

Detailed Contents

| | |
|--|-------|
| <i>Foreword—Sir Ross Cranston</i> | v |
| <i>Preface—Alexander Horne, Gavin Drewry and Dawn Oliver</i> | vii |
| <i>Contributors</i> | xxi |
| <i>Table of Cases</i> | xxiii |
| <i>Table of Legislation</i> | xxvii |

Part I: Privilege and Conduct

1

1. Privilege, Exclusive Cognisance and the Law

3

Liam Laurence Smyth

| | |
|--|----|
| I. Introduction | 3 |
| A. The Claiming and Granting of Privileges of the House of Commons | 5 |
| II. The Privileges, and Contempt of Parliament | 7 |
| A. Freedom of Speech | 7 |
| B. Freedom from Arrest | 8 |
| C. Right of Access to the Monarch | 11 |
| D. Favourable Construction | 11 |
| E. Punishment for Contempt of Parliament | 12 |
| III. Exclusive Cognisance: Powers in Relation to Membership of the House | 13 |
| A. The Power to Expel Members | 13 |
| B. Resignations, the Chiltern Hundreds and Statutory Disqualification | 14 |
| C. Recall of MPs? | 17 |
| D. Lay Members of the Commons' Committee on Standards | 18 |
| IV. Parliament and the Courts | 20 |
| A. The Application of Statutes to Parliament | 21 |
| B. Privilege and Judicial Proceedings | 21 |
| V. Attempts to Reform Parliamentary Privilege | 24 |
| A. The Background: Some History | 24 |
| B. The Joint Committee on Parliamentary Privilege 1997 to 1999, and after | 26 |
| C. Members' Expenses | 28 |
| D. The Green Paper on Parliamentary Privilege 2012 | 30 |
| E. A New Joint Committee on Parliamentary Privilege | 32 |
| VI. Postscript | 32 |

| | |
|---|-----------|
| 2. Privilege and Freedom of Speech | 35 |
| <i>Oonagh Gay and Hugh Tomlinson QC</i> | |
| I. The Elements of Article 9 of the Bill of Rights 1689 Protection..... | 35 |
| A. Freedom of Speech | 37 |
| B. What are ‘Proceedings in Parliament’? | 39 |
| C. What Constitutes ‘Impeaching or Questioning’? | 41 |
| D. What is a Place out of Parliament?..... | 43 |
| E. What Does Article 9 Protect? | 44 |
| F. Article 9 and the European Convention on Human Rights | 45 |
| G. Limitations on Article 9..... | 46 |
| H. Enforcement of Article 9 | 48 |
| II. The <i>Sub Judice</i> Convention, Injunctions and Contempt of Court | 50 |
| A. Injunctions and Super-injunctions..... | 52 |
| B. The Neuberger Report..... | 54 |
| C. ‘Active Proceedings’..... | 55 |
| D. The Joint Committee Report on Privacy and Injunctions and the Green Paper | 56 |
| E. Right of Reply | 57 |
| F. Citation of Select Committee Evidence..... | 59 |
| III. The Courts and Reference to Hansard..... | 59 |
| IV. Protections for Communications with Constituents | 62 |
| V. Conclusion..... | 64 |
| 3. Parliamentary Privilege and Criminal Law | 67 |
| <i>Sally Lipscombe and Alexander Horne</i> | |
| I. Introduction | 67 |
| II. Privilege Claims Based on Article 9 of the Bill of Rights and Exclusive Cognisance | 68 |
| A. Criminal Acts Committed within the Precincts of Westminster..... | 70 |
| B. Corporate Dispensations: The <i>Graham-Campbell</i> Doctrine and its Erosion | 72 |
| C. Issues over Bribery and Corruption | 73 |
| III. Two Case Studies..... | 74 |
| A. The Case of Damian Green and Searches of the Parliamentary Estate | 74 |
| B. The Case of Members’ Expenses | 81 |
| IV. Reflections | 86 |
| 4. The Law and the Conduct of Members of Parliament | 89 |
| <i>Richard Kelly and Matthew Hamlyn</i> | |
| I. Introduction | 89 |
| II. Electoral Matters | 92 |
| A. The Background: Determination of Election Disputes by the House of Commons | 92 |
| B. Transfer of Jurisdiction over Election Disputes to the Courts | 92 |

