

Memorandum for the Committee of Privileges

Select committees and contempt inquiry

Dr John Benger, Clerk of the House of Commons (SCC0016)

Introduction

1. In a letter from the Chair of the Committee on 22 May 2019 I was asked to provide supplementary material to the analysis set out by my predecessor, Sir David Natzler (in his evidence of February 2017),¹ covering the following areas:

- a) any points I wish to make on the published written evidence previously received by the Committee
- b) details of significant recent developments relevant to the inquiry at Westminster and in devolved and overseas parliaments
- c) views on the benefits and risks of legislation (as suggested by Sir David)
- d) practical steps the House can take to ensure the fair treatment by committees of witnesses and prospective witnesses.

I will deal with each of these in turn.

a) Points on published written evidence previously received

2. In the two years since you initiated this inquiry, the issue of how the House exercises and enforces its powers in relation to select committees and contempts has become, if anything, of greater relevance and urgency.

- The evidence submitted since Sir David's continues to present a disparate view of what the most appropriate solution might be. Between them, chairs of committees, both individually and via the Liaison Committee supported all three routes suggested in the 2013 Joint Committee report² - do nothing, a non-statutory solution (reassertion of existing powers) and a statutory regime. (I will comment on these options later).
- Evidence from one of my predecessors, Sir Malcolm Jack, suggests there is a wider problem and that legislation should be used to provide a 'comprehensive codification of parliamentary privilege' incorporating other areas of privilege, such as freedom of speech and exclusive cognisance. This approach has risks as well as benefits. Efforts to pursue it in the past have foundered not least because of differences over what such a 'codification' would entail.
- The former Lord Chief Justice, Lord Thomas of Cwmgiedd, argued that a statutory regime for the enforcement of orders of the House (or a committee) as proposed by Sir David, would necessarily require the courts to be able to examine any order for two reasons, first because of their responsibility to

¹ SEL001, Sir David Natzler, Clerk of the House, February 2017

² HC (2013-14) 100

address any procedural concerns relating to fundamental rights and second because to prohibit them from doing so would be contrary and damaging to judicial independence and the rule of law.

Do nothing

3. Frank Field and Iain Wright (former Chair of the BIS Committee) reflected their personal experiences in their individual evidence. They said that witnesses had been persuaded to attend voluntarily through their concerns about share prices, reputational risk or public perception.³ As a result, these committees had not had to resort to formal use of their, or the House's, powers. Their conclusion was that the current arrangements are adequate.
4. Subsequently, the Liaison Committee has stated that, although there is no consensus among its members on whether a statutory or non-statutory route was the best way forward, there was agreement that the situation could not be allowed to remain as it is.⁴

Reassert the House's existing powers

5. Sir William Cash argued that clarity should be provided by the House about what its jurisdiction was, and that it should reassert that if necessary it would act against contemnors by means of a fine or imprisonment.⁵ Sir Bernard Jenkin repeated his support for the proposals set out in the 2013 Joint Report.⁶
6. However, as Sir David Natzler said, "assertion alone can neither add to the existing powers of the two Houses nor require the compliance or co-operation of others (e.g. the police or the courts) in their enforcement".⁷ Therefore, restating the House's powers is unlikely to provide an effective answer to the problem of securing the enforcement of the House's orders.

Statutory provision and sanctions

7. I set out my views on statutory provision below in discussing the benefits and risk of legislation.

b) Details of significant recent developments relevant to the inquiry at Westminster and in devolved and overseas parliaments

Westminster

8. I do not need to recount the circumstances of the case of Dominic Cummings since they are set out in your report on the matter.⁸ There have been a number of other cases in which committees have struggled to secure the attendance of potential witnesses, although none has progressed so far as to lead to a referral to your committee.⁹

³ SEL0010 (Frank Field MP, Chair of the Works and Pensions Committee), SEL0012 (Iain Wright MP, Chair of the Business, Energy and Industrial Strategy Committee), April 2017

⁴ Correspondence with the Chair of the Liaison Committee relating to the exercise and enforcement of select committee powers, dated 19 June 2018,

⁵ SEL0013 (Sir William Cash MP, Chair of the European Scrutiny Committee), April 2017

⁶ Correspondence with the Chair of the Liaison Committee relating to the exercise and enforcement of select committee powers, dated 19 June 2018, Annex 3.

