HOUSE OF COMMONS

Committee of Privileges

Oral evidence: Select committees and contempts, HC 173

Tuesday 22 October 2019

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Watch the meeting

Members present: Kate Green (Chair); Sir Christopher Chope; Bridget Phillipson; John Stevenson; Sir Gary Streeter; Liz Twist.

Questions 64-93

Witnesses

I: Sir Malcolm Jack KCB, former Clerk of the House of Commons, Ms Eve Samson, Principal Clerk, House of Commons, and Lord Andrew Tyrie, former Chair of the House of Commons Treasury and Liaison Committees and the Parliamentary Commission on Banking Standards.

Written evidence from witnesses:

– [Add names of witnesses and hyperlink to submissions]

Examination of witnesses

Witnesses: Sir Malcolm Jack, Ms Eve Samson and Lord Andrew Tyrie.

Q64 **Chair:** The main purpose of today's sitting is to take further oral evidence for our inquiry into Select Committees and contempt. We are very pleased to have our panel of witnesses here with us this morning. We would like to have quite tight answers, if we may, because I know that at least one witness must leave before midday. We are keen to have as much evidence from all of you as we can, but in quite a tight way. If I may, therefore, I will go straight in and start the questioning.

I will ask my first question of each of you, perhaps starting with you, Sir Malcolm. Received wisdom for some time, and the suggestion of the previous Clerk of the House, is that one of the three options is for the House to do nothing at all. Is there a case for that? How big a problem do you think we really have in relation to witnesses being reluctant to attend Select Committee hearings?

Sir Malcolm Jack: I hope that I made it clear in my written evidence that I don't believe that doing nothing would be the right thing. Unless the House—both Houses, actually—gets a grip on this, there will be continued obstruction of Select Committees. I know that there are not huge numbers of these obstructions, but they are growing. One thing that I would say is that our society is changing, so it reflects to some extent—if I may put it this way—a disappearance of respect. The idea that you are going to be in contempt of Parliament and admonished is not something that frightens people any longer.

Ms Samson: Doing nothing is only an option if the House is willing to accept that Committees will only look at people in the broad public sector, over which they have some moral suasion. Indeed, it might very well happen that as powers are seen to be eroded, there will be a sense of, "If titans of industry don't have to come, why do we?" So I am not even sure that in the long term it would work if you said, "We are only interested in the public sector"; in the short term, it would.

Lord Tyrie: Committees are increasingly important since election. The role of Committees in probing exactly the areas that others might not like is therefore much more acute than it was. This is what is generating many of these cases. In other words, Parliament now, through the Committee system, is doing a job that it wasn't formerly doing.

The Committee system has been increasingly thwarted in a number of big investigations: the Iraq war was one, for the Defence and Foreign Affairs Committees; BHS, for the Work and Pensions Committee; the Cummings case; and so on. If we arrive at the point where appearance is voluntary, and denial of papers can be fought out endlessly in exchanges with lawyers, I think that Parliament and its position as a representative of the

people that is there to obtain consent will be sharply diminished. We just cannot reduce all this to an appearance of the fearful and the willing, as I think Eve Samson puts it in her evidence.

Q65 **Chair:** Some of the written evidence that we have received suggests that it is inappropriate for Select Committees to move their remit beyond the ambit of scrutinising Government Departments. Do you agree that they have a remit to scrutinise individuals or organisations outside the public sector, or do you believe that de facto that is what they have come to do?

Ms Samson: As Lord Tyrie says, Committees are now a primary way for Parliament to fulfil its functions. The remit is set by the House, but it is for the Committees to interpret it. For the departmental Committees, it is to look into the policies of the Department, which has always been interpreted to mean why policy is deficient. Parliament has always looked at why policy is deficient. We would still have the slave trade if Parliament had stuck to Government policy. Of course, Committees should look at people.

Committees need to understand and to see face to face, and to explore things that might or might not be abuses, so that they can understand. Parliament makes policy by taking all those disparate influences, and the understanding and knowledge they have acquired, and applying them to complex and difficult policy problems that involve difficult balances, and that you will perhaps not be able to solve. People love orderly processes for making up their minds, but some things are too difficult to be done in an orderly manner. The Committee is the tip of getting that information for Parliament, so that when individual Members of Parliament come to decide on the propositions before them, they do so with a fully informed range of opinions.

Sir Malcolm Jack: I think that you heard evidence from the former Clerk and the Clerk of the Journals about the role of Committees, and this issue was discussed a bit. I think that the Clerk said something about the change in the role of Select Committees, which Lord Tyrie has mentioned, and there is also the continual involvement of Parliament in the affairs of society, as Eve said.

Q66 **Chair:** Lord Tyrie, when you chaired the Treasury Committee, and indeed the Parliamentary Commission for Banking Standards, the work conducted was quite broad in terms of the remit that it addressed. How might that provide an example for a way that other Select Committees can extend their roles? What risks and opportunities did you experience when doing that work?

Lord Tyrie: So far we have been discussing whether Committees need to be able to summon the people they need to see, and see the papers they need to see, in order to perform a core function. You have referred to an area in which Parliament innovated by creating a parliamentary commission, for the first time in almost 100 years, to investigate a major issue of public controversy—in this case the collapse of standards in

banking—and to report in short order to the House. The effect of what was done drew a huge amount of public attention to a crucial issue. The alternative was to appoint a judge or someone from outside to carry out that function. It is for others to judge whether the commission was a success, but the idea, as implied by the earlier exchanges, that henceforth this type of work should be beyond the remit of Parliament, is absurd. We might as well pack up and go home.