| | |
|--|------------|
| III. The Declaration and Register of Members' Interests | 95 |
| IV. The Committee on Standards in Public Life and a Code of Conduct for Members of Parliament | 97 |
| A. The Parliamentary Commissioner for Standards..... | 98 |
| V. Party Funding and Donations and Loans to Members | 101 |
| A. Dual Reporting of Interests | 102 |
| VI. Members' Expenses and IPSA..... | 103 |
| A. Arrangements in the House of Commons in Relation to Members' Allowances | 104 |
| B. The MPs' Expenses Scandal 2009..... | 106 |
| C. The Passage of the Parliamentary Standards Act 2009 | 108 |
| D. Compliance | 110 |
| VII. Investigation of Members' Expenses—Questions of Jurisdiction | 111 |
| A. Convictions for Expenses Fraud: the Aftermath | 113 |
| VIII. The House of Lords..... | 114 |
| A. Appointment of the House of Lords Commissioner for Standards | 114 |
| B. Disciplinary Powers of the House of Lords | 115 |
| IX. Reflections..... | 116 |
| | |
| Part II: Parliament: Internal Arrangements..... | 119 |
| 5. Legal Advice to Parliament | 121 |
| <i>Andrew Kennon</i> | |
| I. Introduction | 121 |
| II. Internal Sources of Advice | 122 |
| A. Speaker's Counsel and the Legal Services Office (Commons) and Counsel to the Chairman of Committees (Lords)..... | 123 |
| B. Select Committee Legal Specialists | 124 |
| C. The Scrutiny Unit (Commons)..... | 125 |
| D. Commons Library Department for Information Services | 125 |
| E. Members of Parliament | 125 |
| III. External Sources of Advice..... | 126 |
| A. The Role of the Law Officers | 126 |
| B. Parliamentary Counsel | 127 |
| C. Ministers and Government Departments..... | 128 |
| D. The Judiciary | 129 |
| E. Non-judicial Evidence to Committees..... | 133 |
| IV. Putting the Advice to Work..... | 133 |
| A. The Member of Parliament and his Constituency Function: A Hypothetical Case Study | 136 |
| V. Conclusion..... | 137 |

| | |
|--|------------|
| 6. Freedom of Information and Parliament | 139 |
| <i>Ben Worthy</i> | |
| I. Introduction: The Freedom of Information Act 2000 | 139 |
| A. Application of the FOI Act to the Two Houses of Parliament..... | 140 |
| B. What Does FOI Cover and How Does it Work? | 142 |
| C. FOI Requests to Parliament..... | 144 |
| II. Parliamentary Privilege and FOI..... | 146 |
| III. The Impact of FOI on Parliament | 147 |
| A. Transparency | 147 |
| B. Accountability | 149 |
| C. Trust..... | 150 |
| IV. The MPs' Expenses Scandal | 152 |
| A. FOI Requests and Appeals..... | 153 |
| B. Why Did the Scandal Happen? | 155 |
| C. The Aftermath..... | 156 |
| V. Other Changes resulting from FOI | 157 |
| A. Tax Status of Peers | 157 |
| B. Lobbying Access..... | 158 |
| VI. Closing Comments..... | 158 |
| 7. Select Committees: Powers and Functions | 161 |
| <i>Richard Kelly</i> | |
| I. Introduction | 161 |
| II. Role of Select Committees..... | 165 |
| A. Scrutiny of Legislation by Select Committees..... | 168 |
| B. Post-legislative Scrutiny..... | 172 |
| C. Pre-appointment Hearings..... | 174 |
| D. Parliamentary Commission on Banking Standards..... | 178 |
| E. Evidence on Oath..... | 179 |
| F. Lay Members of the Committee on Standards..... | 180 |
| G. Statutory Committees..... | 182 |
| III. Select Committee Powers..... | 184 |
| A. Sub Judice..... | 185 |
| B. The Power to Send for Persons, Papers and Records | 186 |
| C. Sanctions | 190 |
| IV. Reflections | 195 |
| 8. The Impact of Devolution on the UK Parliament | 197 |
| <i>John McEldowney</i> | |
| I. Introduction | 197 |
| II. Devolution in Context | 198 |
| A. Scotland..... | 199 |
| B. Wales..... | 204 |
| C. Northern Ireland..... | 208 |
| D. England | 210 |

| | |
|--|------------|
| III. Issues for the UK Parliament | 212 |
| A. The West Lothian and English Questions..... | 212 |
| B. Legislative Consent Motions | 215 |
| C. Parliamentary Procedures and Select and Grand Committees | 216 |
| D. Elections and Referendums | 218 |
| IV. Summary and Conclusions..... | 219 |
| Part III: Rights, the Constitution and the Legal System..... | 221 |
| 9. The Joint Committee on Human Rights | 223 |
| <i>Murray Hunt</i> | |
| I. Parliament and the Rule of Law | 223 |
| II. The JCHR and Legislative Scrutiny | 227 |
| A. Focus on Significant Human Rights Issues..... | 227 |
| B. Information Provided to the Committee: Explanatory Notes..... | 229 |
| C. Towards Human Rights Memoranda..... | 230 |
| D. Pre-legislative Scrutiny | 233 |
| E. Post-legislative Scrutiny..... | 236 |
| III. Responses to Courts' Judgments Concerning Human Rights | 237 |
| A. Scrutiny of Remedial Orders..... | 237 |
| IV. Human Rights Treaty Monitoring..... | 238 |
| V. Thematic Inquiries..... | 240 |
| A. Standards..... | 240 |
| B. Selection of Inquiry Subjects | 241 |
| VI. Sources of Human Rights Standards..... | 242 |
| VII. Diversity of Views about Human Rights..... | 243 |
| VIII. Effectiveness of the JCHR | 244 |
| A. Guidance and Legislative Standards..... | 245 |
| IX. Reflections..... | 247 |
| A. Mainstreaming Human Rights and the Rule of Law in Parliament..... | 247 |
| B. Law's Place in Parliament | 248 |
| 10. From the Human Rights Act to a Bill of Rights?..... | 251 |
| <i>Alexander Horne and Lucinda Maer</i> | |
| I. The Story of the Human Rights Act 1998 | 251 |
| A. No Love Lost? Human Rights, Politicians and the Public..... | 255 |
| B. The Human Rights Act and the Role of the Judges..... | 258 |
| II. The Interactions between the Strasbourg Court, Domestic Courts and Politicians in the UK..... | 260 |
| A. The Prisoner Voting Issue..... | 260 |
| B. Strasbourg and Sovereignty..... | 261 |
| III. Towards a 'British' Bill of Rights?..... | 263 |
| A. Rights and Responsibilities..... | 264 |
| B. 'Britishness' | 265 |

