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Committee of Privileges

Select committees and contempts: review of consultation on Committee proposals

First Report of Session 2022–23

Report, together with formal minutes relating to the report

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Committee of Privileges

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Committee reports are published on the Committee's website and in print by Order of the House.

Committee staff

The current staff of the Committee are Paul Connolly (Media Officer), Arvind Gunnoo (Committee Operations Officer), Dr Robin James (Clerk), and Robi Quigley (Second Clerk).

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Contents

Introduction

1. On 27 October 2016, the House asked our predecessor Committee to consider the matter of "the exercise and enforcement of the powers of the House in relation to select committees and contempts". Following interruptions including two general elections, the Committee resumed the inquiry in June 2020, and published a report, entitled *Select committees and contempts clarifying and strengthening powers to call for persons, papers and records* in May 2021.[1]

2. In that report we sought to determine what the best options available to the House are in relation to contempts committed before select committees. Specifically, we focussed on the issue of witnesses who refuse to appear before select committees or to provide documents.

3. Refusing to attend a select committee as a witness and refusing to provide papers or other records is a "contempt of Parliament". Fortunately, such a contempt is a relatively rare occurrence. Most select committee requests are swiftly accepted and acted upon. But some select committees have on occasion in recent years had difficulty in securing the attendance of witnesses and the provision of papers, despite Parliament's historic powers to punish Members and non-Members for contempt.

4. In our May 2021 report we considered the arguments for and against three main options: to do nothing; to reassert the House's historic powers, including to fine and imprison; or to legislate to provide new powers. We examined equivalent arrangements in other legislatures. We considered the related issue of fair treatment of witnesses and whether the practices of the House comply with modern standards of fairness and due process.

5. We concluded that:

- Select committees play a vital role in our parliamentary democracy. It is essential that they have the powers necessary to function effectively, and to uphold the reputation, dignity and authority of Parliament.
- Of the three options set out above, we considered the best option was for new legislation to provide a statutory basis for existing select committee powers to summon witnesses and compel attendance and provision of papers. We argued that new legislation would provide much needed clarity as well as effective deterrents for non-compliance, and would bring our Parliament into line with comparable legislatures.
- We also recommended that the House should clarify and reassert its commitment to fair treatment of witnesses to ensure that the practices of select committees comply with modern standards of fairness and natural justice.

6. The May 2021 report evaluated several different models for legislation. We set out in detail our preferred option in the form of a draft Bill that would make failure to comply with a summons issued by a select committee a criminal offence, with the person concerned liable to a fine or imprisonment to be determined by the court. We also

1 Committee of Privileges, First Report of Session 2019–21 (HC 350), published 3 May 2021; hereafter cited in footnotes as "May 2021 report".

proposed that, in the interim before the passage of legislation, the House should proceed by way of resolution and standing order changes to set up improved processes for ensuring the fair treatment of witnesses.[2]

7. Following publication of our report, we held a public consultation on our preferred option. We announced that we would "seek […] the views of current and former Members of both Houses, legal professionals and members of the judiciary from across the different jurisdictions of the United Kingdom, academics, and current and former Clerks".[3] We set out consultation questions to which we sought responses. The questions were as follows:

> (1) What is the primary role of select committees and what should be the practical limits of the application of their powers (as delegated to them by the House)?
>
> (2) Do you agree with our assessment of the three options, and our conclusion that a legislative solution is the best available option?
>
> (3) Do you think the proposed draft Bill provides an appropriate solution to the issue of recalcitrant witnesses before committees?
>
> (4) What do you think the maximum sanction should be for an individual found guilty of an offence of failure to comply with a summons?
>
> (5) Should the legislation be extended to encompass the enforcement of sanctions related to other contempts, or to make equivalent provision for House of Lords committees, or to deal with any other matters relating to parliamentary privilege?
>
> (6) How should the House set out its internal processes and commitment to fair treatment in a way that provides sufficient due process, whilst maintaining the flexibility and effectiveness of the current select committee system?
>
> (7) The draft Bill provides a power to summon non-Members to attend or to provide information or documents to a committee. Should equivalent powers be included to summon Members of the House, or for a committee of one House to summon Members of the other House?
>
> (8) Are there any other issues within the scope of the matter referred to us - "the exercise and enforcement of the powers of the House in relation to select committees and contempts" - that you think should be dealt with in our final recommendations to the House?[4]

8. We received 21 written responses to our consultation, which we have published.[5] We took oral evidence, also published on our website, from the following witnesses:

2 See May 2021 report, Summary.
3 May 2021 report, para 144
4 May 2021 report, para 144
5 Listed under "Published written evidence"

- Professor Tom Hickman QC, Barrister, Blackstone Chambers; Joshua Rozenberg QC (hon), legal journalist, and Professor Alison Young, Professor of Public Law, University of Cambridge
- Mark Hutton CB, former Clerk of the Journals, and Paul Evans CBE, former Clerk of Committees, House of Commons
- Lord Gardiner of Kimble, Senior Deputy Speaker, House of Lords, Rt Hon Lord Judge, former Lord Chief Justice of England of England and Wales, and Christopher Johnson, Clerk of the Journals, House of Lords
- Rt Hon Caroline Nokes MP, Chair, Women and Equalities Committee, Sir Robert Neill MP, Chair, Justice Committee, and Damian Collins MP, Chair, Joint Committee on the Draft Online Safety Bill and former Chair, Digital, Culture, Media and Sport Committee
- Rt Hon Jacob Rees-Mogg MP, Lord President of the Council and Leader of the House of Commons.

We are grateful to all who submitted oral and written evidence to our inquiry.

9. In this report, which continues our consideration of the matter referred by the House on 27 October 2016, we set out an analysis of the responses to each of the consultation questions, adding our further conclusions where appropriate. We annex to the report a revised text of our draft bill. We do not replicate evidence and arguments cited in our earlier report (though we add cross-references where appropriate).

Responses to consultation questions

Role of select committees

Question (1): What is the primary role of select committees and what should be the practical limits of the application of their powers (as delegated to them by the House)?

10. This question was intended to stimulate debate on whether developments in the work of committees in recent years have affected the exercise of their powers, set out in the House's standing orders, to call for "persons, papers and records" (often referred to as "PPR powers"). Most of the responses to our question dealt with the work of the departmentally related committees originally established in 1979, and the smaller number of committees (such as the Committee of Public Accounts and the Public Administration and Constitutional Affairs Committee) which are 'cross-cutting', i.e. with a remit extending across the boundaries of government departments. There was agreement that a principal role of these 'scrutiny' committees is to hold the Government and, by extension, public agencies to account for (in the words of Standing Order No. 152) their "expenditure, administration and policy". Select committees have no power to make their recommendations binding on Government. Their function is not that of executive decision-making, but of assembling and analysing information gathered by way of written and oral evidence, and publishing this along with their conclusions and recommendations. Joshua Rozenberg QC (hon) commented that:

> The primary role of select committees should be to ensure that legislators - and, through them, the public at large - are better informed. The more parliamentarians know about an issue, the better they are likely to be at assessing policies and proposals put forward by ministers and others.[6]

11. Our witnesses agreed, with varying degrees of emphasis, that, in addition to their core work of scrutinising the Government and public bodies, there has been an increasing tendency in recent years for committees to conduct 'topical inquiries', defined by Dr Craig Prescott of Bangor Law School as follows:

> What is meant by the term 'topical inquiry' is that the relevant committee is not primarily concerned with investigating a government or public agency as provided for by SO No. 152, but with the actions of individuals or companies within the private sector. The committee embarks on a fact-finding investigation focussing on a controversy or scandal that has received some media coverage.[7]

12. In a report published in 2012 the Liaison Committee stated that:

> in a growing number of cases, third parties—including private sector bodies—can be the focus of committee inquiries. Increasingly, the private sector is involved in delivering public services, and committees have

6 SCC 0055 (Joshua Rozenberg QC (hon))

7 SCC 0051 (Dr Craig Prescott), para 17

> a legitimate interest in scrutinising how taxpayers' money is spent. And some private sector services are of such concern that the public expect the committee to intervene, filling the accountability gap.[8]

13. In a further report in 2019, the Liaison Committee observed that the number of such inquiries had continued to grow. They quoted the Institute for Government which stated that "increasingly committees are stretching the boundaries of their delegated role, for example, by investigating the behaviour of private companies beyond the public policy implications of what they have done", and the Hansard Society, which stated that committees increasingly act as "an instrument of accountability in relation to concentrations of power and influence wherever that is found in the public or private sectors".[9]

14. Our witnesses agreed that the role of Commons select committees has been expanding. Sir Malcolm Jack, a former Clerk of the House, stated that "increasingly [they] have broadened their scope to examine matters of public interest, for example into areas to do with climate change and sustainability". He added "[t]he new areas of interest will involve summoning witnesses from outside Whitehall and Academe, less attuned to Westminster conventions and practices".[10] Mark Hutton, former Clerk of the Journals, wrote that select committees have aimed to make their scrutiny more effective by founding it on the widest possible range of experiences and views, in their choice of witnesses going beyond the 'usual suspects' and bringing in the voices of those with direct lived experience. He noted this new approach had been based on "making engagement with committees and participation in their inquiries easier, less formal and less intimidating".[11]

15. It was generally agreed that a broadening of committees' engagement with wider society is to be welcomed. However, some witnesses expressed concern about aspects of recent developments, in particular where committee inquiries are aimed at holding non-government actors to account for scandals or alleged misdeeds. Sir Jonathan Jones QC noted that "there will always be limits to what select committees realistically can and should do. In particular they are not courts of law and it is not their job to determine criminal or civil liability."[12]

