NOTE FROM COUNSEL TO THE INQUIRY:

PARLIAMENTARY PRIVILEGE AND ARTICLE 9 OF THE BILL OF RIGHTS

Introduction

1. Amongst the many factual determinations that the Chair has been, or may be, invited to make is a finding that Parliament was misled on various occasions: see, by way of example, §128 of the submissions on behalf of the Core Participants represented by Collins Solicitors [SUBS0000063][1]. This may give rise to questions of parliamentary privilege.

2. The purpose of this Note from Counsel to the Inquiry (CTI) is to outline the principle of parliamentary privilege and its potential application and implications insofar as relevant to this Inquiry. Issues relating to parliamentary privilege have arisen, and have been considered, in a range of different contexts and authorities; this Note is not intended to be a comprehensive examination of the law relating to parliamentary privilege but to provide sufficient information to enable the recognised legal representatives of core participants to address the issue in their oral closing statements, should they wish to do so.

Article 9 of the Bill of Rights 1689

3. The statutory basis for parliamentary privilege lies in Article 9 of the Bill of Rights, which provides that:

> **"the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament"**.

[1] It is understood why these submissions are advanced. Nothing in this Note, however, should be construed as expressing any view, one way or another, on the evidence that the Inquiry has read and heard. Furthermore, and leaving aside the question of parliamentary privilege, the requirements of rule 13(3) of the Inquiry Rules 2006 would have to be complied with before an explicit or significant criticism (such as a finding that a minister misled Parliament) could be included in the Chair's report.

4. In *Office of Government Commerce v Information Commissioner and Her Majesty's Attorney General* [2010] QB 98 Stanley Burnton J (as he then was), following a review of relevant authorities, described the basis of parliamentary privilege at §§46-7:

> "46. These authorities demonstrate that the law of Parliamentary privilege is essentially based on two principles. The first is the need to avoid any risk of interference with free speech in Parliament. The second is the principle of the separation of powers, which in our Constitution is restricted to the judicial function of government, and requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature. These basic principles lead to the requirement of mutual respect by the Courts for the proceedings and decisions of the legislature and by the legislature (and the executive) for the proceedings and decisions of the Courts.
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> 47. Conflicts between Parliament and the Courts are to be avoided. The above principles lead to the conclusion that the Courts cannot consider allegations of impropriety or inadequacy or lack of accuracy in the proceedings of Parliament. Such allegations are for Parliament to address, if it thinks fit, and if an allegation is well-founded any sanction is for Parliament to determine. The proceedings of Parliament include Parliamentary questions and answers to. These are not matters for the Courts to consider." (underlining added)

Does parliamentary privilege apply to the Inquiry's proceedings?

5. There is no doubt that the prohibition on impeaching or questioning proceedings in Parliament applies to courts: Article 9 expressly says so.

6. It appears to have been accepted that Article 9 applies to statutory tribunals: see, for example, *Office of Government Commerce v Information Commissioner and Her Majesty's Attorney General* (above); *DK and RK (Parliamentary Privilege; evidence)* [2021] ULKUT 61 (IAC); *Secretary of State for the Home Department v Akter* [2022] EWCA Civ 741.

7. It is, however, well-established that Article 9 does not mean that proceedings in Parliament may not be impeached or questioned anywhere outside Parliament: see, e.g., *Kimathi v Foreign and Commonwealth Office* [2017] EWHC 3379 (QB) at §37 (i):

> "Journalists and historians regularly question what has been said in Parliament. Of that there can be no doubt. It cannot be right that Parliament intended in article 9 of the Bill of Rights Act that there would be no such questioning."

8. This Inquiry, being a statutory public inquiry, is not a court. The question, therefore, is whether a statutory public inquiry is a "place out of Parliament" within the meaning of Article 9. This question of whether an inquiry established under the Inquiries Act 2005 would constitute a place "has not been judicially considered": *Erskine May Parliamentary Practice* (25th edition) at §13.13.