There are numerous other ways in which Parliament now has the capacity, as well as the moral authority and independence through election, to develop its role. One thing that the Treasury Committee did was to get deep into the work of quangos, where much of the power lies—the most powerful quangos in the land are bodies such as the Bank of England and the big regulators such as the Financial Conduct Authority, which was formerly the Financial Services Authority. It produced reports in which it was conflicted about the performance of HBOS and RBS during the crisis, but of course it was a player—it was supposed to be regulating at the very time the banks collapsed—so how valid were its reports?

To find out, we appointed experts and embedded them in the regulator for six months at a time, with the power to see every paper or witness that they wanted to see internally, thereby circumventing the usual commercial confidentiality bar to such investigations. They then reported back to the Committee and gave us a clear view on whether the reports being produced in the public domain were adequate and accurate. That type of work provided some reassurance to the wider public—perhaps not enough, but some—that those issues were being investigated. Again, the denial of such work on the grounds that it involves looking into cases of firms or the private sector seems manifestly absurd.

Q67 **Sir Christopher Chope:** Good morning. In 2013 the Joint Committee argued in favour of asserting the House's powers, and it produced draft resolutions and draft Standing Orders, which have not been adopted. Is the assertion of the House's powers by this means, without legislation, still a viable option? A lot of water has gone under the bridges on the Thames since 2013, particularly in the past few weeks. Do you think that is still a viable option?

Sir Malcolm Jack: I don't think it is. Eve was involved with the Joint Committee in 2013, so I am sure she will enlighten us, but it was extremely conservative in its conclusions. For my cup of tea, the previous Joint Committee was far more assertive about this. I think 2013 ducked the issue, they lost the opportunity and they ended up by saying in the report that perhaps legislation was necessary. I think they should have recommended going down that route, and yes, a lot of things have changed since 2013.

Ms Samson: I think the essence of this is political will. In 1997 they recommended legislation, but there was no political will for the legislation. In 2013 they recommended assertion. If there had been a unified and strong assertion, at the very least it might have made it clear to witnesses that the House was serious about this, so that trouble would be pushed

down. It might have convinced the courts, I don't know, but so much water has gone under the bridge that now assertion would not work. In 2013 it was the last chance, and if there had been political backing it might just have worked, either by stopping problems arising in the first place, or by just showing that the House really cared.

Lord Tyrie: We need to be clear that in the 2013 report people were identifying legitimate concerns with going down the road of full codification. They are still there, and they cannot be ignored; there may be judicial activism, and we may find ourselves in a position where courts are trying to probe why witnesses have been called and whether it was reasonable that they should be called. That is a risk—in my view, quite a serious risk. The risk of court intrusions has an added difficulty in that it will almost certainly be a ratchet, as in all common law, and not a pendulum. That is why my instinct is to do the minimum necessary now, which I think might deliver a favourable outcome, and keep full-scale legislation in the back pocket, but that is a matter of judgment—difficult judgment—and I am not unalterably in that camp.

Q68 **Sir Christopher Chope:** Don't you think that, as things have now developed, and with the increasing calls, essentially, to move from our unwritten constitution to a written one, this little microcosm of the issue should or could be wrapped up better in a much bigger debate about whether or not we should now move away from relying on the Standing Orders of the House?

When I was first on the Standards Committee and the Procedure Committee, Enoch Powell always used to say, "In the absence of a written constitution, the Standing Orders of the House are our constitution." But the Standing Orders of the House are now under serious challenge, because of the decline in respect for both convention and precedent, as Sir Malcolm explained earlier, and the appealing to short-term views about the Public Gallery.

Even the issue of proceedings in Parliament, which I imagine Sir Malcolm thought was a settled issue, has been completely cast aside, it seems, by the Supreme Court judgment. Would it not be better now to say, "This is a problem, but actually it is part of a much larger problem, and that larger problem can be addressed only by seriously considering having a written constitution instead of Standing Orders"?

Sir Malcolm Jack: I would agree with that, but in the meantime, if you want to do something about the contempt of witnesses, a privileges Act could be the first cornerstone of a written constitution, if that was something that was going to happen. I would like to come back to Lord Tyrie's point. I agree that it is a matter of judgment.

I am less fearful of the courts. If one looks back at judgments—for example, Chaytor and so on—the courts have shown that they are not keen to get involved in what we call exclusive cognisance: what goes on in the House. The fact that they have interpreted statute is another matter, and of course the Bill of Rights is a statute. The Attorney General made it perfectly clear in her memorandum of 2009 that privilege is a statutory

matter that the courts will interpret, and they have done so over the generations, but they have not gone into the internal workings of how that privilege is executed. I have got the Australian Act here, and that is what I think should happen.

Ms Samson: I think that a written constitution is too big. There is a problem here now. I am very attracted to the ingenuity of Lord Tyrie's tiny little bit of legislation to make the House's orders enforceable, but I think that there are bigger issues in play about the courts' attitude to individual fairness and to Parliament.

I am not quite as sanguine as Sir Malcom about the courts' understanding of Parliament and about how they will react in areas such as this where there is, as Lord Thomas of Cwmgiedd said, an external dimension of calling a witness. If you are taking a statutory route, I do not think legislating just for powers would be sensible. I would go down something like the Australian route that says, "Here is a parliamentary no-go zone. These are the parliamentary powers. This is for us to determine, not you," which used to be the practice.

Again, feeling rather embarrassed, I would slightly disagree with Sir Malcolm that privilege is and always has been statutory. There was a time when there was an internal House understanding that the Bill of Rights was a statutory expression of a much more immanent and more common law-akin law of custom and Parliament that the courts did not interfere in—if you like, Parliament's own common law. I think that the emphasis on statute is growing and is unhelpful.

