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GREEN PAPER ON PARLIAMENTARY PRIVILEGE, APRIL 2012, CM8318:

COMMENTS BY GEOFFREY LOCK

Paragraphs 35 and 34 of the Green Paper invite comments and views on the Paper, and I am responding to this invitation. In the interests of brevity I refer to the 1997-99 Joint Committee on Parliamentary Privilege as the "Nicholls Committee" and to its Report as the "Nicholls Report". I was invited to submit a paper to the Nicholls Committee, and it appears on pages 34-45 of Vol. 3 of the Committee's papers. For convenience, I enclose a photocopy.

My biographical details

I was on the staff of the House of Commons from 1953-1991 – Head of the Research Division of the Library from 1977 to 1991.

I have written various periodical articles and book-chapters on parliamentary matters from 1970 onwards, and list below those that are relevant to parliamentary privilege. Where I refer to any of these in this paper, I will give an abbreviated citation in brackets to avoid the need for the repetition of the details.

Public Law

1. *Spring 1985*, p.64-92 Parliamentary Privilege and the Courts: the Avoidance of Conflict. (Written in collaboration with Lord Denning, who supplied an annex on the Strauss case.)
2. *Autumn 1985*, p.376-378 The Application of the General Law to Parliament.
3. *Autumn 2001*, p.465-474 Aspects of Parliamentary Reform.

Industrial Law Journal

4. *March 1983*, p.28-37 Labour Law, Parliamentary Staff and Parliamentary Privilege. (Quoted in a judgment of the Supreme Court of Canada.)

Political Studies

5. *December 1989*, p.540-561 The 1689 Bill of Rights.
6. *The Law and Parliament*, Edited by Dawn Oliver [now QC] and Gavin Drewry. Butterworths – Law in Context, 1998. Chapter IV, p.48-70:- Statute Law and Case Law applicable to Parliament. (A new edition is in preparation.)
7. *Conduct Unbecoming - the Regulation of Parliamentary Behaviour*, Edited by Onagh Gay and Patricia Leopold. Politico's, 2004. Chapter 1 on the Neil Hamilton Affair, p.29-58.

8. *Study of Parliament Group Newsletter,* Summer 1999, p.13-19 Report of the Joint Committee on Parliamentary Privilege. (Copy enclosed.)

Items 6, 7 and 8 above were produced under the auspices of the Study of Parliament Group [SPG], to which I belong. This Group consists of academics and serving and retired parliamentary officials from both Houses. Four SPG members submitted evidence to the Nicholls Committee:-

- Michael Ryle, retired Clerk of Committees
- Professor Patricia Leopold, of Reading University
- the late Dr. Geoffrey Marshall, Provost of Queen's College Oxford
- and myself.

Professor Leopold and Dr. Marshall additionally gave oral evidence

Footnotes to the Report show the extensive use made of our evidence. We also made the proofs of the Oliver/Drewry book (item 6 in the list above) available to the Committee; it was in the press at the time of the enquiry.

To conclude my personal details – as I mention on p.35 of my memorandum to the Nicholls Committee, I was in my time a trade union branch officer at the House of Commons and a member of the staff side of the Whitley Committee. I was involved in getting the law changed so that some labour laws applied to the staff.

Comments on the Green Paper

The Paper's general approach

The Paper makes it clear that it is only because of the MPs' expenses case in the courts that the subject of privilege has been resurrected. Without that, the matter would have been left in oblivion as it has been for over thirteen years. The Paper (paragraph 38) purports to "agree with a great many of the 1999 Committee's individual recommendations", but I doubt if this is correct. I should welcome a schedule of the 39 recommendations in the Nicholls Report showing which the present government accepts and which it rejects. As I went through the Paper, I noticed a succession of subjects where the verdict was that "the case had not been made out" for the changes suggested by Nicholls. The idea of codifying parliamentary privilege in a new Act is a fundamental feature of the Nicholls Report. If that is rejected it makes no sense to say that the government agrees with the 1999 Report.

Detailed Comments

Paragraph 33. I was surprised that the green Paper did not mention the Commons' debate on Nicholls. There was in fact a government response to the Report, given by Mrs Margaret Becket, when Leader of the House, (Commons Hansard 27 October 1999, cols 1020-1026). The government had reservations on two recommendations numbers 28 and 30, but in general accepted all the remaining 37. Mrs Becket said "I cannot at this stage promise the House early action". However, no action whatever ensued, either early or late. If it had not been for the recent exhumation of the Report by the judiciary, it would have sunk into oblivion, and all the hard work that had been put into it would have been wasted.

Paragraph 35. The previous government was not inactive over the Nicholls enquiry. Both the Home Secretary and the Attorney General gave oral evidence and submitted various memoranda, as did the Leader of the House and two government departments.

Paragraph 40. Article 9 of the Bill of Rights was "succinct" only because Parliament never got round to elaborating it. (See p.541 of my *Political Studies* article.) Only about half the thirteen articles were expanded into full-scale statutes, and indeed William of Orange told Lord Halifax in late 1689 that he would not have all the Articles of the February Declaration confirmed by statute. However they *were* all enacted in December 1689.