16. Where some witnesses expressed concern at the trend towards topical inquiries, other considered this to be a desirable development, or at least an inevitable one. As we have seen, the Liaison Committee has referred to an "accountability gap" in relation to the private sector which topical inquiries are intended to fill.[13] Sir Malcolm Jack observed that such inquiries are by no means unprecedented: they mark "a return to the traditional, wide areas of select committee investigations of the nineteenth century, for example into slavery".[14] Sir Jonathan Jones QC, while noting the limits on what committees can and

8 Liaison Committee, Second Report of Session 2012–13, *Select committee effectiveness, resources and powers* (HC 697), para 20

9 Liaison Committee, Fourth Report of Session 2017–19, *The effectiveness and influence of the select committee system* (HC 1860), para 17

10 SCC 0046 (Sir Malcolm Jack)

11 SCC 0060 (Mark Hutton)

12 SCC 0050 (Sir Jonathan Jones QC), para 3

13 See para 12 above.

14 SCC 0046 (Sir Malcolm Jack)

should do,[15] also commented that "the practice of committees conducting such wider inquiries is well established and undoubtedly has made an important contribution to public debate and governance".[16]

17. Our witnesses generally agreed that the trend towards topical inquiries raises questions both about the willingness of witnesses to respond to an invitation from a committee, and about their subsequent treatment by the committee. Dr Craig Prescott analysed the implications in some detail. He stated that a feature of topical inquiries is a reluctance on the part of key witnesses to co-operate with a committee. In the case of four specific inquiries which were the subject of his research,[17] he found that:

> witnesses were subject to probing and, at times, hostile questioning, sometimes for an extended period, as the committee sought to establish particular facts. Witnesses know they are likely to be subject to criticism in the committee's eventual report. *Prima facie*, witnesses have very little to gain by appearing before a committee and potentially a lot to lose. […] The first response from a witness to give evidence to a committee could well be, 'who are *they* to question me? What has it got to do with the committee?'[18]

Dr Prescott observed that such witnesses "do not belong to a broader culture of being accountable to Parliament and may have very little connection to politics or the broader political process".[19]

18. The House gives select committees broad scope in relation to their inquiries by its long-standing convention that they are entitled to interpret their own order of reference.[20] Mark Hutton stated that "although the Liaison Committee has a role in mediating any border disputes between committees, it is well understood that the interpretation of a committee's remit is a matter for that committee".[21] Paul Evans commented that "select committees' secondary role in holding non-government actors to account is inherent in their primary role".[22]

19. In its 2019 report, the Liaison Committee considered whether the wider role that scrutiny committees have adopted should now be reflected in their standing orders. The Committee recommended that Standing Order No. 152 (Select committees related to government departments) should be amended to read as follows:

> Select committees shall be appointed to examine the expenditure, administration and policy of the principal government departments and

15 See para 15 above.
16 SCC 0050 (Sir Jonathan Jones QC), para 5
17 Those by the then Business, Innovations and Skills (BIS) Committee in 2016–17 into *Employment Practices at Sports Direct*, by the Work and Pensions and the BIS Committees in 2016–17 into *BHS*, by the Culture, Media and Sport Committee in 2010–12 into *News International and Phone-Hacking*, and by its successor the Digital, Culture, Media and Sport Committee in 2017–19 into *Combatting Doping in Sport*: see SCC 0051 (Dr Craig Prescott), para 16.
18 SCC 0051 (Dr Craig Prescott), para 20
19 Ibid., para 21
20 *Erskine May's Parliamentary Practice*, 25th ed. (2019), ed. Sir David Natzler and Mark Hutton [hereafter cited in footnotes as "Erskine May"], 38.11
21 SCC 0060 (Mark Hutton)
22 SCC 0059 (Paul Evans)

> their associated public bodies as set out in paragraph (2) of this order; *together with matters of public concern falling within the area of competence of those departments and bodies* [our italics].[23]

20. This proposal from the Liaison Committee has been rejected by the Government, which responded as follows:

> The Government does not consider there is a need to update the Standing Orders to reflect the wider role that some committees have recently chosen to adopt. As the Liaison Committee itself recognises, select committees are already able to interpret their own remit.[24]

21. Dr Craig Prescott argued in his written evidence that topical inquiries risk taking a committee outside the scope of Standing Order No. 152. He noted that currently there is no external check on whether a committee acts within its remit: it is for the committee to interpret its order of reference and "ultimately this interpretation is protected by the Bill of Rights, Article 9, and the principle of exclusive cognisance". However, he observed that our draft Bill makes it "an offence for an individual to fail without a reasonable excuse to comply with a summons". He considered that when it comes to topical inquiries,

> there are two potential reasonable excuses:
>
> (a) That the inquiry is outside the scope of SO No. 152. The draft Bill allows a court to "consider the nature and purpose of the Committee's summons", and it seems likely that this encompasses the underlying inquiry to which the summons relates.
>
> (b) That the inquiry is too soon and that the appropriate regulators are conducting ongoing investigations.[25]

22. Dr Prescott considered that both these points could be addressed by amending Standing Order No. 152 as recommended by the Liaison Committee.[26]

23. **There is widespread agreement that the role of select committees has expanded in recent years. There has been an increase in the number of so-called 'topical inquiries' involving investigations which go beyond the direct responsibilities of the Government and public bodies. Committees have also sought to engage with a more diverse range of individuals and communities. In our view it would be wrong to place too much emphasis on a relatively small number of topical inquiries which have involved elements of confrontation, high-profile though these may be. Many topical inquiries involve the private sector and wider civil society in ways which are non-confrontational and indeed may be welcomed and found empowering by those involved.**

23 Liaison Committee, Fourth Report of Session 2017–19, *The effectiveness and influence of the select committee system* (HC 1860), published 9 September 2019, para 18

24 Liaison Committee, First Special Report of Session 2019–21, *The effectiveness and influence of the select committee system: Government Response to the Committee's Fourth Report of Session 2017–19* (HC 428), published 17 June 2020, Appendix

25 SCC 0051, paras 27–28

26 SCC 0051, para 29

24. **Select committees have a right to scrutinise matters of public interest beyond the main bodies of government. In considering government policy, it is legitimate to look at the effects of policy failure, or to identify emerging areas which need policy oversight. For that legitimate function to be effectively performed, Parliament needs appropriate powers. Topical inquiries involving non-cooperation by witnesses will continue to occur from time to time. Powerful individuals who feel that they have little to lose will test the ability of the House to enforce their attendance as witnesses or their production of papers. Cases may be few but the potential reputational impact on the House is great. On the evidence we have received, we cannot be certain this is an increasing problem, but it is undoubtedly a real problem, which our proposal for legislation is intended to address.**

25. **We support the right of select committees to conduct topical inquiries, subject to safeguards for fair treatment of witnesses, and we do not wish to see any change to their right to interpret their own remit. The ability to conduct topical inquiries falls within the existing powers of committees, but *we agree with the Liaison Committee that, for the sake of clarity, Standing Order No. 152 should be amended to make this explicit, and recommend that the Government should reconsider its opposition to this.* The case for doing so would be strengthened if our legislative proposal is proceeded with, because amending the standing order would reduce the risk that a "reasonable excuse" defence would be argued in court on the grounds that a committee had exceeded its remit, and therefore would reinforce the principle that it is for the House and its select committees to interpret their remit, not the courts.**

26. Select committees which conduct topical inquiries must be particularly mindful to safeguard the rights of those with whom they engage. The issue of the fair treatment of witnesses was a major theme in our earlier report and we deal with it further in our section on Consultation Question (6) below.

The three options

Question (2): Do you agree with our assessment of the three options, and our conclusion that a legislative solution is the best available option?

27. In our May 2021 report we set out three options for how best to address the perceived inability of the House to exercise its penal powers:

a) To do nothing; or

b) To reassert the House's existing powers by amending standing orders or by resolution; or

c) To legislate to provide a statutory regime, whether administered by Parliament or the courts.[27]

27 May 2021 report, para 27

28. We noted that the debate about these options had been continuing for many years before our present inquiry, and that no consensus had emerged. The same choices had been discussed by two Joint Committees on Parliamentary Privilege, in 1999 and 2013, which came to different conclusions.[28]

29. Our provisional conclusions in May 2021 were as follows. On option (a) ("Do nothing") we noted that recent cases involving the exercise of powers, including that of Mr Dominic Cummings, "have revealed the impotence of the House to enforce the powers it delegates to select committees".[29] We observed that the problems of recurring recalcitrance was no longer a hypothetical one. Although examples of witnesses point-blank refusing to attend are rare, when it occurs it can have serious consequences for the Committee and its work, and for the reputation of the House. We also noted that some witnesses are now being given legal advice that the House cannot force anyone to attend or give evidence because the historic powers are null and void. We therefore rejected the option of doing nothing and agreed that the current uncertainty cannot be allowed to continue.[30]

30. On option (b) ("Reassert the House's existing powers by amending Standing Orders or by Resolution"), we concluded that reassertion of the House's historic powers to fine and imprison by resolution or in standing orders no longer offers a workable solution to the problems facing select committees. The risk is that it would be regarded as an empty gesture and only add to the present confusion. We recognised, however, that there are aspects of this issue that the House can and should address by assertion, including updated commitments to fair treatment of witnesses and provision for due process in the exercise of its powers.[31]

31. On option (c) ("Legislate to provide a statutory regime"), we concluded as follows:

> While recognising the risks in a legislative solution, notably the potential erosion of exclusive cognisance and the danger of weakening the status of other privileges, we conclude that legislation is now the only option that can provide the House with the enforceable powers it needs to summon witnesses and order provision of papers. The inability effectively to penalise, and therefore deter, a failure to comply with a summons is preventing the effective discharge of select committee functions. Only legislation can put the powers of the House to punish this form of contempt beyond doubt and provide the necessary clarity to MPs, officials, witnesses, and the public.[32]

32. We also proposed that, in the interim before the passage of legislation, the House should proceed by way of resolution and standing order changes to set up improved processes for ensuring the fair treatment of witnesses.[33]

28 May 2021 report, paras 27–29
29 May 2021 report, para 45. For the Cummings case, see Committee of Privileges, First Report of Session 2017–19, *Conduct of Mr Dominic Cummings* (HC 1490), published 27 March 2019.
30 May 2021 report, paras 45–47
31 May 2021 report, paras 57–58
32 May 2021 report, para 71
33 May 2021 report, para 72

Summary of responses on the three options

33. We received many thoughtful responses to these conclusions on the three options. However, unanimity continues to be elusive. Some responses endorsed our decision to put forward a legislative proposal, some supported it with provisos or reservations, and some were opposed in principle. Several witnesses commented that the choices were finely balanced. In the paragraphs that follow we set out briefly the support or otherwise for each of the options from some of our witnesses.