Lord Tyrie: Your point, Sir Christopher, is that this issue is a microcosm of a much bigger issue and that therefore Parliament should address it as part of that wider issue. Do I agree with that? Well, "Up to a point, Lord Copper"—but largely concentrating on the Lord Copper end of that remark. We have a judge already, a guardian of those standing orders: the Speaker. We have had that for a long time. Many hold that he has gone beyond his powers. That is a matter for Parliament to sort out. Maybe it will be sorted out very soon, and a long line of Speakers who broadly have respected what most consider to be those rules may be appointed.

My second concern is that any legislation—even quite small-scale legislation, such as that which I propose—will almost certainly require Government support; getting something like this through without Government support would be very difficult. I don't think that a majority Government—and I am sure that one day we will have those, perhaps before too long, but who knows—will leap to act in this space because it means strengthening Committees that then scrutinise the Executive more toughly.

You need very benign moments in order to get through improvements in Select Committees. The 1978-79 period that created Select Committees in their modern form arose as a result of innocent commitments made in exchanges with Margaret Thatcher, which she then honoured. The later reforms arose because Ken Clarke and I went to see David Cameron with

George Young and persuaded him that elections to Select Committees by secret ballot would look good in a manifesto.

Before long, there were complaints. I got a lot of complaints from the Treasury about the Treasury Committee's incursions into areas of scrutiny that it considered inappropriate. I am very cautious about wrapping this up in a bigger issue. I come back to my earlier point that any legislation will lead to an extension of judicial activism and risks the creation of a ratchet of involvement in our affairs as we see it. It may or may not be manageable, but I would like first of all to try some other change, short of full legislation. That is my instinct.

Q69 **Sir Christopher Chope:** Sir Malcolm has been shaking his head during the latter part of your remarks.

Sir Malcolm Jack: Because I think that you are just going to be stuck again. We are already stuck and all you are proposing is to remain stuck. The Australia Act was passed in 1987 and has led to no problems of judicial activism in Australia. When talking to Australian colleagues, as I have done, they have said that it has clarified parliamentary privilege, provided deterrents and, because the House has done things in its Standing Orders, paid some attention to human rights, which is the other side of the coin. I do not agree at all that an Act would lead to judicial activism; I see no evidence for that.

Q70 **Sir Christopher Chope:** Lord Tyrie, you say that the Speaker has a role as the arbiter of the Standing Orders and so on. Do you—

Lord Tyrie: I am sorry to interrupt. I was just following up on the Enoch Powell point that you were making, which had some substance to it.

Sir Christopher Chope: Enoch Powell was one of the current Speaker's schoolboy heroes—we need to recall that. As far as the—

Lord Tyrie: I am sorry to interrupt again, but that does not necessarily invalidate everything that he has said or done.

Q71 **Sir Christopher Chope:** Obviously, the whole essence of an unwritten constitution is its flexibility. I think you have acceded to and support the idea that there should be an extension of the role of the Select Committees into areas where it was previously thought that they should not venture. That has not been a subject of legislation; it has just evolved.

In a sense, is not the counterweight to that that if you try to get into those sorts of areas without having really thought through the consequences of how you are going to enforce attendance of people so that they can be humiliated in front of a Select Committee Chair, it will create consequences? In the same way, I think that when we moved away from the unwritten constitution and legislated for the Fixed-term Parliaments Act, some of us strongly opposed that because we could see that it would impose constraints on the exercise of the royal prerogative in future. Our concerns have been well supported by recent events. Even the suggestion that that Act should have contained a sunset clause was

rejected by Parliament, but I think we can now see that that was a big mistake.

In a sense arguing against the first question that I put, do you think that if you do try to stick with the Speaker and the flexibility, that might be a better way forward?

Lord Tyrie: I would like to pick up on several points that you have made. First of all, yes, the Select Committee system has evolved, but it has evolved with big punctuation marks, which have been quite carefully thought through at the time, and they have got themselves into parliamentary practice as a result of quite substantial changes to Standing Orders.

Secondly, you are right that that may lead to consequences that one cannot possibly foresee—that is part of my concern with legislation. That is true of any change of substance in anything procedural, and this Committee is right on top of very tricky and tense issues in relation to that all the time, because you deal so much with procedure.

You said, among the consequences, that some Select Committees may harass and humiliate witnesses. Yes, but does that not point to Parliament needing to develop its own set of rules on which it then adjudicates—perhaps through this Committee; perhaps through the body that I suggest be created—to ensure that Select Committees do not exceed what Parliament thinks is a reasonable way to go about their business? I do not think that you will rush unnecessarily to hamper Select Committees.

In most cases, self-restraint is in operation almost all the time—I think, perhaps, too much self-restraint. One of the reasons why we have had relatively few cases of people not bothering or wanting to turn up, or papers not delivered, is that a Clerk has a quiet word every now and then with a Select Committee Chairman—I have been in receipt of a few of these—saying, "Be a bit careful here. We don't want to find ourselves humiliated by demanding something which we then don't get supplied with." Then you are into a stand-off, which you might not win, or which might exhaust all the energies of the Committee in that Session, so people are cautious and try to find another way around it. That is the core reason for the need for action, if you accept the argument—the premise right at the beginning, implied by your Chair's question—that we should accept the extension of the role of Select Committees, and find ways of entrenching it and supporting it, which is why all three of us are arguing for extensions of the protection of parliamentary Committees' capacity to call for people and papers.

Q72 **Liz Twist:** Following on from that, I would like to ask about the fairness with which witnesses are treated. Lord Tyrie, you have commented on this. Is the House vulnerable to challenge at the European Court of Human Rights arising from the way in which witnesses are treated? Has the introduction of the behaviour code changed the situation at all? How could we develop principles-based guidance on this issue?

Lord Tyrie: On the first point, the House is certainly vulnerable to a case being brought. I am not a lawyer. Both the people to my left, although not lawyers, are steeped in this subject and are better placed to comment. On your point about how we should develop a principles-based system, I think there is a clear way forward. Parliament should write down what it thinks is a reasonable way of conducting its affairs.

