definition of the phrase. There is a danger of creating a variety of circumstances where "proceedings in Parliament" can be "impeached or questioned" but at the same time leaving open the risk that what a court or the IPSA or the Commissioner will decide is a proceeding in Parliament may not be supported in Parliament. It should not be forgotten that although, in recent years the courts and Parliament have been careful not to interfere with each other on the matter of jurisdiction, a conflict could still arise.

5.1 The educational function of the various bodies and individuals does not seem to appear anywhere—I may have missed it or it may be going to appear in the subsequent rules. Should this not be one of the statutory administrative functions of the IPSA? An attempt to implement his educational role was one of the important changes made by Sir Philip as PCS. Despite these moves it was not reassuring to read in his reports that experienced MPs and the staff of MPs were reluctant to attend training sessions on standards of conduct. Should this role to encourage and educate MPs not be made express as a function of the IPSA? It is surely better to have improved standards of conduct than to be able to prosecute a small number of MPs for new criminal offences.

29 June 2009

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[23] See generally Lock Chapter IV and Leopold chapter V in *The Law and Parliament* (1998) edited by Oliver and Drewry.
[24] HC 435 (2002–03) Appendix, para 46.
[25] HC 523 (2007–08).
[26] [1990] 2QB 460.
[27] Para 123–124.
[28] Which has been defined by the Privy Council in *Prebble v NZ TV* [1995] 1 AC 321 at 333. by virtue of adopting the definition in the Australian Parliamentary Privileges Act 1987.