34. There was little support for option (b), re-asserting the powers of the House without legislating. Sir William Cash MP, Chair of the European Scrutiny Committee, thought that the draft standing orders and resolutions proposed by the 2013 Joint Committee on Parliamentary Privileges should be looked at again,[34] but most of our other respondents agreed that the realistic choice was between option (a), do nothing, and option (c), legislate. Paul Evans commented that:

> The choice before Parliament is between abandoning its claim to have PPR powers and taking legislation. […] there isn't really a middle way that the existing powers cover.[35]

Mark Hutton agreed that re-assertion "would be little more than 'an empty gesture'".[36] Sir Jonathan Jones QC considered that any attempt to assert penal powers against non-Members by standing orders or by resolution would be fraught with risk, including that of legal challenge.[37]

35. Professor Tom Hickman QC and Harry Balfour-Lynn stated that in their view the case had been made out that it would be of assistance to select committees for legislation to confer on them powers as proposed. They regarded the powers as not excessive and analogous to those conferred by Westminster on the devolved institutions as well as on a range of other statutory bodies.[38] Professor Alison Young of Cambridge University also supported legislation, though she had concerns about the drafting of the "reasonable excuse" defence.[39] Paul Evans concluded that "the Privileges Committee gave a balanced consideration to the options and rightly concluded that a legislative solution was the neatest and most convincing solution".[40] In oral evidence he added that:

> If you are happy to accept that Parliament has no power of compulsion, fine. If you want Parliament to have a power of compulsion, this is the right way to do it. It is taking a fine chisel with a carefully controlled hammer to a legal problem. It is not taking a sledgehammer to crack a nut.[41]

36. Tom Tugendhat MP, Chair of the Foreign Affairs Committee, supported option (c), arguing that "the additional clarity and powers provided by legislation are worth the price of potential encroachment on parliamentary processes by the courts".[42] Sir Malcolm Jack

34 SCC 0057 (Sir William Cash MP)
35 Q 138
36 SCC 0060 (Mark Hutton)
37 SCC 0050 (Sir Jonathan Jones QC), para 15
38 SCC 0058 (Professsor Tom Hickman QC and Harry Balfour-Lynn), paras 3–5
39 SCC 0047 (Professor Alison Young), paras 2–6. For our proposals on the "reasonable excuse" defence, see paras 72–75 below.
40 SCC 0059 (Paul Evans)
41 Q 166
42 SCC 0065 (Tom Tugendhat MP)

agreed that a legislative option was the best one, though he would prefer this to be part of a wider codification of privilege.[43] The Constitutional Law Sub-Committee of the Law Society of Scotland also supported a legislative solution, as did Rt Hon Baroness Butler-Sloss, former President of the Family Division of the High Court of Justice.[44]

37. Sir Jonathan Jones QC stated that:

> As between options (a) and (c) I consider the position is quite finely balanced - particularly if […] improvements to the treatment of witnesses might encourage co-operation even in the absence of new powers. I also agree that there is no straightforward solution. Again the report fairly sets out the pros and cons.[45]

Sir Jonathan came to the tentative conclusion that if the legislation were crafted sufficiently tightly to limit the degree of judicial intervention, the advantages of option (c) might outweigh the disadvantages.[46]

38. Dr Craig Prescott concluded that "overall, the Draft Bill does solve the problem of reluctant witnesses", but added that "it is debatable whether the problem is sufficient to need resolving in the first place", especially as, in his view, "by resolving one problem, the Draft Bill may create others", particularly in relation to the protection of witnesses.[47] Sir Robert Neill MP, Chair of the Justice Committee, did not commit himself as between the options, but remarked that any legislative proposals would need to be carefully considered.[48] Sir William Cash MP considered that the three options should not be regarded as mutually exclusive, but should be viewed as steps, with re-assertion the first; if that proved problematic, the House might consider other ways forward including legislation.[49]

39. The heads of the judiciary in England and Wales, Scotland, and Northern Ireland responded to our invitation to submit their views. Rt Hon Lord Burnett of Maldon, Lord Chief Justice of England and Wales, expressed agreement with evidence submitted at an earlier stage of our inquiry by his predecessor, Lord Thomas of Cymgiedd, who had stated, *inter alia*, that the issue was one for Parliament to decide, but that, if the courts were to be involved, a statutory framework would be prudent to ensure the respective roles of Parliament and the courts were respected. Lord Burnett commented on our specific proposal in relation to a Speaker's certificate;[50] we deal with this later in the report.[51] Rt Hon Lord Carloway, Lord President of the Court of Session and Lord Justice General, Scotland, considered that "[i]f the House considers that the status quo is not a tenable option and that changes is required, […] a legislative solution is preferable to the second option discussed".[52] Rt Hon Dame Siobhan Keegan, Lady Chief Justice of Northern Ireland, informed us that "she is content to concur" with the observations made by Lord Burnett.[53]

43 SCC 0046 (Sir Malcolm Jack)
44 SCC 0052 (Constitutional Law Sub-Committee, Law Society of Scotland) and SCC 0053 (Baroness Butler-Sloss)
45 SCC 0050 (Sir Jonathan Jones QC), para 16
46 SCC 0050 (Sir Jonathan Jones QC), para 17
47 SCC 0051 (Dr Craig Prescott), paras 40, 48
48 SCC 0061 (Sir Robert Neill MP)
49 SCC 0057 (Sir William Cash MP)
50 CC 0063 (Lord Burnett of Maldon)
51 At paras 72–75 below.
52 SCC 0064 (Lord Carloway)
53 Email dated 4 August 2021 from Office of the Lady Chief Justice of Northern Ireland (not reported).

40. Several witnesses opposed our legislative proposal. Rt Hon Lord Carlile of Berriew CBE QC considered that the existing powers of select committees are broadly sufficient, that being found in contempt of Parliament remains a sufficient sanction, and that our proposal "runs the risk not only of undermining the separation of powers, but also of putting committees on a collision course with the Human Rights Act".[54] Joshua Rozenberg QC (hon) argued that "bringing in the courts […] would appear heavy-handed and inappropriate". He feared that legislation would change the nature of select committees, encouraging members to "make political capital out of their new powers", leading to a legalisation of evidence sessions, conducted by members lacking the necessary forensic skills.[55] Mark Hutton also feared that "if select committees start to behave in a legal way, with legal or quasi-legal procedures, they will lose a great deal of what they have gained over the past 20 or 30 years: flexibility, agility and the ability to operate in different ways". He took issue with the description of option (a) as "Do nothing", arguing that even if options (b) and (c) were to be rejected, there would be scope to use the existing public communications apparatus of select committees better to explain their role and to emphasise that "those with public responsibilities have a public duty to co-operate and assist with that work".[56] Alexander Horne, of Durham Law School (and a former legal adviser in the House of Lords), found the proposed safeguards for the rights of those summoned to be wanting, considered that "Parliament does not currently possess the legal capacity to run the type of fair hearing that would be needed to forcibly examine the conduct of private individuals", and concluded that "[t]his proposal has the potential to open a can of worms, without leading to better outcomes".[57]

41. Finally, the Government submitted its view on our proposals in the form of oral evidence from the then Leader of the House, Rt Hon Jacob Rees-Mogg MP. He did not commit the Government to supporting or opposing our legislative proposal, but said that the case for legislation would need to pass three tests:

> first, the legislation would not affect the exclusive cognisance of the House; secondly, that it would be more effective than the current system in terms of witness attendance and the information that they were willing to give—it needs to be actively better than the current system. And that leads to the third point: I think we need a statistical analysis of who has not been appearing and who has been appearing. It is quite hard to make the case to legislate for a very small percentage of cases if most people are in fact turning up and the system is working well.[58]

Mr Rees-Mogg also argued that the need for legislation rested upon an assumption that the House's historic powers to fine and imprison had lapsed, which had not been tested in the courts.[59]

54 SCC 0056 (Lord Carlile of Berriew QC)
55 SCC 0055 (Joshua Rozenberg QC (hon))
56 SCC 0060 (Mark Hutton)
57 SCC 0045 (Alexander Horne)
58 Q 244
59 Q 239

Issues raised by the Government and others on the three options

42. In the remainder of this section of our report we discuss the following issues germane to the choice between the three options, raised by the then Leader of the House and other witnesses:

- Whether the House's historic powers to fine and imprison should be tested in the courts
- Whether it would be useful to commission quantitative research on committees' recent exercise of their powers
- What the implications of our legislative proposal are for the House's right to manage its own affairs ("exclusive cognisance")
- Whether our legislative proposal would lead to a change in the behaviour of committees.