As I said earlier in response to Sir Christopher, on the whole, Select Committees already abide by this. It is an informal nod and wink from a Clerk, very often, that nudges a Committee in a direction that ensures that there is demonstrable fairness, even when they are all getting very annoyed over some particular issue. We have started to discuss whether that should be entrenched more fundamentally, and possibly subject to oversight by the courts. I am in favour of seeing whether we could create some kind of parliamentary tribunal, which could examine these cases, and which should have as its prime task ensuring that there is procedural fairness, and that ECHR article 6-type protections are provided to witnesses, while at the same time balancing that with article 9 of the Bill of Rights, and our right and need to see the papers and the people we do in order to fulfil our constitutional function.

Ms Samson: I would distinguish that. I am not a lawyer, but I have been before the European Court of Human Rights on a parliamentary privilege case. I advise the Committee to check what I say with a lawyer, but I would say that there are two things at issue. Article 6 of the convention applies when civil rights, obligations or criminal things are determined. Normal Committee proceedings do not deal with rights. A witness comes before a Committee and is asked to give an account of what happened.

Committees care hugely about fairness, in my experience. If you look at what Committees are doing to support vulnerable witnesses, you will see that they grade, if you like, the support they give to the witness by their need for support. You can never say never, but if somebody brought a case against the House or a Committee, based on a normal Committee hearing, my response to the ECHR would be, "Article 6 is not engaged. Go away."

That does not mean to say that you should be horrible to witnesses. In my experience, the House takes fairness very seriously. I think one of the problems in this discussion is that we talk as if fairness was an externally imposed value of the courts. It is not: it is a value of the House, in my experience, and quite often it is a value that worries about the fairness of calling the powerful to account, as well as the fairness in terms of individual rights. That is the first thing.

Where article 6 would be engaged is, of course, in determining whether somebody had to come and what the penalties would be. At that point, you would be talking about civil rights and obligations. The ECHR did uphold parliamentary privilege for freedom of speech. You can't predict. I would have thought a transparent, clear account of what would be done and what the obligations were, with plenty of appeal processes, inside or outside Parliament, might satisfy that Court; we can't tell.

Sir Malcolm Jack: Yes, that is a very interesting point. The classic case actually didn't concern Select Committees. It was in 2002 and was the case of A *v.* the UK Government. That was following remarks in the House made by a Member in an Adjournment debate. A, the person named, claimed that she had been libelled, and the case was heard in the European Court. As Eve says, the Court defended freedom of speech in Parliament, as it would for Committees as well, but it did say that it was—I am putting this in lay terms—high time that Parliaments did more to defend human rights in a general context.

I am absolutely sure that Eve is right that Committees are very careful with witnesses. There is one thing that I have always thought, personally. I will just throw this in; it's slightly wider than what we are talking about. I don't see why individuals should not have a right to come to Parliament and complain about the use of privilege when they feel they have been defamed in one way or another. They can do that through an obscure process of petitioning the House, but this is so remote that it is unlikely to be used. Again, in the Australian Parliament, the privileges Committee can hear from individuals who have complaints on grounds of privilege or, as they allege, abuse of privilege.

Q73 **Liz Twist:** In recent years, a rights-based culture has developed and abuses of power are increasingly called out. What steps do you think Parliament can take to ensure that witnesses will be fairly treated, and how could changes to Standing Orders achieve this? Is it a project that could be undertaken by the Liaison Committee?

Sir Malcolm Jack: Can I come in now and then leave the others to talk about what the House can do? That is protected in the Australian Parliamentary Privileges Act, so if you have an Act like this, witnesses are protected. That includes, by the way—this is a very important matter—whistleblowing, which has been the subject of a big case here. If you have an Act, it's there, but internally—Eve and Lord Tyrie would perhaps like to comment.

Ms Samson: What I would say is that Committees actually do huge amounts to safeguard witnesses. We are focusing, let's be honest, on powerful people, in one way or another—opinion formers—who don't wish to come because they will face difficult questions. That is where this debate is focused. We have to remember that for most of the time, Committees are talking to people who really want to come to the Committee to tell it about their experience. Committees are reaching out to people who do not have a voice in other areas. They are doing huge amounts in, for example, making sure that vulnerable witnesses are properly supported, protected and questioned appropriately.

In terms of fairness, as I say, civil rights and obligations in a normal Committee hearing, however robust, are not an issue. Article 9 of the Bill of Rights means that what you say to a Committee should not be used against you in subsequent court proceedings, so it should be a safe space. Those are very valuable protections.

What they have in Ireland, I understand—this is dimly remembered court case knowledge, so somebody needs to look it up—is that if a Committee is talking about summoning a witness, they have to apply to the Committee of Privileges to explain why they want that witness. There is a great deal to be said for an internal parliamentary sense check: "We want to summons this witness and this is why," so that it is clear. There is more we could do in setting out expectations of witnesses in guidance or Standing Orders. Standing Orders on Joint Committees are rather heavy-duty; they are based on the New Zealand model, I think.

There is something we can do, but the trouble is that if you do too much, you are setting something in place to deal with the absolutely exceptional cases rather than the normal thing. Let's be honest: if I have a vulnerable witness, I will ring them up, talk them through the questions, sometimes show them the Committee room, and tell the Committee that they are vulnerable and that one person only may question them. There is an awful lot that the House does; we have this vision of it standing there and bullying, and it is not true.