9. The 1999 Joint Committee on Parliamentary Privilege, in chapter 2 of its report *Parliamentary Privilege: Volume 1 – Report*, observed as follows:

> "91. The prohibition in article 9 is not confined to the questioning of parliamentary proceedings in courts. It applies also to any 'place out of Parliament'. This is another obscure expression of uncertain meaning. To read the phrase as meaning literally anywhere outside Parliament would be absurd. It would prevent the public and the media from freely discussing and criticising proceedings in Parliament. That cannot be right, and this meaning has never been suggested. Freedom for the public and the media to discuss parliamentary proceedings outside Parliament is as essential to a healthy democracy as the freedom of members to discuss what they choose within Parliament. So the embrace of the phrase is narrower than this, but wider than merely 'courts': the whole phrase is '… any court or place out of Parliament'.
> 92. The interpretation of this expression has never been the subject of a court decision. The point has arisen in the contexts of tribunals of inquiry set up under the Tribunals of Inquiry (Evidence) Act 1921 where both Houses of Parliament resolve 'that it is expedient that a tribunal be established for inquiring into a definite matter (specified in the resolution) of urgent public importance'. These tribunals have the same powers as a court, in particular for enforcing the attendance of witnesses, examining them on oath, and compelling the production of documents. Their purpose is described by a recognised constitutional authority as 'to investigate certain allegations or events with a view to producing an authoritative or impartial account of the facts, attributing responsibility or blame where it is necessary to do so.' The 1921 Act was passed in the shadow of the Marconi affair and the controversy over what was widely regarded as an unsatisfactory parliamentary inquiry.
> 93. It seems likely that a court would decide that a tribunal appointed under the 1921 Act is sufficiently similar to a court to constitute a place out of Parliament for the purposes of article 9 and, accordingly, that such a tribunal would be precluded from examining proceedings in Parliament. This conclusion means that an inquiry cannot be set up under the 1921 Act if its purpose is to look into parliamentary matters which may involve examining proceedings in Parliament. Article 9 would bar the tribunal from conducting any such examination. Thus, as matters stand, where proceedings in Parliament may need to be examined, a

> non-statutory body, lacking the advantages afforded by the 1921 Act, has to be appointed. A recent instance of such a non-statutory tribunal was Sir Richard Scott's inquiry into 'arms for Iraq'.
> 94. This is not satisfactory. Since Parliament already controls the appointment of such a tribunal, we see advantage in the two Houses having a statutory power to waive article 9 in the resolution of appointment.
> 95. A statutory power of waiver assumes that article 9 does, or may, apply to 1921 Act tribunals.[2] The Joint Committee considers it would also be advantageous to dispel the uncertainties with a statutory definition. The Parliamentary Privileges Act 1987 (Australia) applied the article 9 prohibition to any court or tribunal, and defined tribunal as any person or body having power to examine witnesses on oath. This seems to provide a clear and sensible basis for the future. In general, power to administer oaths is dependent upon statutory authority. The power is conferred on bodies whose proceedings are endowed with a degree of legal solemnity and formality. It means, for instance, that article 9 will apply to coroners' inquests, land tribunals and industrial tribunals. Beyond such formal tribunals, article 9 will not apply. By this means the boundary can be clearly delineated, with an embargo on examination of parliamentary proceedings in all courts and similar bodies but not elsewhere.
> 96. The Joint Committee recommends a statutory enactment to the effect that 'place out of Parliament' means any tribunal having power to examine witnesses on oath, coupled with a provision that article 9 shall not apply to a tribunal appointed under the Tribunals of Inquiry (Evidence) Act 1921 when both Houses so resolve at the time the tribunal is established."

10. The Tribunals of Inquiry (Evidence) Act 1921 has since been repealed by section 49 of the Inquiries Act 2005 but the broader point remains.

11. CTI notes that the recommendation that there be a statutory definition of "place out of Parliament" so as to include a statutory public inquiry has not been implemented. Thus, there remains no statutory definition of the term described by the Joint Committee as an "obscure expression of uncertain meaning".

12. The following factors may be said to support, or lend weight to, the argument that a statutory public inquiry is a "place out of Parliament" within the meaning of Article 9:

    a. As set out in paragraph 4 above, one of the principles underpinning Article 9 is the importance of avoiding interference with free speech in Parliament. See further ***Prebble v Television New Zealand*** [1995] 1 AC 321 at 334A-C (per Lord

[2] As is discussed below, absent such a statutory power parliamentary privilege cannot be waived.