| | |
|--|------------|
| C. Rights and Devolution..... | 265 |
| D. Economic and Social Rights..... | 267 |
| E. Ownership of a Bill of Rights..... | 267 |
| F. Will the Coalition Deliver a Bill of Rights?..... | 269 |
| IV. Relations with the European Court of Human Rights..... | 276 |
| V. Conclusion..... | 278 |
| 11. The House of Lords Select Committee on the Constitution | 281 |
| <i>Andrew Le Sueur and Jack Simson Caird</i> | |
| I. Introduction | 281 |
| II. Origins, Personnel, Operation..... | 283 |
| A. Origins..... | 283 |
| B. Membership | 284 |
| C. The Influence of the Chairman..... | 287 |
| D. Committee Staff and Advisers..... | 287 |
| E. Other Committees | 288 |
| III. Legislative Scrutiny..... | 289 |
| A. Scope..... | 289 |
| B. Process of Bill Scrutiny | 290 |
| C. Standards..... | 292 |
| D. Case Study on the Legislative and Regulatory Reform Bill 2006..... | 293 |
| E. Case Study on the Health and Social Care Bill 2011 | 297 |
| IV. Policy Inquiries..... | 300 |
| A. The Inquiry Process | 301 |
| B. Assessing the Impact of Inquiries | 302 |
| C. Case Study on Deployment of British Armed Forces Abroad | 302 |
| V. Dialogue with the Judiciary | 304 |
| VI. Conclusions..... | 307 |
| 12. Parliament and the Courts: A Pragmatic (or Principled) | |
| Defence of the Sovereignty of Parliament | 309 |
| <i>Dawn Oliver</i> | |
| I. The Doctrine of the Sovereignty of Parliament..... | 309 |
| A. Sovereignty vs Privilege | 311 |
| B. The Special Position of European law | 313 |
| C. A Democratic Principle?..... | 313 |
| II. A Choice for the UK: Constitutional Supremacy or Parliamentary Sovereignty and Pragmatism?..... | 315 |
| A. Towards Judicial Striking Down of Statutory Provisions?..... | 316 |
| B. Parliamentary Sovereignty—a Doctrine, not a Democratic Constitutional Principle | 317 |
| C. A Hypothetical..... | 318 |
| III. Conflict, Comity and Culture in Relations between the Courts, Parliament and the Executive | 321 |
| IV. Deterrents against Abuse of Parliamentary Sovereignty | 323 |

| | |
|--|------------|
| A. Political Cultural Capital | 323 |
| B. International and European Standards..... | 324 |
| C. The Houses of Parliament: Select Committees | 327 |
| D. Some Reflections..... | 329 |
| V. What More Is To Be Done about Parliamentary Sovereignty? | 330 |
| A. A Written Constitution? | 331 |
| B. Stronger Parliamentary Committees | 332 |
| C. A Greater Role for the Courts?..... | 333 |
| D. Towards an Independent Scrutiny Commission?..... | 334 |
| VI. Summary and Conclusions..... | 335 |
| 13. Parliamentary Accountability for the Administration of Justice | 339 |
| <i>Gavin Drewry</i> | |
| I. The Constitutional Territory of Accountability..... | 339 |
| II. A Negative Tradition of Accountability—the View from the Lord Chancellor’s Window | 342 |
| A. Non-accountability in the 1980s..... | 344 |
| B. Enter Lord Mackay—the Green Paper Furore | 345 |
| III. New Public Management and the Administration of Justice..... | 347 |
| IV. The Constitutional Reform Act 2005—Redrawing the Boundaries..... | 350 |
| A. Some Implications for Parliamentary Accountability..... | 352 |
| V. The Ministry of Justice and Parliament | 355 |
| A. The Role of Select Committees..... | 356 |
| VI. Conclusion..... | 359 |
| <i>Index</i> | 363 |

<http://www.dbooks.org>