Sir Malcolm Jack: Can I come in quickly on the safe space point that Eve made, to make a point that is slightly at a tangent but, again, something that legislation would take care of? It is not a safe space. There is a catalogue of cases before the courts where the Speaker has had to intervene to stop the use of material, particularly Select Committee material. That happens behind the scenes and is a job that the Speaker does, with the House not really involved, but there were numerous instances in my time of the Speaker's having to intervene in court cases where the use of evidence, because of Pepper *v.* Hart, appeared to be an interpretive use but was actually bringing Select Committee evidence into the court. That loophole has not been closed.

Ms Samson: And, indeed, the one addition I would make to the Australian Act would be to revive the old principle whereby if a court wished to use parliamentary proceedings, it would have to ask Parliament. Petitioning is probably too heavy-duty and old-fashioned, but notification to the Speaker's Counsel would be sensible, because we just do not know how often this is going on, and once you get into bad habits, we know it is very hard to break them.

Lord Tyrie: It sounds as though you are speaking from personal experience. *[Laughter.]* I am not keen on legislation to codify all this, unless we absolutely have to do it, for exactly the reason I gave earlier: it is an invitation to judicial activism in the interpretation of the code of conduct and the way we do our business. One point that I have not so far made is that a court's view of fairness is not necessarily exactly the same as a Select Committee's view, but both may be valid. Although we could get into tortuous detail to try to illustrate those two points, there is a bar above article 6 protections, which we do not want quietly to allow to be raised in order to arrive at what domestic courts may currently think is appropriate. I am wary of legislation, and you can hear this coming out all the time in my responses to your questions.

My second point is a proposal I have made that we do this internally, by having an internal tribunal with a very high degree of credibility, chaired by a Law Lord. One of the people who have proposed this idea is a former Lord Chief Justice, Lord Thomas; I picked up this thought from his evidence to the 2013 inquiry. That means that an element of flexibility is built into the system, while bearing in mind the Committee's legitimate concern about article 6.

Thirdly, you asked whether the Liaison Committee should look at this. I used to chair the Liaison Committee, and the trouble with it is that it has a membership of about 34—I don't know what it is at the moment; someone will know the answer—but it is quite unwieldy. Members of this Committee may have views on this issue; indeed, I would encourage people to have views about what constitutes fairness on this point. The need for codification is one of the five recommendations I put forward if codification does take place internally regarding what largely already happens. If you give the Liaison Committee the job and send it an exam question, make that a very detailed exam question that sets out fully every aspect of the issue, so that it doesn't have to start from scratch. It should also be targeted—otherwise, this may turn into long grass.

Ms Samson: I'm afraid I think the Committee best placed to do that is this Committee.

Lord Tyrie: I was hesitating to say that. I was thinking about the Committee's workload—*[Interruption.]* I am getting a nod of assent from the Chair. That is always the problem with these things. Everyone knows it has got to be done, but there are other priorities.

Sir Malcolm Jack: We perfectly understand that these are complex matters of judgment, and I think I have made it clear which side I am on. Regarding public perception, our society has changed completely, and I think the idea of Parliament determining things as a court is untenable in the 21st century. I do not think that the public would be very impressed by that. If you have a law, that is a law and it will be applied, but I honestly don't think you can go down that route.

Lord Tyrie: I think that's a counsel of despair at a weak moment for Parliament—I am not yet that desperate.

Ms Samson: As I sit in the middle, I will not give my personal view, but I will quote something from the 1967 Committee of Privileges, which I think is apposite: "This balance between the freedom of the individual and essential protection of the House involves considerations of a political character which may vary according to the circumstances of the day. It is right that the House, which is responsible to the electorate, should make such decisions, rather than that they should be made by an appointed tribunal, whether or not of a judicial character." That might translate to saying that the House would probably only do it if the public were on its side.

Q74 **Liz Twist:** We have been talking about the rights of witnesses, and most

of you have mentioned the informal system through which a Committee Clerk will talk to people or give advice to the Chair. Is there a danger that if we start to codify the rights of witnesses, we limit Select Committees in their ability to question and seek information?

Lord Tyrie: Yes, but perhaps some limitation is desirable. In any case, the whole process is then internal. If it is not put on the statute book, we will not have to rely on a court judgment. That is why I am so concerned. We can discuss the issue among ourselves. The Select Committee Chair can take the issue to the Liaison Committee. It is shocking if it is, "This internal rule is stopping me doing x. I am sure that wasn't the original intention. May we have a look at changing the Standing Order in that respect?". That will not be available once you have legislated. That is the detailed nub of my concern about full-scale legislation for a code of conduct for Select Committees.

Ms Samson: I think there is a difference between what you do for witnesses who turn up, and what you do when deciding whether to summon people. More robust processes ought to be in place to ensure that the person being summoned has a clear chance to explain why that is wrong.

I take the point about flexibility. There are some things that I think it would do the House no harm to spell out. If witness A is rude about person B, and the Committee intends to rely on that to be rude about person B in its report, it seems only fair that the Committee ought at least to write to them to say, "We have heard this. Have you anything to say about it?" Beyond that, given the protections of article 9, I might not go for what you might call ordinary evidence.

Q75 **Liz Twist:** Finally, do you think increased sanctions are needed to protect witnesses from attempts outside Parliament to interfere with their right to testify?

Sir Malcolm Jack: Definitely. Absolutely.

Ms Samson: Yes.

Lord Tyrie: Yes. Certainly I have set out why in written evidence. That is one of the defences used by the powerful, which until we do that will sound more plausible. If there is any chance of the evidence being used in a court, then there will be reticence.

Perhaps I may add one point about the international aspect of all this. If you take the work of the Treasury Committee and the Banking Commission, we were looking at global firms. When Bob Diamond came before us—I should not be so ad hominem but I have mentioned him now—I have absolutely no doubt that he was thinking not only about how anything he said might play out in the UK courts in a subsequent case in the UK or with the regulator, but about the United States and the fact that he was running a company that had a large arm in New York. That is a restraint against which we cannot provide protection. I haven't thought of a solution to that problem.