Historic powers to fine and imprison

43. In his oral evidence the then Leader of the House repeatedly mentioned that the House's ancient rights to fine and imprison contemnors "have not been tested and they have not been abandoned by the House".[60] Mr Rees-Mogg said that he was not advocating use of the power of arrest, but "I think it is not unreasonable for the House to fine people for failing to attend".[61] He said "it is a theoretical power and […] you do not know whether it would survive challenge until tested".[62] He acknowledged that the powers might be held to have fallen into desuetude, and "if [they] have fallen by the wayside, they cannot just be magicked up", but also commented that "[y]ou may think that the untested nature of it actually in and of itself provides an incentive to attend, because people are not entirely sure whether it would be effective or not".[63]

44. The 2013 Joint Committee report argued that the House's penal powers still existed and could be exercised if the House had the "institutional confidence" to do so. The report pointed out that desuetude is not a legal doctrine in England and Wales and that the power to fine (based on the House of Commons' power) had recently been asserted and used in New Zealand.[64]

45. In our May 2021 report we cited the Joint Committee's view but expressed deep scepticism about whether the House's penal powers could be enforced in practice. The House's right to imprison was last exercised in 1880 and its right to fine in 1666.[65] We noted that the current Clerk of the House has said that Parliament cannot and would not expect other agencies, whether the courts or the police, to act to enforce its orders without explicit statutory authority.[66] Daniel Greenberg CB, Counsel for Domestic Legislation, Office of Speaker's Counsel, advised us that "to restore Parliament's powers to fine or

60 Q 247
61 Q 250
62 Q 239
63 Q 238, 243, 251
64 Joint Committee on Parliamentary Privilege, Report of Session 2013–14, *Parliamentary Privilege* (HC 100), para 77
65 May 2021 report, para 11
66 May 2021 report, paras 50–51

imprison directly for contempt of Parliament is not a realistically achievable proposition", a primary reason being that it would "certainly be contrary to the European Convention on Human Rights (ECHR)".[67] We cited other parliamentary and legal authorities to the same effect.[68] We concluded that:

> any attempt to exercise the House's historic powers to fine or imprison would contravene the Human Rights Act 1998 and the UK's international obligations under the [ECHR] and the International Covenant on Civil and Political Rights.[69]

46. Evidence we received as part of our consultation reinforces this analysis. Lord Judge, former Lord Chief Justice of England and Wales, told us that "we cannot have some medieval process through which you suddenly become a high court of Parliament and start locking people up. You cannot do that."[70] Both Professor Tom Hickman QC and Professor Alison Young, when asked "[f]or the avoidance of doubt, do you think that the House of Commons has the power to arrest?", answered bluntly, "No".[71] Mark Hutton dismissed the argument that there are advantages to keeping people in doubt as to whether the House possesses certain powers:

> Committees […] have hinted at some sort of residual mysterious power - "If you don't do what we say, terrible things may happen" - but they are not very specific about what they are. I don't think that is a good place to be. If you've got a power, you should be clear about it.[72]

47. **We stand by the conclusion in our May 2021 report that "reassertion of the House's historic powers to fine and imprison by resolution or in Standing Orders no longer offers a workable solution to the problems facing select committees". The then Leader of the House's suggestion that the House should put to the test whether the courts recognise its historic power to fine is not one we can endorse. Any such attempt would almost certainly fail legally and make the House look foolish. We also believe it would be wrong for Parliament to seek to introduce a power to fine or imprison without oversight by the courts. We believe the decision before the House in relation to powers is between accepting the status quo or introducing new powers by means of legislation, accepting there will be a role for the courts. A primary benefit of legislation is that it would put Parliament's power to sanction beyond doubt.**

Quantitative research

48. The then Leader of the House told us that "we need a statistical analysis of who has not been appearing and who has been appearing":

67 May 2021 report, para 52
68 May 2021 report, paras 51, 53
69 May 2021 report, para 55
70 Q 180
71 Q 129
72 Q 147

> I think your report needs the numbers, so that we have the context. Is it that 1,000 have come and there is one who refused? Is it that 100 have come and one has refused? What is the proportionality? I don't think legislating on one or two high-profile cases is a sufficient case.[73]

49. **We have considered the then Leader's proposal that quantitative research be commissioned. We do not believe that this would assist the House. We acknowledged in our May 2021 report that committees reach amicable agreements with prospective witnesses over arrangements for their attendance in the vast majority of cases. It is not in dispute that the number of cases where witnesses are seriously recalcitrant is very small. Whether the incidence of such cases is one in 100 or one in 1,000 is immaterial. Moreover, any such research would struggle to quantify the relevance of a witness to an inquiry, the importance of an inquiry to a Committee's remit, and the value of the evidence that they might have offered. A single refusal to attend in a high-profile case may significantly interfere with the conduct of an inquiry and substantially erode confidence in the House's authority. One select committee chair told us of their "extreme frustration" when "there is information or an individual we want and, simply put, the powers are not adequate for us to get that".[74] Where select committees choose to investigate highly contentious public matters, then individual cases of recalcitrance can make obstruction and obfuscation more likely.**

50. **We have argued that only legislation will put beyond doubt the House's ability to enforce attendance, but this carries risks, notably by way of the erosion of exclusive cognisance. It is ultimately for the House to weigh those risks and decide what action, if any, to take. The accumulation of statistics of, at best, marginal relevance would, in our view, not significantly help the House in taking those decisions.**

Exclusive cognisance

51. The then Leader of the House in his oral evidence stated that a condition for government support for legislation would be that "the legislation would not affect the exclusive cognisance of the House".[75]

52. In our May 2021 report we made clear that our proposal for legislation *would* affect Parliament's "exclusive cognisance", that is, its control over its own affairs. We stated:

> We do not seek to disguise the fact that our proposal would encroach upon protections previously afforded to parliamentary proceedings under Article IX of the Bill of Rights. However, a limited reduction in the extent of exclusive cognisance is a price worth paying to secure effective enforcement. Our proposal gives scope for the court to consider the nature and purpose of a committee's summons, but only for the purposes of ensuring compliance with the UK's international human rights obligations, in particular Article 6 of the European Convention on Human Rights (the right to a fair trial).[76]

73 Q 244–45
74 Q 216 (Rt Hon Caroline Nokes MP, Chair of the Women and Equalities Committee)
75 Q 244
76 2021 report, para 143

53. **Our proposed legislation was drafted so as to reduce the potential for the courts to involve themselves in the internal processes of Parliament to the minimum, but we have been open about the fact that any legislation in this area, no matter how tightly drafted, raises the possibility, no matter how slight, of such involvement. The question is not whether this will be the case - it will - but whether the potential gains from legislation outweigh the potential disbenefits. That is in our view a matter for the House to consider when it debates our report.**

54. We further discuss the extent to which the role of the courts can and should be limited under our proposed legislation under our consideration of Consultation Question (3) below.

Will legislation change committees' behaviour?

55. As we have seen,[77] several witnesses, notably Joshua Rozenberg QC (hon) and Mark Hutton, opposed our legislative proposal on the grounds that it would be likely to lead to an undesirable shift in the behaviour of select committees, encouraging grandstanding by politicians and introducing greater formality and legalism into committee practices in place of the existing relative informality, thereby making reluctant or vulnerable witnesses less rather than more willing to put themselves forward.

56. Joshua Rozenberg QC (hon) summed up this line of argument:

> If you are telling people that they face a prison sentence if they do something wrong […] then they are going to be cautious. They are going to be reluctant, they are going to be nervous and worried about what may happen to them if they inadvertently mislead you. This fairly friendly co-operation that the Chair refers to, when you summon a witness and the witness says "No, you want another witness and here that person is," will go, because the whole thing will become adversarial. Because you will be relying on the courts to buttress your authority, you will become more like a court and less like an information-gathering service.[78]

57. Mark Hutton felt that the proposed new procedures would necessarily entail greater formalisation of the process of approaching all prospective witnesses, not just potentially recalcitrant ones:

> You describe the route you would go down to get to the certificate as being stage by stage by stage, but if someone ends up at the end of it, they surely have the right to go back to the beginning and say, "When I started talking to you, you never said I might end up in this place." If you are going to treat people in a legal way or a lawyerly way, with them being subject to those proceedings, you have to do so from the start. You can't suddenly change the way in which you treat people.[79]

77 See para 40 above
78 Q 109; see also Q 95
79 Q 140

58. The then Leader of the House queried:

> By getting the one difficult person, do you make it a different atmosphere for the others who have come willingly? Would a formalisation undermine the informal system that is working very well in most cases? Or would it simply work in the cases that need it?[80]

59. Other witnesses thought it unlikely that there would be changes in committee practice. Professor Tom Hickman QC said "I would be surprised if this power is used regularly, or even at all".[81] Paul Evans commented:

> I cannot predict the future, but I am fairly confident that it will not have the chilling effect feared, because 99.9% of Select Committee witness interaction is informal […]: you phone them up and say, "Would you like to come next Tuesday?" They say, "Could you make it Wednesday?" And you say, "Okay," and all the rest of it. It will never even arise.[82]

60. **It is difficult to predict the behavioural consequences of procedural changes, but we consider it unlikely that our legislative proposal, if implemented, would lead to a significant change in the culture of select committees. We expect that the proposed powers would be used very occasionally, possibly never. The threat of their deployment would, we hope, concentrate minds in the small number of cases where witnesses are contemplating refusing to attend, while not impacting at all in the great majority of cases. Legislation would simply enable the House to exercise in practice the power of enforcement which it already possesses in theory, and which we suspect that most potential witnesses, to the extent that they reflect upon these matters at all, assume that it possesses.**