Paragraph 43, Northern Ireland. See p.37 of my memo to Nicholls and p.557-8 of my *Political Studies* article. Lord Nicholls pressed Sir Robert Carswell (as he then was) for the basis of his assertion that Article 9 applied to Northern Ireland. (Questions 734-5.) The Committee was not wholly convinced and the Report (paragraph 134) said that "an element of doubt must remain" and that the matter should be clarified if legislation was enacted.

Paragraphs 41 and 42. The scope of the Bill of Rights (Article 9) and Article 25 of the Claim of Right differ (see p.37 of my memo to Nicholls and p.557 of my *Political Studies* article – item 5 above). For example, Scottish committee witnesses are not covered. The 1689 meeting of the Scottish Estates was ratified as a proper Parliament – Parliament of 1689 Act. (Stair Memorial Encyclopaedia, Vol. 5 paragraph 683.)

Paragraph 48. The judge in the *Railtrack* case permitted evidence to be given in court about proceedings in standing Committee on the Bill concerning Railtrack.

Paragraph 60. For a discussion of flexibility v certainty, see my chapter in *The Law and Parliament* (item 6 above) p.48-50. I comment: "Commending what purports to be a body of law for its vagueness does appear somewhat odd".

Paragraphs 77-82 and 193-197. "Place out of Parliament". The criticisms of some proceedings in Parliament made in the enquiry by Sir Richards Scott (as he then was) into Arms for Iraq were mentioned in my memorandum to Nicholls (p.38) and in Patricia Leopold's chapter in *The Law and Parliament* (item 6 on the book-list) p.82-3 [a passage in fact contributed by myself]. I concluded that these criticisms were "a clear but very necessary breach of Article 9 [of the Bill of Rights"].

Paragraphs 183-192. Section 13 of the Defamation Act 1996. I commented in my 2001 *Public Law* article and in my chapter in *Conduct Unbecoming* (items 3 and 7 of the book-list). The Nicholls Committee was greatly perplexed by the problems presented by Section 13, which has been much criticised. Paragraph 190 of the Green Paper says that the remedy proposed by Nicholls would be "of very limited usefulness". Paragraph 82 of the Nicholls Report says: "We believe the effort is worth making". On balance I agree.

I was surprised at the statement in paragraph 186 of the Green Paper that Section 13 Waiver had never been used. I assumed that privilege had been waived in *Hamilton v Al Fayed*, but this may be wrong.

Paragraphs 203-4. A notable case involving the Corporate Officer for the House of Commons was the Harmon Façades case of 1999 in the Technology and Construction Court. [See Nicholls Report, paragraph 254 and my 2001 *Public Law* article – item 3 in the book-list- pp.470-2]. The Commons lost the case and the total cost to the taxpayer was about £10 million:- in damages, the other side's costs and the Commons' own costs. The action related to the supply of some materials for Portcullis House – a project that was overseen by a Commons Committee. But could the Committee's papers – proceedings in Parliament – be made available to the Court? This point was raised with the judge by counsel for the House of Commons. The case established that relevant EC law applied. In my memorandum to Nicholls (p.41) I suggested that the enquiry might consider the impact of EC law, but it did *not* cover this matter. However, the subject did surface in oral evidence – Questions 57 and 509-10.

Paragraphs 199 and 206-211. Recommendation 20 of the Nicholls Report reads:- "It should be made clear in statute that every law applies to Parliament unless Parliament has been expressly excluded. The precincts of Parliament should not be a statute-free zone".

This recommendation is based on my evidence, and I coined the phrase "statute-free zone". (See pp.35-36 of my memorandum to Nicholls, p.55-64 of my chapter in *The Law and Parliament* – item 6 in the book-list – and Mrs Leopold's answers to questions 505 and 506 to the Nicholls Committee). I enclose a photocopy of a letter from Commons' Establishment Section to the Secretary of the Staff Side of the Commons' Whitley Committee, citing the AP Herbert case as a reason for the non-application of a statute.

As a staff representative I took a less Panglossian view than that expressed in paragraph 211 of the Green Paper. Sex discrimination in staff recruitment for both Houses was so blatant and deep-seated that it seemed to me that only explicit changes in statute law would do – not coverage "by analogy". Department of Employment ministers – Michael Foot and Albert Booth – achieved the necessary legislation for the Commons, but the House of Lords did not come into line until 1993, and then only after more than one intervention by the International Labour Organisation. It seemed a pity that the United Kingdom had to be shamed into complying with a Convention that it had signed.

The official view of the "authorities of the House of Commons" has long been that set out in paragraph 207 of the Green Paper – that legislation does not apply to Parliament unless it says so. The second view, set out in paragraph 208 is that the general law of the land covers Parliament except where it interferes with "exclusive cognisance". This view is expounded more fully in paragraphs 213-216. I am not convinced that the Chaytor judgment will necessarily have the consequences envisaged by the Green Paper. The quotation from the judgment says that the "presumption [based on *ex parte* Herbert] is open to question". It does not say that the presumption is wrong. Paragraph 217 says that the "approach (i.e. relying on *Chaytor*) is similar to that taken by the Joint Committee". This is quite wrong. Earlier in this Paper, I quoted the full text of recommendation 20 of the Nicholls Report. There is a world of difference between Nicholls and the Green Paper.