⁷ SEL001, Sir David Natzler, Clerk of the House, February 2017, para 2.11

⁸ *Conduct of Mr Dominic Cummings*, First Report of Session 2017-19 (HC 1490).

Wales

9. The [Standing Orders of the National Assembly of Wales](#) state that:

17.50 Committees may invite any person to attend meetings for the purpose of giving evidence, or providing advice and may invite any such person or body to submit evidence and produce documents.

17.51 Any committee may, subject to sections 38 and 40 of the Act, exercise the powers in section 37 of the Act, to require persons to attend their proceedings or to produce documents.

[S37\(2\) of the Government of Wales Act 2006](#) states that the Assembly cannot impose requirements on a person who is not involved in the exercise of functions in relation to Wales.

10. To date, the power accorded the Assembly by the Act and the Standing Orders has not been used by a committee, or by the Assembly as a whole. However, the powers have been a topic of recent discussion.
11. In April 2018, a motion tabled by the Opposition, for an ‘opposition debate’, which sought the release of a report into a possible ‘leak’ of information by the Government relating to the November 2017 Cabinet reshuffle.¹⁰ The motion was narrowly defeated by the Government.
12. Since this event two further ‘No Name Day Motions’, seeking to invoke the same power for the same purpose, have been tabled by an Independent AM. However, the Business Committee has declined to schedule them for debate, with the Presiding Officer citing an expectation that the power should be used “proportionately and reasonably”.
13. Furthermore, the Public Accounts Committee recently discussed the possibility of using the power to force the release of the same report but halted proceedings on the matter when the First Minister of Wales announced that the Government would publish the report.¹¹

United States of America

14. In the US, if, during an inquiry, Congress finds that testimony or documents which have been requested are withheld, House rules state that either the Senate, the House of Representatives, or their committees can request the information by subpoena.¹² Non-compliance can lead either to orders being

⁹ For example, Mr Jeremy Kyle declined an invitation to appear before the Digital, Culture, Media and Sport Committee, see <https://www.parliament.uk/business/committees/committees-a-z/commons-select/digital-culture-media-and-sport-committee/news/reality-tv-chair-statement/>

¹⁰ The reshuffle had resulted in Carl Sargeant AM losing his position as Cabinet Secretary for Communities and Children. Mr Sargeant reportedly took his own life four days later.

¹¹ The First Minister announced that the report, and other relevant documents, would be published once the Coroner’s Inquest into Mr Sargeant’s death had reported. The Inquest is expected to reopen, and conclude, in Summer 2019.

¹² There are several ways in which Congress can combat non-compliance with subpoenas. The criminal contempt statute permits Congress to progress the matter to the executive branch for criminal

issued by court, or the relevant body can ask a court to declare whether its own subpoena is valid. In the case of the latter, the subject of the subpoena is given the chance to comply before being ordered to do so by the court. This builds in fairness to the witness by ensuring as many opportunities as possible for them to comply while ensuring there is a greater authority to ensure they comply. If they fail, then they are punished for contempt of court. Avoiding such a punishment provides an incentive for compliance.

15. However, as Sir David noted, the weakness of this statutory regime is that it does not apply in the case of a subpoena issued to an officer of the executive acting in their official capacity.¹³ There have been several recent cases in the US where members, and former members, of the executive branch have resisted subpoenas to appear before Congressional committees.¹⁴ Attorney General William Barr and former White House Counsel Don McGahn have both refused orders to give evidence to the Judiciary Committee on issues such as Special Counsel Robert Mueller's Russia report in the last few months.
16. On 11 June 2019 the full House of Representatives passed a civil contempt resolution that allows the House and all its committees to pursue and enforce civil contempt of Congress citations for officials of the executive if they have previously refused subpoenas.