61. **Much, though, depends on the way in which our proposals for safeguarding the fair treatment of witnesses are implemented. It is crucial that the new arrangements, while being robust, are also light-touch and do not impact on committees' rightly cherished flexibility. We do not accept that it will be necessary to initiate all contacts with prospective witnesses with a heavy-handed recitation of their rights that might intimidate them. The necessary information can be conveyed in a written document which will set out rights and committee powers for information, while also drawing attention to the fact that the great majority of attendances are voluntary and arranged without needless bureaucracy.**

62. **We have in addition modified our original proposals, by proposing that in cases of recalcitrant witnesses there should be a clear initiation of a statutory process in the form of a statutory summons issued by the Speaker - see paragraph 74 below. This would, we believe, further address the 'chilling effect' argument by making clear that the early stages of arranging witness appearances would proceed exactly as they do now, with a clear marker as to when, in a tiny minority of cases, a statutory process would be launched.**

80 Q 229
81 Q 110
82 Q 158

The three options: overall conclusion

63. **We have summarised the consultation responses on the three options, and discussed a number of challenges to our proposal to go down the legislative route. Having carefully considered the fresh evidence received, we reaffirm our belief that if the House wishes to address the problem of recalcitrant witnesses, then legislation is the only appropriate means to do so.**

The draft Bill

Question (3): Do you think the proposed draft Bill provides an appropriate solution to the issue of recalcitrant witnesses before committees?

64. In the previous section of this report, we dealt with responses by our witnesses to our decisions on the three options. In this section we consider some issues arising from the consultation responses relating to the detailed drafting of our legislative proposal and the mechanisms it would set up.

Clarification of the draft Bill's purpose

65. We first wish to clear up misunderstandings on two points which arose in evidence. First, **we clarify that our draft Bill does not seek to criminalise contempts of the House as such.** Refusing to attend a select committee when ordered to do so may be regarded by the House as a contempt, but the House has its own internal procedures for dealing with contempts and, even if the available sanctions for such contempts by non-Members are inadequate, we do not consider it appropriate that the courts should be directly involved either in determining whether a contempt has been committed or in sanctioning it. Our proposal does something different: it creates a criminal offence and makes that punishable by the courts. The fact that the offence may well be regarded by the House as being a contempt is therefore strictly irrelevant to the legal process.

66. Second, some witnesses misinterpreted our draft Bill as criminalising not simply the refusal to attend a select committee, but also a refusal to answer questions before a committee or give satisfactory answers to questions. This was not our intention. Giving unsatisfactory answers might at present be deemed to be a contempt but to seek to bring this within the ambit of enforceability proposed by the Bill would create major difficulties in respect of how to define whether answers were unsatisfactory and what a "reasonable excuse" for giving unsatisfactory answers might be. This might open up many aspects of a committee's work to scrutiny by the courts. **We have accordingly redrafted our Bill to remove any unintended ambiguity in Clause 1, subsection (1) and to make clear that the criminal offence is failing to comply with a summons, to attend a committee or produce papers, without reasonable excuse, rather than giving unsatisfactory responses to questions when attending a committee.**

Relationship between Parliament and the courts

67. **We have never sought to disguise the fact that any legislative proposal would encroach to a limited extent upon the protection from scrutiny by the courts afforded to parliamentary proceedings under Article IX of the Bill of Rights 1689. However, we**

note that the Bill of Rights itself is a statute and we are reassured from the evidence we have received, including from former senior judges, that a proportionate legislative solution can be conceived without upsetting the comity between Parliament and the courts.

68. We have given careful attention to the contents of our draft Bill in the light of the consultation responses.

69. Several witnesses commented on whether the draft gets the balance right between restricting what the courts can examine relating to a select committee's operations and allowing the courts the legitimate role they would expect to play in taking decisions on an alleged criminal offence by way of safeguarding the rights of the accused.

70. Paul Evans felt that our draft Bill was on the right lines:

> It is wise not to be over-prescriptive in an area where the particular circumstances of any case are unpredictable. In particular, clause 1(4) seems to me to be an elegantly laconic way of expressing the important point that the courts should not seek to interpose their views on the political appropriateness of a committee's choice of witness or on a committee's internal proceedings when coming to a judgement.[83]

71. Professor Tom Hickman QC and Harry Balfour-Lyon in their written evidence supplied us with an alternative draft Bill.[84] We are grateful to them, and to Daniel Greenberg, Counsel for Domestic Legislation, Office of Speaker's Counsel, who has supplied us with a critique of the alternative draft Bill, as well as comments on other consultation responses to our draft Bill.[85]

72. Mr Greenberg has supplied us with detailed consideration of some of the points raised by our witnesses on the "reasonable excuse" defence and on the courts' ability to consider the "nature and purpose" of the summons. He notes that the latter is tied to the summons, and expressly excludes consideration of wider aspects of the Committee's proceedings, such as its reasons for conducting an inquiry. He comments:

> it is inconceivable today that the public would accept an unconditional and unregulated right to attach a criminal sanction to attendance (nor would it be compatible with the European Convention on Human Rights). The courts are the appropriate gatekeeper in this context, and I am confident that they would be able to operate it in accordance with their established practices and procedures, without being drawn into unacceptable politicisation (which the judges generally wish to avoid as much as if not more than anyone else) and without permitting themselves to interfere in the substance of parliamentary proceedings.[86]

73. Mr Greenberg concludes that "[f]or the reasons given, […] I am satisfied that the clause as drafted in this respect represents an acceptable and lawful criminal sanction for attendance or non-attendance upon a Committee".[87]

83 SCC 0059 (Paul Evans), para 5
84 SCC 0058 (Tom Hickman QC and Harry Balfour-Lynn), para 18 and Annex 2
85 SCC 0066 (Counsel for Domestic Legislation), para 20 and passim
86 SCC 0066 (Counsel for Domestic Legislation), para 9
87 SCC 0066 (Counsel for Domestic Legislation), para 16

74. Following discussions with the Committee and others, Mr Greenberg has proposed a significant change to the draft Bill, to create a power of statutory summons, to be exercised by the Speaker. He argues that any potential "chilling effect" of the legislation would be significantly reduced by drafting it so that it only applies to a summons that specifically invokes the Act. He notes that this would be similar to the approach of section 1 of the Parliamentary Witnesses Oaths Act 1871:

> Committees proceed with business as normal, asking questions without attracting any powers of compulsion to answer truthfully, unless and until they wish to invoke the statutory procedure at which point the oath is administered. So far as I am aware, there is no general feeling that the use of the power by the Public Accounts Committee in 2011 when examining Anthony Inglese, General Counsel and Solicitor, HMRC has exercised any chilling effect in the case of witnesses generally or made people less inclined to cooperate with Committees.
>
> Under this model most summonses would issue as at present and would be formal but not enforceable. If a Committee took the view that a particular witness was being contemptuously evasive, at that point it could choose to increase the pressure by issuing a summons under a separate Standing Order, expressly invoking the statutory provision about failure to comply.
>
> An additional advantage of this model would be that the gatekeeper function would be exercised before the informal summons was converted into a statutory summons, giving the House greater control over the overall policy of compelling witnesses.[88]

75. **As we have set out above, we do not consider that there would be a significant "chilling effect" even if the draft Bill were to be enacted in its original form. However, we also accept that any such effect would be even less likely if the draft Bill were to be amended as the Counsel for Domestic Legislation recommends, and we have modified our revised draft Bill set out at Annex 1 accordingly, and have added a revised description of steps to be followed under the new procedure at Annex 2. We note that this change has the added advantage that it advances the gatekeeper process to the stage before Parliament decides to invoke potential criminal liability. This would help address some of the concerns raised by witnesses about "reasonable excuse" in relation to "the nature and purpose of the summons". This change would mean that the reference to the courts would always and only be made by Parliament once all other avenues had been exhausted. It would also mean the court would be engaged in limited, exceptional cases with a much clearer machinery of process, leading to fewer concerns about engaging with or considering parliamentary proceedings in a way that would be problematic on Article IX of the Bill of Rights grounds.**

76. **In the light of Mr Greenberg's comments on proposals we have received in consultation responses relating to the draft Bill, which we have published,[89] we are minded only to make limited changes to the draft Bill, as set out elsewhere in this report.[90]**

88 SCC 0067 (Counsel for Domestic Legislation)
89 SCC 0066 (Counsel for Domestic Legislation)
90 At paras 66, 75, 82, 106

Sanctions

Question (4): What do you think the maximum sanction should be for an individual found guilty of an offence of failure to comply with a summons?

77. In our May 2021 report we considered what an appropriate sanction should be for those found guilty of an offence under our proposed legislation. We noted that in examples where parliaments can set up investigative commissions, the sanctions for non-compliance tend to be equivalent or similar to sanctions for contempt of court. In the UK, the maximum penalty for contempt of court is a period of imprisonment not exceeding two years or a fine not exceeding £2,500.[91]

78. Our draft Bill as originally published provides that "An individual guilty of an offence under subsection (1) is liable on conviction on indictment to imprisonment for a term not exceeding two years, a fine or both".