I find the idea quite implausible that many laws have applied to Parliament all along without anybody knowing. If this had been the case, why has Parliament passed some laws specifying that they *do* apply – for example, the Freedom of Information Act?

It seems to me that Question 20 is the wrong question. I should prefer:-

"Do you agree that it should be made clear in statute that every law applies to Parliament unless Parliament had been expressly excluded?"

My answer is "Yes".

I do *not* think that case law can be a substitute for statute law. Judicial rulings on a given subject are forthcoming only if a suitable issue comes before the courts, and are binding only if they are delivered at a high enough level. Furthermore, since 1966 the House of Lords/Supreme Court has been able to reverse itself – a much easier process that altering statute law.

Paragraphs 319 and 320. The passage refers to a "judgment of the three Law Lords". The term is incorrect. House of Lords judgments were delivered by panels of a least five judges. The matter was never argued before them by counsel and the three Law Lords were not sitting judicially. Nicholls (Report paragraph 336) uses the word "advice". Incidentally, neither the Attorney General nor the Lord Advocate, both of whom went on to be Lord Chancellor, agreed with the opinion of the three Law Lords.

Paragraphs 339-341 (and 315-318). I raised the subject of privilege of peerage on p.41 of my memo to the Nicholls Committee. It was not in its original questionnaire. (p.1 of Vol. 3 of its papers.) I outlined the *Stourton* and *Mancroft* cases, which differed greatly in their outcome. (They are also covered in the two sources cited on p.86 of the Nicholls Report.) In the more recent case – Mancroft, 1989 – the judge simply refused to apply the privilege. However, the court staff were uneasy at the possible consequences for themselves if they arrested Lord Mancroft. The case for abolition of the privilege is clear.

The Context of the Green Paper

My 1999 article on the Nicholls Report (item 8) deals briefly, in addition to its main subject, with a 1967 predecessor. This related to the Commons only and was in other respects a much less thorough treatment of the subject than Nicholls. But its fate may be instructive. There were originally 24 recommendations; and in 1977, when the Privileges Committee did a follow-up report, 20 of these were still current. The Committee tried to resurrect some of them, but had little success. Six had already been adopted, by resolution of the House. The only reason for progress had been a campaign by Michael Foot, who had been a member of the 1967 Committee.

Unfortunately nobody has played a similar role with regard to the 1999 Report and I thought it had sunk without trace. However, recently, even though not enacted, it has been used in the role of text book:- quoted not only by the judges at all three levels of the *Chaytor* case (who all pay

tribute to its usefulness) but also by Lord Bingham in the Judicial Committee of the Privy Council (Buchanan v Jennings [Attorney General of New Zealand intervening] [2005] 1 AC115).

The Nicholls Report was based on an immense amount of work: by the members and staff of the Committee; the witnesses who gave oral evidence; and the authors of written evidence – both individuals and organisations. Evidence was received from the United States and three Commonwealth Countries. The Committee held 14 oral hearings, with 20 witnesses; it asked 904 questions; it printed 67 written submissions and additionally received evidence from 165 other persons and organisations.

But no government has any conscience about wasting the time of busy people, and the subsequent scandalous neglect of the enquiry and Report is par for the course.

The figures given above show the width of the consultation carried out by the 1997-9 enquiry, and the thoroughness of its Report.

Its recommendations divide as follows:-

No change needed	Three recommendations
Can be implemented by administrative action, resolution, preparation of statements of guidance, changes to internal rules, etc	Ten recommendations
Needing legislation	Twenty six recommendations

Is there any reason why the second category should be not implemented forthwith?

The main impression I derived from the Green Paper was its recital of excuses for inaction. There is a contrast between its half-hearted approach to the subject and the robust attitude displayed by Nicholls. The quality of the latter's analysis has been recently commended by the courts, including the Supreme Court. It should be accepted as a coherent whole, not largely scrapped.

The Nicholls enquiry carried out a very wide consultation exercise, and I doubt if the results of repeating it are likely to differ very much. A new Joint Committee would need to strive hard to equal the performance of the 1997 – 9 body – and there will be no serving Law Lord to chair the Committee and write its Report. On past form, any new report on parliamentary privilege is just as likely to disappear into a black hole as its two predecessors.

I do not see any reason for a new Joint Committee. I favour the belated implementation of the Nicholls Report, which was of outstanding quality.

I attach my answers to some of the questions contained in the Green Paper.

Geoffrey Lock

July 2012

Summary of Questions (p.84-5 of the Green Paper)

I give below my answers to some of the questions asked in the Green Paper. I have no comment on the remainder

Question	
1	No
2	Yes
3	Yes
4	Yes
5	No
17	Yes
18	As suggested in the Nicholls Report
19	Yes
20	I suggest a revised question, to which I answer Yes
24	No
25	No
29	No
30	No
32	No
33	No