Browne-Wilkinson): "The important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect."

b. A public inquiry established under the Inquiries Act 2005 shares some of the characteristics of, and has some of the powers of, a court. For example, it can take evidence on oath and for that purpose administer oaths (section 17), and it can require the attendance of a witness, the production of documents and the provision of a witness statement (section 21). Non-compliance, without reasonable excuse, with a notice under section 21 is an offence (section 35(1) – see also the further offences in section 35).

c. It could be said that these coercive powers could inhibit a parliamentarian and hence offend against Article 9 and the public interest identified in ***Prebble*** (above).

d. The view of the 1999 Joint Committee on Parliamentary Privilege was to the effect that a court would decide that a statutory inquiry was sufficiently similar to a court to constitute a "place out of Parliament".

e. The Inquiry is aware that it is the view of Speaker's Counsel that any statutory public inquiry does fall within the meaning of "place out of Parliament" for the purposes of Article 9.

f. The leading text book on public inquiries states that whether or not parliamentary privilege applies to public inquiries in the United Kingdom is "more open to doubt" than in Australia, but concludes that "the better view is that the privilege does apply to such inquiries": Beer (ed), *Public Inquiries* (OUP, 2011) at §5.117.

g. There is no precedent, so far as CTI are aware, of a public inquiry established under the Inquiries Act 2005 determining that it was not a "place out of Parliament" for the purposes of Article 9. Some other inquiries appear to have proceeded (although without necessarily hearing argument) on the basis that parliamentary privilege applied to their proceedings: see, for example, The Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly C.M.G. by Lord Hutton, (HC247) at §461 (though see also the questioning discussed in the preceding paragraph), and the approach of the Independent Inquiry into Child Sexual Abuse, as referred to in a publicly available document.[3]

13. The following factors may be said to support, or lend weight to, the argument that a statutory public inquiry is not a "place out of Parliament" within the meaning of Article 9:

a. As set out above in paragraph 4 above, the second principle underpinning Article 9 is that of the separation of powers, which requires the judiciary not to interfere with or to criticise the proceedings of the legislature. Although the chair of a statutory public inquiry may (or may not) be a judge, such an inquiry is not part of the judiciary and the constitutional principle of separation of powers would not be undermined.

b. In ***Pepper v Hart*** [1993] AC 593 at 638G-H, Lord Browne-Wilkinson concluded that "the plain meaning of article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal, for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed". Unlike a court, an inquiry panel is unable to rule on or determine any person's civil or criminal liability: section 2 of the Inquiries Act 2005. It could be said, therefore, that allowing a statutory public inquiry to assess and "question" what has been said

[3] www.iicsa.org.uk/key-documents/2261/view/INQ000571_001.pdf

in Parliament would not undermine the purpose for which Article 9 was principally enacted.

c. It could be argued that there are public policy and public interest reasons as to why a statutory public inquiry should not be limited in its questioning and conclusions by Article 9. In particular, an inquiry under the 2005 Act will have been set up in response to public concern about particular events (see section 1). Such public concern may not be alleviated or addressed if the Inquiry is unable to consider and make findings regarding Parliamentary proceedings.

d. It could be said that there is a close relationship between the establishment of an inquiry under the Act and the work of Parliament: see, for example, section 6, which requires the minister setting up an inquiry to make a statement to the relevant Parliament or Assembly, and section 26, which requires the Minister to lay the inquiry's report before Parliament, either at the time of publication or as soon afterwards as is reasonably practicable. See also *Warsama and anr v The Foreign and Commonwealth Office and ors* [2018] EWHC 1461 and *Foreign and Commonwealth Office v Warsama and anr* [2020] EWCA Civ 142.

e. It could be said that the duty of an inquiry under the 2005 Act is to report to Parliament and that ultimately its report is for Parliament to accept or reject. In short, it is not holding Parliament accountable to the law as would a court.

f. The fact that the 1999 Joint Committee on Parliamentary Privilege recommended the enactment of a statutory definition of "place out of Parliament" so as to include a statutory public inquiry may be said to indicate ambiguity as to whether, without such enactment, such an inquiry falls within Article 9.

g. The implication of the Report of the Joint Committee on Parliamentary Privilege is that a non-statutory inquiry is not a "place out of Parliament", and hence can examine Parliamentary proceedings. The example of the Scott Inquiry was given. If such a non-statutory inquiry does not inhibit free speech in Parliament, then it can be argued that a statutory inquiry would not do so

either. Further, if that distinction is maintained, would it mean that a statutory inquiry could avoid the strictures of parliamentary privilege where a witness attended voluntarily and was not asked relevant questions under oath? Such an outcome would seem difficult to justify.