79. Paul Evans commented that:

> The sanction proposed […] seems to me appropriate. In particular, I think an unlimited (either minimum or maximum) fine provision is right, given the very different circumstances that are likely to pertain to the economic situation of recalcitrant witnesses, as well as to the degree of unreasonableness of their defiance. The courts should be trusted to pitch a fine at an appropriate level to discourage others contemplating defying a committee summons while not being oppressive to individuals. I believe the courts would only have resort to imprisonment in the very gravest of cases, or very rarely where a short, sharp shock seemed to them the most appropriate response.[92]

80. However, several other witnesses considered that our proposed sanction was excessive. Joshua Rozenberg QC (hon) stated that the Committee "seems to have recommended sanctions that are in line with the penalties for contempt of court", but he considered that the offence under the Bill "is not comparable with undermining the course of justice".[93] The then Leader of the House argued that "the potential of two years in prison is entirely disproportionate to failing to appear as a witness. It is very hard to see the circumstances where two years in prison would be a suitable penalty."[94] Sir Malcolm Jack considered a "[f]ine to be determined by the court and imprisonment perhaps 6 months is adequate".[95] Nicholas Goodwin, an A Level student, made the interesting observation that the House's historic power to imprison lapsed at the end of the parliamentary session; he suggested that this historic position should be reflected as much as possible, and that, given that the parliamentary session usually lasts around one year, the maximum sanction should be one year's imprisonment.[96]

81. Lord Judge suggested that the court's initial decision on sanction might be conditional upon the individual's giving evidence. He said:

91 May 2021 report, para 88
92 SCC 0059 (Paul Evans)
93 SCC 0055 (Joshua Rozenberg QC (hon))
94 Q 237
95 SCC 0046
96 SCC 0048 (Nicholas Goodwin)

> Let us assume that there is a conviction […]. I would have thought that the first power that the court should have would be the power to make an order conditional on your giving evidence. The court order itself would say, "You will be on probation," or, "This will be conditional discharge," or whatever it might be, "provided that within three months you respond to this summons by the House Committee." But beyond that, then I think a fine—I don't know what level—or imprisonment.[97]

82. **We are persuaded that the maximum sanction of two years' imprisonment in our original proposal would be disproportionate to the gravity of the offence. We have redrafted the Bill to provide for a maximum sentence of six months' imprisonment. We support Lord Judge's proposal that the court may choose to make its decision on sanction conditional on the person concerned giving evidence within a specified timeframe. We note Lord Judge's advice that it is not necessary to amend the text of the Bill to confer this power on the court as it would be within the court's discretion to do this.**

The House of Lords, other contempts and privilege matters

Question (5): Should the legislation be extended to encompass the enforcement of sanctions related to other contempts, or to make equivalent provision for House of Lords committees, or to deal with any other matters relating to parliamentary privilege?

Lords committees

83. One of our consultation respondents commented, "the Bill only applies to witnesses summoned by the House of Commons. It is not clear why the Lords have been excluded from its provisions (since select committees in the Lords may conduct equally important work)."[98] The answer is simple: we are a committee of the House of Commons, charged by that House with considering "the exercise and enforcement of the powers of the House in relation to select committees and contempts". Our remit, unlike that of the 1999 and 2013 Joint Committees on Parliamentary Privileges which made bicameral recommendations, does not extend to the House of Lords. Nonetheless, we posed as one of our consultation questions whether there should be equivalent provision for House of Lords committees.

84. We received written evidence from Baroness Taylor of Bolton, the Chair of the House of Lords Constitution Committee, on behalf of that Committee, the Liaison Committee (chaired by the Senior Deputy Speaker) and the Chairs' Forum (also chaired by the Senior Deputy Speaker and comprising the chairs of all Lords committees). Baroness Taylor stated:

> We appreciated the circumstances in the House of Commons which have prompted consideration of this matter and are ourselves concerned about the willingness of some ministers to appear before House of Lords select committees in a timely manner. However, we are unanimous that legislating

97 Q 204; see also Q205–06

98 SCC 0045 (Alexander Horne)

> in this area would be a disproportionate and impractical response, which would raise significant constitutional issues by allowing the courts to consider proceedings in Parliament.[99]

85. Baroness Taylor's written evidence gave no further details of why the two committees and the Chairs' Forum came to this conclusion. We explored this in oral evidence with witnesses from the House of Lords: Lord Gardiner of Kimble, Senior Deputy Speaker, Lord Judge, Convenor of the Cross Bench Peers (but appearing before us in a personal capacity), and Christopher Johnson, Clerk of the Journals.

86. Lord Judge put his views bluntly: "You [meaning the Commons] have a problem […]; we [meaning the Lords] do not have a problem".[100] Mr Johnson pointed out that the Lords had conferred PPR powers on its committees as recently as 2008, largely to bring them into line with Commons committees, and since 2008 no Lords committee had needed to issue a summons. He added that:

> There have been cases of Lords Committees having reluctant witnesses and, as it were, the veiled reference to the possibility of some kind of unspecified sanction down the road has been sufficient to get the witness to come and give evidence.[101]

87. Lord Gardiner confirmed that "in our House the difficulties have not presented themselves in that we have not been unable to secure the witnesses we wanted".[102] He told us that if the Commons decided it wished to proceed with legislation conferring powers on the Commons, in his view the Lords would not oppose it:

> The idea that if any legislation came through, we would then say, "No, we're going to vote against it" - that is not going to happen. Whether the Lords would want to join in bicamerally is a separate question.[103]

Lord Gardiner said that if the Commons did with to proceed with legislation, in the interests of maintaining a bicameral approach to privilege matters he would wish to take the matter back to the Lords, "with due time and proper consideration", to establish whether in the light of that decision by the Commons, the Lords would wish the legislation to extend to their House also.[104] Lord Judge added that in those circumstances he would prefer there to be a single statute to cover both Houses.[105]

88. ***In the event that the House, and the Government, wish to proceed with legislation, we recommend that there should be further consultation with the House of Lords to determine whether that House wishes equivalent powers to be conferred on its committees and on joint committees of both Houses. As privilege is a bicameral matter we think it would be desirable for measures to introduce new powers to apply to both Houses, but there is no constitutional reason why legislation should not apply to one House alone if the other House does not wish to have the new powers conferred upon it.***

99 SCC 0062 (Baroness Taylor of Bolton)
100 Q 179
101 Q 182
102 Q 180
103 Q 184
104 Q 183
105 Q 185

Other contempts and privilege matters

89. Dr Craig Prescott drew attention to what might be considered an anomaly:

> those witnesses who refuse to answer a summons may face a fine or imprisonment of up to two years. By contrast, third parties who punish or harm a witness for the evidence they give; or those witnesses who mislead or provide false evidence will still receive the more lenient punishment of admonishment. This may be more of an issue in topical inquiries, given the contexts in which they are likely to arise.[106]

90. However, Dr Prescott also pointed out that:

> Resolving these issues would require legislation that goes considerably further than the draft Bill. Consequently, given the limited scale of the problem of reluctant witnesses so far, it might be best to leave things as they are. At least, for now.[107]

91. Paul Evans stated that:

> On the question of extending the provisions to other contempts, I think the issue is finely balanced. The most obvious case is punishment for false witness–the issue which gave rise to the original reference of this matter to your Committee. The challenges around proving such a contempt are much greater than those for simple non-compliance with an order compelling evidence. Even if you took the same approach of certifying that an offence had occurred, I think it would be hard for the courts to reach any judgement on punishment without re-examining the nature of the alleged lie or lies. It may be wise to get on with this much simpler legislation and leave that question for further deliberation.[108]

92. We note that one area that is not in doubt is the House's ability to sanction its own Members for a contempt such as leaking a draft select committee report, refusing a Committee summons or misleading the House. Potential sanctions for a contempt committed by a Member include an apology, suspension and expulsion from the House. These sanctions are normally, but not exclusively, delivered on the basis of a reference to and report from the Committee of Privileges.

93. On the question of protection of witnesses from intimidation or bribery, Paul Evans considered that the issues around proof and the need to protect parliamentary proceedings from being questioned by the courts were not as acute as in the circumstances of alleged false witness. He supplied a draft clause based on Irish legislation which he thought could be inserted in the Bill, but added, "[h]owever, I can also see a good case for getting on with the proposed legislation rather than waiting on the resolution of this problem".[109]

94. **We agree with our witnesses cited above that, if Parliament decides to legislate to provide more effective sanctions against recalcitrant witnesses, the provision of similar sanctions against witnesses who provide false evidence or against those who**

106 SCC 0051 (Dr Craig Prescott), para 6
107 SCC 0051 (Dr Craig Prescott), para 7
108 SCC 0059 (Paul Evans), para 10
109 SCC 0059 (Paul Evans), paras 11–12

seek to intimidate or bribe a witness may reasonably be regarded as "unfinished business". However, for the reasons also cited above, we believe that to expand our draft legislation to encompass those matters would be a step too far at this stage. It is one to which Parliament may wish to return.

Fair treatment of witnesses

Question (6): How should the House set out its internal processes and commitment to fair treatment in a way that provides sufficient due process, whilst maintaining the flexibility and effectiveness of the current select committee system?

95. It is helpful to distinguish between the specific issue of fair treatment of allegedly recalcitrant witnesses under our legislative proposal, and the wider issue of fair treatment of select committee witnesses in general.[110] We deal with the former in our section on the draft Bill above. The wider issue is one on which our consultation responses were all but unanimous. The responses accepted that the House can and should do more to set out clearly how witnesses can expect to be treated, and to indicate enforcement mechanisms for ensuring fair treatment. The grounds for doing so are twofold: (1) it is the right thing to do; and (2) in cases involving recalcitrant witnesses, the more the House can demonstrate that they have been treated fairly and according to due process, the less likely the courts will be to entertain a "reasonable excuse" defence that they decline to attend a hearing because of a well-founded fear that they will be badly treated at the hearing or by the committee subsequently.