I started to think of solutions to it with respect to regulatory oversight, which requires a high degree of co-operation between regulators. That wasn't taken forward in the way that I would have liked—it is complex and difficult and, frankly, we, the UK, are more interested than the Americans in trying to find a common set of standards. In general, I can well understand witnesses' concerns if they think that their firm or they themselves could become vulnerable in other jurisdictions as a consequence of their giving evidence in the UK.

Sir Malcolm Jack: May I just come back quickly on another tiny point of detail? I am looking at "Erskine May", where the Attorney General's memo of 2009 really does need looking at. She says clearly that article 9 of the Bill of Rights is a question of the law for the courts to determine. I think that is irrefutable, because it is an Act, and whatever Parliament thinks about it domestically, the ambit of privilege is a matter of law; the internal workings, what we call exclusive cognisance, are not, and those are the Standing Orders and practices of the House. However, the Attorney General made it perfectly clear in her memorandum that the 19th-century struggle between Parliament and the courts really was all about that.

Lord Tyrie: This is the Stockdale case.

Sir Malcolm Jack: Yes, the Stockdale case.

Q76 **John Stevenson:** You have probably already touched on many of the areas that I want to explore. The dilemma is summed up by Iain Wright, former MP, in his evidence: "present uncertainty around enforcement of select committee powers is liable to be exploited by witnesses to undermine proper committee inquiries"; however, statutory regime is not attractive because of potential involvement of the courts; and yet a "mere reinstatement or assertion of Parliament's powers" would be insufficient, so "some element of legislative underpinning may be necessary". You can see our dilemma. Interestingly, at the outset, when we asked whether doing nothing is an option, all three of you said no. But what is the solution? That is where there is a diversion of opinion. May I start with you, Sir Malcolm? You, I think, are going down the statutory route and looking to Australia for our solution. What are the strengths of the Australian solution that you think we potentially should incorporate?

Sir Malcolm Jack: This is slightly wide of dealing just with Select Committee witnesses, but the first Joint Committee, in 1998 I think, set out pretty clearly that if you had a privileges Act, you would have a definition of the key terms—what proceedings in Parliament are, for example, and a whole lot of other things. In it, you would also have protection of witnesses, which we have been discussing, and penalties for contempt. That is what is in the Australian Act. I am not saying that we would need to follow it word for word, and I am quite sure things in it can be modified, or changed for that matter, but there is a good basis there.

Q77 **John Stevenson:** Lord Tyrie, you take a different view, but recent events have demonstrated that the courts appear, on the face of it, to be willing to take on a greater interest in what goes on in politics and the activities

of this place.

Lord Tyrie: I think one could say that—so far.

Q78 **John Stevenson:** Do you not feel, though, that if we were to introduce legislation that was limited, it could curtail activism of the law to only certain areas? The simplest solution, for example, is sanctions and enforcement.

Lord Tyrie: I do not know the answer to that question; no one does until it has been tried. I am cautious. I would favour legislation if we have exhausted all other remedies, and I am not yet convinced that we have exhausted all other remedies, which is why I proposed what I hope is an innovative alternative. You described it as ingenious, but I don't think it is, because I more or less stole or developed it from something that Lord Thomas said.

I think it is worth giving something else a go. It keeps it in-house. I don't agree with the view that this is all going to be entirely assessed at the time it is put through by what the public will accept. The public will come to a view over time about the process that is put in place, but at the time it is legislated people will scarcely notice any of this, albeit put in place. Whatever scheme is enacted, it will be a specialist subject for Privileges Committees and so on, and a few journalists who take an interest in these recondite issues.

Sir Malcolm Jack: "Arcane matters", I think, is the way that parliamentary counsel once described them.

Q79 **John Stevenson:** Is there not a danger? As Sir Malcolm mentioned earlier, society is changing. We also sit on the Standards Committee, and it has fundamentally changed in the past year. A lot of that has been driven by public perception and the public view. Is there not a danger that if we do not start to modernise the system, we might undermine the effectiveness of Parliament?

Lord Tyrie: Yes, I completely agree with that. I am not suggesting the status quo; I am suggesting a change. I am suggesting the creation of an internal court—compliant with article 6 and led by a Law Lord—of both Houses, whose function is to perform exactly that function, which could otherwise end up in the courts. It has many of the features and, I hope, virtually all of the benefits of court scrutiny, but fewer of the drawbacks—if it can be made to work. I don't know if it can be made to work, but I am very clear that it is worth a try.

Q80 **John Stevenson:** The other interesting thing is that we have to be practical. You have highlighted the issue of when things can change and, as you well know, a majority Government might not like to see change. Is it your view that your solution is more likely to get through procedures here, rather than go down Sir Malcolm's route of a full legislative programme?

Lord Tyrie: Yes. The current balance in Parliament, if it can be called that—stasis, in the classical sense—is not the standard feature of British

post-war democracy, so sooner or later I expect there to be a majority Government. If that comes sooner rather than later, I would think this will be very high on their agenda. Why shouldn't it be?

I used to take the Conservative Whip, but now I sit on the Cross Benches. The time to nobble political parties, by the way, is right now, while they are writing their manifestos—getting a sentence into a manifesto, saying, "We can't carry on as we are on the Select Committee corridor. We have got to make sure that these so-and-so's turn up, or that this organisation or that powerful organisation supplies papers." Of course, it is the responsibility of individual Members of this Committee to get those points across.