Australia

17. The privileges and powers of the two houses of the Commonwealth Parliament of Australia (the House of Representatives and the Senate) are set out in the Australian constitution and in statute – the Parliamentary Privileges Act 1987.
18. The power to conduct inquiries by compelling the attendance of witnesses, the giving of evidence and the production of documents is conferred by section 49 of the Constitution.
19. 'Privileges resolutions' passed by the Senate in 1988 provide a code of procedures for Senate committees to follow for the protection of witnesses; this is binding on those committees. The procedures confer a number of rights on witnesses, particularly the right to object to questions put in a committee hearing and to have such objection duly considered. Witnesses are to be supplied with copies of the procedures, and may appeal to the Senate if a committee fails to observe the procedures.
20. Refusing an order to attend a committee may constitute a contempt. In the worst cases, contempt may be punished by a term of imprisonment or the imposition of a fine. The Senate has never imposed such a penalty. Other penalties include admonishment or, in appropriate cases, the withdrawal of access to facilities at Parliament House (for example, the Press Gallery). It should be noted that the 1987 Act does not transfer to the courts the power to impose penalties for a contempt; this power is vested in the two Houses themselves.

prosecution of the person withholding the information. Alternatively, Congress could seek a civil judgement which would declare that the person withholding information is legally obligated to comply. Congress can also use "legislative leverage" and political negotiation where necessary.

¹³ SEL001, Sir David Natzler, Clerk of the House, February 2017, para 2.16

¹⁴ Executive privilege can be used for those working as an adviser to the President to avoid compelling them to testify about their official duties.

21. In a recent case in the High Court, the power of a joint committee (committee of both Houses) to summon witnesses was challenged, on the grounds that section 49 of the Constitution does not make explicit mention of joint committees. The outcome of the case was summarised in a publication of the Senate:

The Joint Committee on Corporations and Financial Services had ordered the attending of two witnesses before its franchising inquiry, after they had declined invitations to appear. Those witnesses sought to challenge the committee's capacity to make those orders and applied for a stay or injunction – the precise relief sought was unclear – to restrain their operation. Her Honour Gordon J found that the witnesses' application lacked merit, and that the issues raised "should generally be resolved by the Parliament, not the courts". [...] In dismissing the interlocutory application, Her Honour set out the constitutional, legislative and procedural bases of the committee's powers, finding:

Where, as here, there is an apparently validly appointed joint committee...which has a power to direct a person to attend, it is difficult to identify a role for the courts in relation to that exercise of power.

The witnesses later appeared before the committee, as required.¹⁵

c) Views on the benefits and risks of legislation

Benefits of legislation

22. I do not believe that Parliament can or should expect other agencies, whether the courts or the police, to act to enforce its orders without explicit statutory authority. The power of the Speaker to issue a warrant or order for committal and in so doing to require the support of the civil powers in its exercise (as was formerly the case)¹⁶ is, in my view, unlikely nowadays to be acted on or indeed to survive challenge in the courts.
23. If such powers are required, they can be ensured only by statutory provision. That could come in a variety of forms. The former Lord Chief Justice proposed in his memorandum alternative options to that canvassed by Sir David. Other approaches have been taken elsewhere. The key question is whether the benefit of effective enforcement in those very few cases where a witness remains intractable outweigh the potential risks of subjecting some elements of parliamentary proceedings to inquiry and judgment by the courts.

Risks

24. There are two principal grounds for concern over introducing an element of judicial oversight of select committee proceedings. The first is that it might be the thin end of a wedge; that somehow legitimate examination in one area might encourage what Parliament would consider to be illegitimate inquiry in another. There have been recent cases which have demonstrated that the courts do not

¹⁵ Australian Senate, Procedural Information Bulletin No. 331 (for the sitting period 26 November to 6 December 2018).