14. CTI does not propose, in this Note, to express any concluded view as to whether a statutory public inquiry is a "place out of Parliament". That would be a matter for the Chair to determine, having heard any submissions that are made on behalf of Core Participants and any other body invited to make such submissions. Whether the Chair considers it necessary or appropriate to make such a determination is, again, a matter for him.

The effect of parliamentary privilege

15. *If* – which is a matter for the Chair to determine, if he considers it necessary to do so – the prohibition in Article 9 applies to a statutory public inquiry, then it follows from case law that a finding (for example) that a minister knowingly misled Parliament would amount to impeaching or questioning and would breach parliamentary privilege: see, e.g., *Hamilton v Al Fayed* [2001] 1 AC 395 at 403, *Prebble* at 332F-G.

16. However, it is important to note that there are circumstances in which reference can properly be made to proceedings in Parliament and where this will not constitute impermissible questioning of statements made in Parliament: see, for example, *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2020] EWCA Civ 213 at §158:

> "(1) The Courts may admit evidence of proceedings in Parliament to prove what was said or done in Parliament as a matter of historical fact where this is uncontentious: see *Prebble v Television New Zealand Ltd [1995] 1 AC 321* , at 337
> (2) Parliamentary material may be considered in determining whether legislation is compatible with the European Convention on Human Rights: see *Wilson v First County Trust Ltd (No. 2) [2004] 1 AC 816* , at paragraph 65 (Lord Nicholls of Birkenhead).
> (3) The Courts may have regard to a clear ministerial statement as an aid to the construction of ambiguous legislation: see *Pepper v Hart [1993] AC 593* , at 638.

(4) The Courts may have regard to Parliamentary proceedings to ensure that the requirements of a statutory process have been complied with. For example, in this case, the Courts may admit such material in order to be satisfied that the steps specified in section 9 of the Planning Act have been complied with.
(5) The Courts may have regard to Parliamentary proceedings in the context of the scope and effect of Parliamentary privilege, on which it is important for Parliament and the Courts to agree if possible: see the decision of Stanley Burnton J (as he then was) in *Office of Government Commerce v Information Commissioner [2010] QB 98* , at paragraph 61.
(6) An exception has also been identified for the use of ministerial statements in judicial review proceedings. The Speaker accepts that such an exception exists but contends that the scope and nature of this exception has not yet been the subject of detailed judicial analysis. It calls for careful consideration of the constitutional issues involved. We respectfully agree."

See further the discussion in *R (Justice for Health Ltd) v Secretary of State for Health* [2016] EWHC 2338 (Admin) at §§151-165 and in particular the observation at §164 that the prohibition in Article 9 does not allow the minister to don "a Harry Potter *'invisibility cloak'*", and in *R (Project for the Registration of Children as British Citizens and O, a minor) v Secretary of State for the Home Department* [2021] EWCA Civ 193 at §§89-90, §§102-109.

17. It is also important to note that Article 9 is directed at protecting "freedom of speech and debates or proceedings in Parliament". As Lord Phillips observed in *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684 at §47, Article 9 is "directed at freedom of speech and debate in the Houses of Parliament and parliamentary committees" and this is "where the core or essential business of Parliament takes place". Article 9 is not directed at protecting executive acts from scrutiny: see, e.g., *Toussaint v Attorney-General of Saint Vincent and the Grenadines* [2007] UKPC 48, [2007] 1 WLR 2825 at §17. Decision-making and policy-making which takes place within a government department can be fully examined and critical/adverse findings can be made.

Further matters

18. Two further points should be noted:

    a. It is for the courts, or in the present context the Chair (subject to any decision of the courts in the event of a challenge by way of judicial review), and not

Parliament, to determine what constitutes "proceedings in Parliament" or whether the use to which parliamentary material is put constitutes an infringement of Article 9: *Kimathi v Foreign and Commonwealth Office* at §3, *R v Chaytor* at §15[4].

b. Parliamentary privilege cannot be waived, whether by an individual member (or former member) or by the Speaker of the House: *Kimathi v Foreign and Commonwealth Office* (above) at §34. This reflects the fact that *"The privilege protected by article 9 is the privilege of Parliament itself"*: *Prebble v Television New Zealand* at p.335F-G.

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[4] §16 of the judgment in *Chaytor* should also be noted: *"Although the extent of parliamentary privilege is ultimately a matter for the court, it is one on which the court will pay careful regard to any views expressed in Parliament by either House or by bodies or individuals in a position to speak on the matter with authority."*