It seems to me that the benefits of what I am proposing are pretty clear. It creates a flexible tool for developing exactly the types of internal checks and balances that are probably required in order to ensure that there isn't unfair treatment of witnesses. I think it will make it much more difficult for a powerful Government with a big majority to erode the gains made by Select Committees. Don't exclude the possibility that they take another look at the election of Select Committee Chairs by secret ballot. Don't exclude the possibility that there will be recidivists. At least for the time being, it keeps the courts out, with a reasonable chance, to use language in some other evidence, to re-clothe the emperor. I see a lot of attraction in taking a route that is less dramatic than full-scale legislation—even if we could get it, which I am not convinced that we could.

Q81 **John Stevenson:** Always a challenge. Ms Samson, you were coming between the two in your initial comments, so I would be interested in what you think of what has been said.

Ms Samson: During the 1997 Government, I spent a little time sitting in the Cabinet Office. I think it is the art of the possible. Drafting resources are limited. Political capital is limited. It is very much for your judgment as to which of these is most politically possible. If I were back in the Cabinet Office, my argument would be to say to the Government, "Look, you can lift and shift the Parliamentary Privileges Act from Australia. It hardly takes any parliamentary counsel time—just shift this line, add this line."

Equally, if I were batting for Lord Tyrie, I would say, "Actually, it is a tiny legislative change; the rest we could draw up ourselves. Let's just get on with it. Add some of the other proposals for legislation made for you." To be honest, my view is that anything would be better than this. I would like a parliamentary privileges Act best, but as to what you think you can get, if you agree with us—which is what I think we have all said: anything would be better than this—I will leave it to your judgment as to which "anything" might command political support.

Q82 **John Stevenson:** Do you think that there is support for change among the Clerks who support the Select Committee system?

Ms Samson: I am, for my pains, the Clerk in the Select Committee system who is responsible for procedure and privilege. I have been in the post for only a few weeks. I am having regular consultations with my

colleagues; I think we would very much like clear powers. Before all this was in doubt, at the very beginning of my career, somebody rang up and said, "This invitation to appear before the Select Committee—I'm not coming". I said—because this wasn't in doubt—"This isn't the sort of invitation you can refuse". That has now eroded, and I think we would like some of that back. If not that, then something like, "If you really don't want to come, this is the process you go through to challenge it", would be more helpful.

Sir Malcolm Jack: I just want to add a tiny point, picking up Lord Tyrie's point about manifestos, which of course is very pertinent—getting something or other in party manifestos. As you all know, individuals can play an important part: Leaders of the House, for example. I think Lord Tyrie would agree that, going way back to the origin of the departmental Select Committees, St John-Stevas, the Leader of the House, was very keen on this. That gave a huge impetus. Things can happen if certain individuals in Government get involved.

Lord Tyrie: In answer to your question, Mr Stevenson, I have spoken to quite a few Clerks about the proposal that I have just put forward. In the form that you now see it, it has taken account of the drawbacks that they identified. Eve was particularly helpful to me, but I have also spoken to half a dozen others, and four or five senior Clerks have read it in draft and it has been amended to take account of their concerns. I suppose I could summarise their view in one simple sentence, which is broadly speaking what Eve said: they are all agreed that these gentlemen's agreements, on the basis of which the House has proceeded for decades, are no longer enough. Something has to be done. Everybody is agreed about that. They also do not like having to negotiate their way between the reality of the limits of a Committee's capacity to do what it thinks it should do, and the Committee's discontent about its own relative impotence.

Q83 **Sir Gary Streeter:** I am going to home in—I think this is the final set of questions—on the idea of a parliamentary court or tribunal that Andrew has been talking about. I must say that Sir Malcolm's reaction of, "What would the public perception be of Parliament setting up its own little court?", resonates with me, because on the Standards Committee we are under some pressure that MPs should be removed from that so we cannot mark our own homework or even sit in judgment on our own peers, and here we are setting up a new court. On the other hand, I take the point that this is just a moment in British social history and things do not go in a straight line—there could be a swinging back towards, "Actually, why don't we give Parliament the power to get on with it?", and so on. Would it be easy, Andrew, to make such a tribunal or court compliant with article 6 of the ECHR?

Lord Tyrie: If you appoint a person charged with the capacity to think that through properly, and give him or her wingmen and women who think those sorts of issues through—former Attorneys General, serious people—in a high-powered panel, then yes, I am confident of that.

Can I briefly address the first point you made? Yes, the Standards Committee and the Privileges Committee, or the Standards and Privileges Committee, as they used to be called, are criticised for deciding those cases on their colleagues, but that is because you are so evidently, from the public's perspective, conflicted. As the public see it, it is a cosy relationship where you have a chat over lunch and then go out in the afternoon to make a decision. Of course, that is not how it is done. The work of both those Committees has been, in my view, on the whole, high class—very high class in some cases, including some very tricky cases—but that perception is very powerful.

In this case, we are dealing with cases where, very often, the public will be taking a very different perspective on it. They will be thinking through whether the people taking the decision are really parliamentarians in that sense. They will see a group that is at one remove from Parliament—in Parliament, but not fully steeped in it at the time it takes its decisions.

Q84 **Sir Gary Streeter:** A bit like we used to have with the Lord Chancellor.

Lord Tyrie: Yes, which has been lost, and maybe that constitutional innovation has had unforeseen consequences. Lord Judge made an excellent speech on that point in the House of Lords only yesterday.

Q85 **Sir Gary Streeter:** I will hurry to look that up when I get back to my room. I think it is not impossible in terms of public perception, because actually, public perception is often perceived public perception—what we are really talking about is media perception, which is a different thing altogether.

Lord Tyrie: That is a very good point.

Q86 **Sir Gary Streeter:** You are proposing a court or tribunal that would be bicameral. Do you think the Commons would accept interference from two or three Lords sitting on such a court, or would it have to be Commons for the Commons, as it were?