¹⁶ See Erskine May 22nd edition p134

always have at the front of their minds the restrictions imposed upon them by Article 9 of the Bill of Rights, and even when reminded of them are not always convinced of their extent or relevance.¹⁷ Any statutory provision which complicates or makes less clear the scope of those Article 9 protections might encourage further challenge to them. The second is that, in the particular context of select committees, the courts might be obliged to satisfy themselves that the conduct of the committee in all its proceedings up to the issue of the order had met the requirements of natural justice and human rights legislation.¹⁸

d) Practical steps the House can take to ensure the fair treatment by committees of witnesses and prospective witnesses.

25. Across all the evidence there was no dispute about the need to ensure committees behave reasonably to a witness. It is vital to the reputation of committees, the House and to public confidence in their processes that Members treat witnesses fairly and with courtesy. Public opinion is often part of the soft influence which persuades witnesses to attend or provide papers, but a committee is being scrutinised itself by the public. It is not inconceivable that egregious behaviour by a committee could reverse that influence.
26. A committee needs to be robust in asking questions where needed but it should also allow fair opportunity for response. Sir David proposed the creation of principles-based guidance for witnesses. Parliament's Behaviour Code, developed in 2018, is a good set of principles on which to base such guidance. Committees might also consider more proactive communication with witnesses on how to make a complaint if they feel they have been treated in breach of the code.
27. Fair treatment is about process not just behaviours. Witnesses need to know they won't be ambushed by questions on topics they are unaware of. They need to know they will be given the chance to respond in full and rebut and explain any criticisms. In your recent inquiries into individual case of alleged contempt you successfully built on the 2013 Joint Committee's draft Standing Orders¹⁹ by establishing and circulating in advance, including to the alleged contemnor, the procedures by which cases are examined. There might be merit in adopting a similar approach more widely amongst other committees - setting out what a committee is trying to achieve, how it will go about its business and what is expected from witnesses. This information could be included in existing guidance, such as the *Guide for witnesses giving oral or written evidence to select committees* produced by the Committee Office.

Conclusion

28. There are a number of points which the Committee may wish to weigh up during its deliberations:

¹⁷ See for example *R(Heathrow Hub Ltd and Another) v Secretary of State for Transport*, paras 139-152.

¹⁸ The recent judgment by the Irish Supreme Court in the case of *Kerins* illustrates how such issues might be dealt with by a UK court if it had comparable jurisdiction.

¹⁹ HC (2013-14) 100, Annex 3

- 1) Do nothing could be an option, considering that the need for enforcement or effective sanction is rarely needed, although the Liaison Committee most recently rejected this proposal.
- 2) Reasserting existing powers alone cannot ensure that committees will be able to enforce their powers to summon witness and call for papers. This has proved difficult in recent cases and is recognised by committees as a growing issue in parallel with the growth in the range and scope of scrutiny by select committees.²⁰
- 3) New statutory provision could provide a solution but will require detailed examination in order to establish a system which works for the House, committees, witnesses and the judiciary - not weakening the protections of Article 9 while providing witnesses and third parties with checks and balances and protecting judicial independence and the rule of law. A limited intervention from the courts, focussed on enforcing orders after the House has certified a non-compliance might achieve this.
- 4) Regardless of the route is chosen, a prior task may be to clarify what is expected of Members and witnesses regarding their behaviour, what happens under current processes and what would happen if there was a breach of these arrangements. Developing principles-based guidance which could be endorsed by the House with more detailed guidance and rules developed by the Liaison Committee, akin to the 2013 Joint Committee draft Standing Orders, might be a positive way to lay the groundwork for any subsequent proposal.

29. I would like to thank the Committee for inviting me to submit a memorandum. I am at your disposal for any further assistance you may require and to expand on any of the points I have raised in this memorandum in the forthcoming oral evidence session.

Dr. John Benger, 24 June 2019

²⁰ Correspondence with the Chair of the Liaison Committee relating to the exercise and enforcement of select committee powers, dated 19 June 2018