**Select Committees and Contempts**

**Memorandum to the Committee of Privileges from Sir Malcolm Jack KCB, Former Clerk of the House (SCC0002)**

*Introduction*

1. I am pleased to submit a memorandum on the matter of the exercise and enforcement of the powers of the House in relation to contempts committed before Select Committees following the Resolution of the House of 27th October 2106 referring it to your Committee.
2. While in this paper I will focus on the specific context of Select Committees, I should say at the outset that for some time I have become convinced of the need for comprehensive codification of parliamentary privilege, a view I submitted to the Joint Committee on Parliamentary Privilege in 2013.[1]
3. As the Committee knows, that view was not supported by the Joint Committee at that time which set aside the opinion of its predecessor Joint Committee (1999). The principal arguments for codification advanced in 1999 were –

An Act would make it easier for the electorate to understand the importance of parliamentary privilege by presenting a clear, accessible code;

Such a Code would clarify two key areas – freedom of speech on the one hand and exclusive cognisance on the other [the latter referring to the rights of each House to set its own rules and practices; control its own precincts & exercise disciplinary & penal powers];

Such a Code would clarify key terms in the Bill of Rights 1689 such as 'proceedings in Parliament'; 'place out of Parliament'; 'questioning'; 'impeaching' etc.;

Such a Code could maintain flexibility by stating principles;

Such a Code would not increase the power of the Courts which already interpret the ambit

of privilege.[2]

4. My view is that these arguments remain convincing and that Parliament should act to legislate. The present subject matter, of how to deal with witnesses' contempts, needs to be set in the framework of a comprehensive, privileges Act.[3]

*Contempts*

5. The present case reported by your Committee to the House which led to the referral should be seen in the context of a long history of contempts over which, in recent times, the House has exercised little or no control.

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[1] Joint Committee on Parliamentary Privilege of Session 2013-14 Report HL Paper 30; HC 100.
[2] Joint Committee on Parliamentary Privilege of Session 1998-99 Report & Evidence HL Paper 43 I-III; HC 214 I-III. I: paragraphs 378-385.
[3] See R. Gordon & Malcolm Jack, *Parliamentary privilege: Evolution or codification?* The Constitution Society, 2013.

6. Erskine May sets out many examples of contempts committed by witnesses appearing before Select Committees. These include witnesses who:
   - have refused to be sworn or undertake to tell the truth;
   - have refused to answer questions;
   - have refused to produce or destroy documents in their possession;
   - have prevaricated;
   - have given false evidence;
   - have wilfully suppressed the truth;
   - have persistently misled a committee;
   - have trifled, were insolent or insulting and
   - even appeared in a state of intoxication.[4]
7. In recent times Select Committees themselves have struggled to get satisfactory evidence from witnesses. Two egregious cases were that reported by the Committee on Culture Media and Sport in their report on *News International and Phone Hacking* (2012) and an enquiry in 2013, the Treasury Select Committee came to the conclusion that the evidence of the principal witness in an inquiry "fell well short of the standard that Parliament expects."[5]

*House's ineffectiveness*

8. The essence of the House's ineffectiveness in dealing with contempts is that Parliament is no longer the High Court of Parliament and cannot act as a Court judging cases and deciding on penalties. That reality is recognised in a number of ways from the decision to impose penalties sparingly and while admonishing offenders, abandoning the practice of summoning them to the House. There is also a legitimate concern of how Parliament can act in a modern, human rights context.
9. The latter point emerged most clearly in the case of A. V. UK in the European Court of Human Rights (2002). The European Court did not hesitate to hear the case despite the fact that it constituted an intrusion into the area of parliamentary proceedings proscribed in the UK by Article 9 of the Bill of Rights (1689) and by constitutional provisions in the cases of other Member states. In the event the Court came to the conclusion that the use of parliamentary privilege on that occasion was not a disproportionate restriction on the right of access to a court or in respect of private and family life and that therefore neither Article of the Convention had been violated.
10. While the ruling was a vindication of the absolute nature of parliamentary privilege, the judges were not unanimous nor were they uncritical of the exercise of privilege without recognition of modern, human rights such as in the provision of a right of reply by citizens who feel they have been libelled in Parliament.
11. Even if the UK is no longer under the jurisdiction of the Courts, similar human rights arguments will doubtless be deployed in any attempt of Parliament itself to administer justice.

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[4] Erskine May, 24th Edition, (2011) p. 252/3.

[5] see Culture Media and Sport Select Committee Eleventh Report of Session 2010-12 "News International and Phone Hacking" HC 901-1 and Treasury Select Committee Second Report of Session 2012-13 "Fixing Libor: preliminary findings" HC 481-1: paragraph 144.