Lord Tyrie: I am proposing a bicameral system, but these are ideas which one needn't have. One could have separate bodies reflecting separate procedures and Standing Orders. But I see complications with that—complications created by divergence. These are detailed issues but none the less important ones that need to be thought through.

Q87 **Sir Gary Streeter:** I have sat in on a couple of quasi-judicial procedures here—you probably have, too. I am not sure how well they work, with people pretending they are Perry Mason and going through court-type language and so on. That often tends to be a bit cumbersome. Could you, or we, design something that is effective, not clumsy and not half a court with people not sure if they should wear a wig or not, and so on?

Lord Tyrie: I am very confident indeed of that. All over the UK, tribunals are operating right now that are led by, and often involve a good number of, senior and experienced lawyers, and that also have a lay presence—or technical experts, for example, at the Competition Appeal Tribunal—which is considered of value. I chair the CMA. There is an example.

Q88 **Sir Gary Streeter:** A fourth option is proposed by Professor David Howarth—you have probably seen it—which basically says that a finding of contempt would be relevant in deciding whether someone was a fit and proper person to be appointed to a public post in the future. Sir Malcolm, what is your view on that?

Sir Malcolm Jack: I am certainly not an employment lawyer—I am sure David Howarth is and knows what he is talking about—but it seems to target people who are probably not problematic; that is, those in the public service and so on. How it would apply beyond that, I just do not know. I would be very hesitant. Clearly legislation has sanctions, and in a way sanctions are threats, but this would seem like a very direct way of threatening people.

Ms Samson: I agree with Sir Malcolm. I have one thing about a tribunal within Parliament. If you look at what I think was this Committee's report into phone hacking, you will see that that was set up as a fair system that was article 6 compliant. There is a list of what you have to do in article 6, and it is not particularly difficult. The lawyers could not get their heads around it, but they were used to it. If you do not like a bicameral body—it would be constitutionally quite novel—then have the Lords as advisory. There are lots of ways of sticking it or swinging it, if you want to go this way.

Q89 **Sir Gary Streeter:** So you don't think it is a completely daft idea.

Ms Samson: I stick to my position: you are better placed than I am to work out what is politically feasible.

Lord Tyrie: No, I don't think it's a daft idea.

Sir Gary Streeter: I know you don't.

Lord Tyrie: I think it has merits, but we need to understand its limits. That is reflected—I will put it politely—in David's evidence, where he talks about the Cummings case in the penultimate paragraph. What he is basically saying is that you'll get the small fry, but the big fish will get away. That is point 1.

The second shortcoming—this is a closely related point, which I have not examined in depth, although I have looked at it carefully in the past—is the Osmotherly rules problem when you are dealing with an individual who is in public service. Of course, these rules are not rules—they are things made up by civil servants to protect themselves—but they are quite powerful internally. You would have to address every aspect of Osmotherly, I think, and probably legislate on it if you were to go down this route. I do not discount that. I haven't thought that through fully, but I would need more time.

The third point I would make—and we began the hearing with it—is that it is very limited in the sense that a high proportion of the cases that most concern us are not in the state sector anyway.

Sir Malcolm Jack: Can I just add one final thing, Chairman? Bear in mind that of course privilege does apply to Parliament—to both Houses. Of course the House of Commons can do what it likes itself, but article 9 talks about Parliament and I think both Houses are involved.

Ms Samson: Can I make a further point? The 2013 Committee was right in one way. In theory, as far as I can see, a Committee could ask the House to ask the Speaker to send somebody to jail. The problem is, as we have seen, there was no willingness to do that, and as we look down the line we can see some awfully interesting legal and constitutional consequences if we did so.

Chair: I think the evidence we have had is, as was first said in answer to some other questions, that we need to be in the art of the possible.

Q90 **Sir Christopher Chope:** This has been a fascinating evidence session. If the Committee was minded to go down the route of recommending statutory resolution, we need to have some draft legislation. Sir Malcolm and, I think, others, to an extent, have said, "Well, the Australian model is a good one," but Sir Malcolm has also said that the Australian one is not perfect. I am just wondering, perhaps in anticipation of a possible conclusion by this Committee, whether he would be willing to suggest what modifications to the Australian legislation would be appropriate for inclusion in any UK legislation.

Lord Tyrie: I think you should hire yourself out.

Sir Malcolm Jack: I will try my best to help the Committee.

Q91 **Chair:** We will be very grateful to receive any additional evidence you would like to give us in that respect.

Lord Tyrie: I have one more tangential point, and I ask for the Committee's indulgence. We have only been discussing Select Committees. The Intelligence and Security Committee is a very important Committee. It is a Committee of parliamentarians but it is not a Select Committee. It does a lot of very good work, most of which is below the radar. Every now and again—and there have been a couple of such cases; maybe three but probably a couple of such cases in the last 20 years—it has taken an issue of very high salience and it has been unable to do its work. It has said as much publicly—it has failed to do its job properly—because it does not have access to people and papers. I do think it would be helpful at the very least if this Committee felt able, as part of your investigation into people and papers powers, to say that this also needs to be addressed.

Q92 **Chair:** We will note that. Of course the remit we have been given is to look at Select Committees and contempts, but I am sure we can make oblique reference to related matters at the very least.

Lord Tyrie: As a former Select Committee Chair I am aware that Committees can interpret their own Standing Orders. Indeed, I used to take advice from Eve on exactly this point, so I am asking for a little—

Q93 **Chair:** Although we are in a different position from other Committees, in that our remit is that we act on the instruction of the House, so I have perhaps less leeway than other Committee Chairs.

Lord Tyrie: Well, no doubt you could take advice from the Clerks on whether it would be outrageous to add a paragraph about it.

Chair: I am sure a paragraph would be less than outrageous. I am very grateful to all of our witnesses for coming this morning. That concludes the Committee session.