

## Written evidence from Sir William Cash MP, Chair of the European Scrutiny Committee (SCC0010)

### Introduction

I am responding to your invitation to give evidence on select committees and contempt, which naturally includes consideration of the powers of the House itself to deal with contempts.

You ask:

- What are the benefits and drawbacks of the options for change;
- What are the appropriate sanctions for non-compliance or other contempts by witnesses and how these should be applied;
- What protections or safeguards are necessary for witnesses; and
- whether there are other issues the committee should consider?

### Background

As both a constitutional lawyer and a former member of the 2013 Joint Committee on Parliamentary Privilege, I remain of the opinion that the measures set out in that Committee's report remain appropriate.

While in most instances Committees will seek evidence in the course of a general inquiry, they will on occasion need to enquire into the circumstances surrounding specific actions. They may need to seek evidence from those who would prefer not to give it. It is in the public interest that they should be able to get that evidence, and this ultimately depends on a power to compel witnesses to attend.

It should be noted that this will be exceptional. Committees have consistently been anxious not to interfere with the functions of statutory investigative and adjudicatory bodies, which include not just the courts and the police, but inquiries set up under the Companies Act or the actions of regulators. Nonetheless, there are circumstances in which committees rightly feel they wish to investigate significant failures. This can be in order to ensure that if necessary the legal and policy framework is changed to prevent their repetition. In such cases, the extremely lengthy delays which would occur if Parliamentary investigation was delayed for a criminal investigation or regulatory inquiry could frustrate the public interest in ensuring that broader reforms were promptly made, and based on proper understanding. There will also be occasions on which a Committee may wish to take action because it considers that abuses are either sanctioned by the current legislative framework, or are not being taken with proper seriousness.

In practice, while Committees have pressed for regulatory action, and have on occasion looked into matters involving civil rights and obligations, I cannot think of a case when Committees

have not been at great pains to ensure that their inquiries did not expose witnesses to civil or criminal liability, to the extent of postponing an inquiry, or abandoning it all together.

Indeed, the anxiety of Committees on this front is remarkable, given that, in principle, Article 9 of the Bill of Rights should mean that evidence given to a Committee could not be used in any subsequent legal proceedings against a witness.

So the position is that the House and its Committees do not abuse the powers available to them.

The next issue is the interaction of the House's powers with the expectations of fairness contained in the Convention of Human Rights. I reiterate the point of the Joint Committee: in the ordinary case of taking evidence, Committees are not concerned with determining civil legal liability: they wish to establish either policy background, or events, or the reasons for certain decisions. They may criticise individuals in the course of evidence taking, or in any final report, but those criticisms cannot be taken into account in any legal proceedings, and should not be cited in court. If this is not the case, the remedy is in the Court being more attentive to the boundary between its proceedings and those Parliament.

I give this background because I think it is important that any consideration of change to the current system is based on a realistic assessment of the way in which Committees operate in practice.

### **Change to the current system**

While the present lack of clarity about the House's powers to deal with contempt has not yet lead to an impasse between Committees and witnesses, it is not desirable that it should continue. The House should now take steps to make it clear that its jurisdiction over contempts remains and that it will, if necessary, take action against contemnors.

Parliament has to be supreme in areas related to its own cognizance. For the reasons set out in the Joint Committee report, I do not believe enforcement can be handed over to the court without either fundamental change to the relationship between the courts and Parliament or reducing the role of the courts in such cases to that of a cipher. I note that even the draft legislation set out in the Clerk of the House's memorandum contains provision that

- (5) The court may consider the nature and purpose of the Committee's summons and proceedings for the purposes of determining what action (if any) to take under subsection (3)(b) (but not for any other purpose, and this section does not diminish or qualify any existing right or privilege of the House of Commons).

While this may direct to court to consider only the suitable penalty for failure to with a Committee order, its interpretation will rest with the courts. I cannot imagine a court would not wish to ensure proceedings were properly fair, which would inevitably lead to evaluation of the Committees' actions by the courts, and end the principle of courts and each House of Parliament respecting each others' sovereignty.

There does indeed need to be a mechanism to ensure that Committees are acting reasonably. If the courts are not the appropriate body to make this assessment, responsibility needs to rest within the House of Commons, as it does at present. Contempt of court is rightly and fairly dealt with by the court system; contempt of the House should similarly be dealt with by the House itself

As for sanctions, I consider that both the power to fine and the power to imprison should be available. The fact the House has not exercised these powers does not mean they have been extinguished. Indeed, since the release of prisoners from custody in the 19 century was dependent on their paying fees set by the House, some sort of financial penalty may have imposed even after 1660, even if it was not termed a fine.

### **Safeguards for witnesses**

I agree with the Clerk of the House that a principled based system should be set by the House, with details of the procedures to be followed set at Committee level. The level of safeguard will depend on nature of the proceedings. In a normal Committee inquiry there can be no question of anything approaching a civil or criminal liability being involved, and fairness can be secured with a light touch. Whether not to share drafts of criticisms likely to appear in the Committee's report should be a matter for the Committee concerned.

The approach should be different where a matter has been referred to the Committee of Privileges for dealing with as a contempt. If it is accepted that a contempt inquiry could lead to fines or imprisonment, then there will need to be safeguards to ensure that Committee of Privileges inquiries meet the standards which would be expected under the European Convention of Human Rights. Again, these need not be heavy handed, given the rarity of proceedings, and the House's extreme reluctance to invoke its penal jurisdiction.

The Committee of Privileges has shown that it is able to conduct a fair and proportionate investigation, but there needs to be some certainty about the procedure which it will be following, and that the process has the sanction of the House itself. If the approach of setting out the Committee's process in standing orders is considered too inflexible, then I believe the House should explicitly give the Committee the power and duty to set out the procedure it will use in each case.

### **Other matters**

I have stressed in my evidence Committees are in fact anxious to act in a way which does not expose witnesses to any double jeopardy. I consider the Committee should also consider the

problems which could be caused by Ministerial refusal to allow civil servants to give evidence in cases where a full and frank account of events by officials would be crucial for a Committee enquiry. I also believe that the convention that members of the House of Lords cannot be summoned is ripe for review, particularly in cases where those involved are either currently ministers, or have recently held ministerial office.

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