*What needs to be done?*

12. In my opinion the only viable options of the three set out in the Memorandum of the Clerk of the House (i.e. do nothing; proceed by way of Standing Order or by Resolution; legislate) is to legislate, not only to provide for contempts by witnesses before Committees but for the reasons set out in paragraph 3 above. While doing nothing will lead to nothing; proceeding by Standing Order or Resolution without power of enforcement, will similarly have no real effect.
13. The model of the Australian Parliamentary Privileges Act 1987 is at hand. Retaining for Parliament itself to decide what constitutes contempt, the Australian Act gives Parliament the power to impose fines (on a stated scale) for those who commit contempts both against the House and its Committee as well as to impose a prison sentence of up to six months (with a possibility of rescinding the decision).[6] A procedure for due process in the execution of these powers has been put in place.
14. An important provision is set out in Section 12 which protects witnesses from any fraud, intimidation, force or threat, or by other improper means to influence another person in respect of evidence given. Penalties are imposed. This would protect witnesses from being victimised for evidence given to Committees as in the Weleminsky case cited in the Clerk of the House's Memorandum.
15. While not all the provisions of the Act may be deemed appropriate, legislation modelled on it would provide much more muscle for Select Committees.

*Would legislation invite interference into the internal workings of Parliament by the Courts?*

16. One of the principal objections argued against encoding parliamentary privilege in statute is that it would lead to interference by the courts in the affairs of Parliament, linked in the minds of those arguing the case, with an increase in so-called judicial activism. There are a number of factors which, in my mind, render this argument weak but it is first necessary to be clear about what the boundaries between the two organs of the constitution actually are.
17. The first point to make is that modern parliamentary privilege, at least in respect of freedom of speech, is already a matter of statutory law. The Bill of Rights 1689 may be regarded as a sacrosanct, "constitutional" statute but that has not prevented the Courts, over the ages, from interpreting it. The result of the nineteenth century struggle between the Courts and Parliament was that Parliament gave up its effective right to determine what privilege is – it ceded that right to the Courts but retained the right to have exclusive cognisance over its internal affairs. The argument recently advanced by the Liaison Committee - that a privileges statute would undermine the separation of powers - ignores the basic fact that the foundation of modern privilege, the Bill of Rights is itself a statute.[7]
18. A significant statement about this matter was made by the then Attorney General in a memorandum laid before the House of Commons on 3rd April 2009.[8] While there is

[6] Ibid. s.7 (Penalties Imposed by Houses); s. 12 (Protection of Witnesses) and s. 13 (Unauthorised disclosure of Evidence).

[7] Liaison Committee Second Report of Session 2012-13 "Select Committees effectiveness, resources and powers" HC 697 paragraph 133.

[8] For the full text of the Attorney's view see House of Commons Committee on Issue of Privilege of Session

recognition of the right of Parliament to regulate its internal affairs without interference, the Attorney makes it clear that determining questions of law in relation to privilege is a matter for the Courts and not Parliament and such determination is based upon the interpretation of Article 9 of the Bill of Rights. It is clear from this statement of legal policy that there is no question of the Courts giving up that right in the existing status quo.

19. Nevertheless, I believe there are grounds for considering that the risk of interference in the internal affairs of Parliament is minimal should there be a new statute defining privilege. My confidence arises from pronouncements from the bench in the case of *R. v. Chaytor.*[9] At every court level – in the High Court, the Court of Appeal and the Supreme Court, the exclusive cognisance of Parliament over its own affairs is clearly acknowledged and there is no suggestion in any of the judgments delivered in these courts that there is a desire to interfere with Parliament's internal workings. A new statute would in fact clarify exactly what the boundaries between Parliament and the Courts were, in a way useful to both sides.
20. Finally, I draw support for that conclusion from the experience of the Australian Commonwealth. After more than 20 years of codification in a common law system similar to our own, there has been no sign of an increase in court cases involving disputes over the meaning of the 1987 Privileges Act. On the contrary, it is the opinion of the parliamentary authorities in the Australian jurisdiction that the existence of the Act has been of considerable benefit in clarifying the relations between the various organs of the constitution. That is particularly the case because of the redefinition of otherwise obscure terms in the Bill of Rights 1689.

Malcolm Jack, 2017

Addendum

1. My Memorandum was first submitted to the Committee in 2017 but I do not see any matter of principle in it that I feel I need to change.
2. The case of Dominic Cummings, resulting in a formal admonishment from the House in April of this year, following a Report of your Committee, reinforces the need for the House to act in the way I have suggested in my memorandum.

Malcolm Jack, August 2019

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2009-10 HC 62 Ev. 130—31. Also see Erskine May, 24th Edition (2011) p. 303.

[9] See *Chaytor* [2010] UKSC 52.