96. Our May 2021 report set out the current arrangements for ensuring the fair treatment of witnesses.[111] In that report we summarised the work on fair treatment of witnesses undertaken by the 1999 and 2013 Joint Committees on Parliamentary Privileges, including the draft standing orders published by the latter, and the work subsequently carried out by the Liaison Committee on this matter.[112]

97. We note that since the publication of our May 2021 report, the Committee on Standards has commissioned and published a review by former senior judge Sir Ernest Ryder of fairness and natural justice in the House's standards system.[113] In a subsequent report the Standards Committee has indicated that it accepts Sir Ernest's recommendations and intends to produce a Procedural Protocol, as recommended in the review, which will bring together in one place, accessibly written, detailed information about the House's standards processes. It is intended that the Protocol will be put before the House for its approval. Under this proposal, the Standards Committee would be empowered to keep the Protocol under review and make minor or purely administrative changes, while any major changes, including any which "impact significantly upon the rights of Members or others", would require the express approval of the House.[114]

110 See SCC 0058 (Professsor Tom Hickman QC and Harry Balfour-Lynn), paras 14–15

111 At paras 114–21

112 May 2021 report, paras 122–29

113 Committee on Standards, Sixth Report of Session 2021–22, *Review of fairness and natural justice in the House's standards system* (HC 1183), published 4 March 2022

114 Committee on Standards, First Report of Session 2022–23, *New Code of Conduct and Guide to the Rules: promoting appropriate values, attitudes and behaviour in Parliament* (HC 227), published 24 May 2022, paras 126–32 (quotation from para 132)

98. **The Procedural Protocol could serve as a model for the House's approach to fair treatment of select committee witnesses. A protocol would be produced by the Liaison Committee for approval by the House, with a governing resolution making clear that the document should be kept under review and where necessary updated by the Liaison Committee, with any major changes, including those which impact on the rights of Members or others, to be approved by the House. We think this approach will strike the right balance between entrenching witnesses' rights by decision of the House and allowing some flexibility and latitude in interpretation.** ***We recommend that the Liaison Committee should set a process in train to develop a Protocol on Treatment of Witnesses, in consultation with select committee chairs and members and with interested outside bodies and individuals.***

Other possible powers

Question (7): The draft Bill provides a power to summon non-Members to attend or to provide information or documents to a committee. Should equivalent powers be included to summon Members of the House, or for a committee of one House to summon Members of the other House?

99. Alexander Horne commented:

> While clause 1 of the draft Bill applies to "individuals", it is not clear how the legislation would apply to ministers and officials. At present, it is not possible for a committee to summon a Member of either House. While it is, in theory, possible to summon officials, the Government will often seek to rely upon the Osmotherly Rules which restate the primacy of the principle of ministerial accountability and set out a number of restrictions on civil servants' engagement with select committees. It would be remarkable if the new powers made it easier for committees to hold private citizens to account, while leaving ministers and senior officials in a separate, privileged, category.[115]

100. Mark Hutton addressed the same subject:

> The Committee states that its draft bill applies only to non-Members. Although there are good constitutional (as well as practical, see below) reasons for this, it may seem perverse to the general public that they should be liable to criminal prosecution, while Ministers (whose actions are generally the primary object of select committee scrutiny) remain exempt. One option would be to extend the scope of the bill to cover Members. There would be challenges of constitutional propriety in giving such powers to committees and of reciprocity if members of the House of Lords were to be included. But beyond that, the political and practical obstacles to persuading any government to legislate a power to compel its Ministers to attend select committees would be formidable.[116]

115 SCC 0045 (Alexander Horne)

116 SCC 0060 (Mark Hutton)

101. Lord Gardiner, Senior Deputy Speaker in the House of Lords, urged that careful thought to be given before recommending that committees of one House should be able to summon Members of the other House:

> one should have a very strong reason to start breaching or changing a convention about not having powers to summon. […] one would want to have very compelling reasons, and perhaps issues that had gone dramatically wrong, to make one feel that the convention should no longer be the convention.[117]

102. Paul Evans commented that "subjecting recalcitrant Members of one House to the criminal law for defying a summons of the other House would be a very serious attack on the constitutional need for comity between the two Houses".[118]

103. In producing our draft Bill, we deliberately adopted a minimalist approach, i.e. proposing legislation that would achieve the minimum desired outcome of enabling the House to enforce its existing powers "to call for persons, papers and records". We took the view that any proposal to extend those powers would materially reduce the (already by no means certain) likelihood of the Bill making its way successfully onto the Statute Book. It would also arguably go beyond our remit from the House. For these reasons we took a deliberate decision not to include Ministers or Members within the scope of our draft Bill.

104. **In the light of the consultation responses we have further considered this matter. We remain of the view that Ministers and Members should be excluded, for the following reasons:**

a) **Any proposal to legislate for coercive powers over Ministers and Members would represent an extension of the House's existing powers, not simply the enforcement of those powers as set out in the referral of this matter to us on 27 October 2016.**

b) **It would be a major constitutional change which in our view should only be proceeded with following extensive consultation, including with the Government, the House of Lords and the Procedure Committee.**

105. **Although it may appear anomalous that Members of the House of Commons are excluded from the ambit of the draft Bill, there is a strong justification for doing so in that the House already possesses effective sanctions against its own Members. A Member who disregards an order of the House to attend a committee can be found to have committed a contempt, and punished with suspension (including loss of salary) or even expulsion. It is only in the case of non-Members that the problem of enforceability arises. (We note, incidentally, that while most select committees can only require the attendance of a Member if they seek and obtain an order of the House to that effect, the Committee of Privileges and the Committee on Standards have the power to require such attendance without an order of the House, under their respective standing orders.[119])**

117 Q 195

118 SCC 0059 (Paul Evans), para 14

119 Standing Orders Nos. 148A(6) and 149(9)

106. **We have redrafted our draft Bill to make clear, for the avoidance of doubt, that Members of the two Houses (which would include all Ministers) are excluded from its provisions.**

Other issues

Question (8): Are there any other issues within the scope of the matter referred to us - "the exercise and enforcement of the powers of the House in relation to select committees and contempts" - that you think should be dealt with in our final recommendations to the House?

107. Joshua Rozenberg QC (hon) raised with us the question of the territorial application of the Bill. He said;

> I am […] rather confused about how this legislation would work. You clearly want it to apply across the United Kingdom. Somebody who refused to come here to give evidence would presumably face prosecution here. If they were in Scotland, they would face prosecution there. How would it work if somebody was simply between the two jurisdictions or going to Northern Ireland? Where would they be prosecuted, and how would it work if they simply moved from one to the other?

108. We sought advice on this point from Daniel Greenberg, Counsel for Domestic Legislation, Office of Speaker's Counsel, who responded as follows:

> Clause 2(3) expressly provides that the clauses extend to the whole of the United Kingdom. So the courts of Scotland, and of Northern Ireland, will be able to prosecute offences under clause 1, as well as the courts of England and Wales. […] it will be a prosecutorial decision as to where to initiate proceedings in any particular case. This is not uncommon in relation to offences with UK-wide extent, and over the years the prosecutorial authorities have developed criteria for determining venue including: location and interests of the victim; location and interests of witnesses; and location and interests of the accused.[120] In the case of the new offence, where a potential witness who lives and works in Scotland is summoned and refuses to attend a select committee meeting in London, it is likely to be thought appropriate for the case to be brought in Scotland.[121]

109. **Our revised version of the draft Bill at Annex 1 includes a clause which states that rules of court may include provision about "forum (including the appropriate venue where an individual or an alleged offence has connections with a particular part of the United Kingdom)".**

120 See Crown Prosecution Service, *Legal Guidance on Jurisdiction*, 26 July 2021.

121 SCC 0068 (Counsel for Domestic Legislation)

Conclusion

110. **We are pleased that our May 2021 report has acted as a catalyst for informed discussion of this difficult but important issue. As indicated in this report, we have made some modifications to our original proposals, as well as mounting a defence of them where we feel criticisms were misplaced. In essence, we are balancing the risks of action (with its potential concomitant infringement of exclusive cognisance) over the risk of inaction which could leave Parliament toothless and unable fully to discharge its responsibilities. It will be for the House to decide which alternative it prefers.**

Conclusions and recommendations

Responses to consultation questions

1. There is widespread agreement that the role of select committees has expanded in recent years. There has been an increase in the number of so-called 'topical inquiries' involving investigations which go beyond the direct responsibilities of the Government and public bodies. Committees have also sought to engage with a more diverse range of individuals and communities. In our view it would be wrong to place too much emphasis on a relatively small number of topical inquiries which have involved elements of confrontation, high-profile though these may be. Many topical inquiries involve the private sector and wider civil society in ways which are non-confrontational and indeed may be welcomed and found empowering by those involved. (Paragraph 23)

2. Select committees have a right to scrutinise matters of public interest beyond the main bodies of government. In considering government policy, it is legitimate to look at the effects of policy failure, or to identify emerging areas which need policy oversight. For that legitimate function to be effectively performed, Parliament needs appropriate powers. Topical inquiries involving non-cooperation by witnesses will continue to occur from time to time. Powerful individuals who feel that they have little to lose will test the ability of the House to enforce their attendance as witnesses or their production of papers. Cases may be few but the potential reputational impact on the House is great. On the evidence we have received, we cannot be certain this is an increasing problem, but it is undoubtedly a real problem, which our proposal for legislation is intended to address. (Paragraph 24)

3. We support the right of select committees to conduct topical inquiries, subject to safeguards for fair treatment of witnesses, and we do not wish to see any change to their right to interpret their own remit. The ability to conduct topical inquiries falls within the existing powers of committees, but we agree with the Liaison Committee that, for the sake of clarity, Standing Order No. 152 should be amended to make this explicit, and recommend that the Government should reconsider its opposition to this. The case for doing so would be strengthened if our legislative proposal is proceeded with, because amending the standing order would reduce the risk that a "reasonable excuse" defence would be argued in court on the grounds that a committee had exceeded its remit, and therefore would reinforce the principle that it is for the House and its select committees to interpret their remit, not the courts. (Paragraph 25)

4. We stand by the conclusion in our May 2021 report that "reassertion of the House's historic powers to fine and imprison by resolution or in Standing Orders no longer offers a workable solution to the problems facing select committees". The then Leader of the House's suggestion that the House should put to the test whether the courts recognise its historic power to fine is not one we can endorse. Any such attempt would almost certainly fail legally and make the House look foolish. We also believe it would be wrong for Parliament to seek to introduce a power to fine or imprison without oversight by the courts. We believe the decision before the House in relation to powers is between accepting the status quo or introducing new powers

by means of legislation, accepting there will be a role for the courts. A primary benefit of legislation is that it would put Parliament's power to sanction beyond doubt. (Paragraph 47)

5. We have considered the then Leader's proposal that quantitative research be commissioned. We do not believe that this would assist the House. We acknowledged in our May 2021 report that committees reach amicable agreements with prospective witnesses over arrangements for their attendance in the vast majority of cases. It is not in dispute that the number of cases where witnesses are seriously recalcitrant is very small. Whether the incidence of such cases is one in 100 or one in 1,000 is immaterial. Moreover, any such research would struggle to quantify the relevance of a witness to an inquiry, the importance of an inquiry to a Committee's remit, and the value of the evidence that they might have offered. A single refusal to attend in a high-profile case may significantly interfere with the conduct of an inquiry and substantially erode confidence in the House's authority. One select committee chair told us of their "extreme frustration" when "there is information or an individual we want and, simply put, the powers are not adequate for us to get that". Where select committees choose to investigate highly contentious public matters, then individual cases of recalcitrance can make obstruction and obfuscation more likely. (Paragraph 49)

6. We have argued that only legislation will put beyond doubt the House's ability to enforce attendance, but this carries risks, notably by way of the erosion of exclusive cognisance. It is ultimately for the House to weigh those risks and decide what action, if any, to take. The accumulation of statistics of, at best, marginal relevance would, in our view, not significantly help the House in taking those decisions. (Paragraph 50)

7. Our proposed legislation was drafted so as to reduce the potential for the courts to involve themselves in the internal processes of Parliament to the minimum, but we have been open about the fact that any legislation in this area, no matter how tightly drafted, raises the possibility, no matter how slight, of such involvement. The question is not whether this will be the case - it will - but whether the potential gains from legislation outweigh the potential disbenefits. That is in our view a matter for the House to consider when it debates our report. (Paragraph 53)

8. It is difficult to predict the behavioural consequences of procedural changes, but we consider it unlikely that our legislative proposal, if implemented, would lead to a significant change in the culture of select committees. We expect that the proposed powers would be used very occasionally, possibly never. The threat of their deployment would, we hope, concentrate minds in the small number of cases where witnesses are contemplating refusing to attend, while not impacting at all in the great majority of cases. Legislation would simply enable the House to exercise in practice the power of enforcement which it already possesses in theory, and which we suspect that most potential witnesses, to the extent that they reflect upon these matters at all, assume that it possesses. (Paragraph 60)

9. Much, though, depends on the way in which our proposals for safeguarding the fair treatment of witnesses are implemented. It is crucial that the new arrangements, while being robust, are also light-touch and do not impact on committees' rightly

cherished flexibility. We do not accept that it will be necessary to initiate all contacts with prospective witnesses with a heavy-handed recitation of their rights that might intimidate them. The necessary information can be conveyed in a written document which will set out rights and committee powers for information, while also drawing attention to the fact that the great majority of attendances are voluntary and arranged without needless bureaucracy. (Paragraph 61)

10. We have in addition modified our original proposals, by proposing that in cases of recalcitrant witnesses there should be a clear initiation of a statutory process in the form of a statutory summons issued by the Speaker - see paragraph 74 below. This would, we believe, further address the 'chilling effect' argument by making clear that the early stages of arranging witness appearances would proceed exactly as they do now, with a clear marker as to when, in a tiny minority of cases, a statutory process would be launched. (Paragraph 62)

11. We have summarised the consultation responses on the three options, and discussed a number of challenges to our proposal to go down the legislative route. Having carefully considered the fresh evidence received, we reaffirm our belief that if the House wishes to address the problem of recalcitrant witnesses, then legislation is the only appropriate means to do so. (Paragraph 63)

12. We clarify that our draft Bill does not seek to criminalise contempts of the House as such. (Paragraph 65)

13. We have […] redrafted our Bill to remove any unintended ambiguity in Clause 1, subsection (1) and to make clear that the criminal offence is failing to comply with a summons, to attend a committee or produce papers, without reasonable excuse, rather than giving unsatisfactory responses to questions when attending a committee. (Paragraph 66)

14. We have never sought to disguise the fact that any legislative proposal would encroach to a limited extent upon the protection from scrutiny by the courts afforded to parliamentary proceedings under Article IX of the Bill of Rights 1689. However, we note that the Bill of Rights itself is a statute and we are reassured from the evidence we have received, including from former senior judges, that a proportionate legislative solution can be conceived without upsetting the comity between Parliament and the courts. (Paragraph 67)

15. As we have set out above, we do not consider that there would be a significant "chilling effect" even if the draft Bill were to be enacted in its original form. However, we also accept that any such effect would be even less likely if the draft Bill were to be amended as the Counsel for Domestic Legislation recommends, and we have modified our revised draft Bill set out at Annex 1 accordingly, and have added a revised description of steps to be followed under the new procedure at Annex 2. We note that this change has the added advantage that it advances the gatekeeper process to the stage before Parliament decides to invoke potential criminal liability. This would help address some of the concerns raised by witnesses about "reasonable excuse" in relation to "the nature and purpose of the summons". This change would mean that the reference to the courts would always and only be made by Parliament once all other avenues had been exhausted. It would also mean the court would be

engaged in limited, exceptional cases with a much clearer machinery of process, leading to fewer concerns about engaging with or considering parliamentary proceedings in a way that would be problematic on Article IX of the Bill of Rights grounds. (Paragraph 75)

16. In the light of Mr Greenberg's comments on proposals we have received in consultation responses relating to the draft Bill, which we have published, we are minded only to make limited changes to the draft Bill, as set out elsewhere in this report. (Paragraph 76)

17. We are persuaded that the maximum sanction of two years' imprisonment in our original proposal would be disproportionate to the gravity of the offence. We have redrafted the Bill to provide for a maximum sentence of six months' imprisonment. We support Lord Judge's proposal that the court may choose to make its decision on sanction conditional on the person concerned giving evidence within a specified timeframe. We note Lord Judge's advice that it is not necessary to amend the text of the Bill to confer this power on the court as it would be within the court's discretion to do this. (Paragraph 82)

18. In the event that the House, and the Government, wish to proceed with legislation, we recommend that there should be further consultation with the House of Lords to determine whether that House wishes equivalent powers to be conferred on its committees and on joint committees of both Houses. As privilege is a bicameral matter we think it would be desirable for measures to introduce new powers to apply to both Houses, but there is no constitutional reason why legislation should not apply to one House alone if the other House does not wish to have the new powers conferred upon it. (Paragraph 88)

19. We agree with our witnesses cited above that, if Parliament decides to legislate to provide more effective sanctions against recalcitrant witnesses, the provision of similar sanctions against witnesses who provide false evidence or against those who seek to intimidate or bribe a witness may reasonably be regarded as "unfinished business". However, for the reasons also cited above, we believe that to expand our draft legislation to encompass those matters would be a step too far at this stage. It is one to which Parliament may wish to return. (Paragraph 94)

20. The Procedural Protocol could serve as a model for the House's approach to fair treatment of select committee witnesses. A protocol would be produced by the Liaison Committee for approval by the House, with a governing resolution making clear that the document should be kept under review and where necessary updated by the Liaison Committee, with any major changes, including those which impact on the rights of Members or others, to be approved by the House. We think this approach will strike the right balance between entrenching witnesses' rights by decision of the House and allowing some flexibility and latitude in interpretation. We recommend that the Liaison Committee should set a process in train to develop a Protocol on Treatment of Witnesses, in consultation with select committee chairs and members and with interested outside bodies and individuals. (Paragraph 98)

21. We remain of the view that Ministers and Members should be excluded, for the following reasons:

    a) Any proposal to legislate for coercive powers over Ministers and Members would represent an extension of the House's existing powers, not simply the enforcement of those powers as set out in the referral of this matter to us on 27 October 2016.

    b) It would be a major constitutional change which in our view should only be proceeded with following extensive consultation, including with the Government, the House of Lords and the Procedure Committee. (Paragraph 104)

22. Although it may appear anomalous that Members of the House of Commons are excluded from the ambit of the draft Bill, there is a strong justification for doing so in that the House already possesses effective sanctions against its own Members. A Member who disregards an order of the House to attend a committee can be found to have committed a contempt, and punished with suspension (including loss of salary) or even expulsion. It is only in the case of non-Members that the problem of enforceability arises. (We note, incidentally, that while most select committees can only require the attendance of a Member if they seek and obtain an order of the House to that effect, the Committee of Privileges and the Committee on Standards have the power to require such attendance without an order of the House, under their respective standing orders.) (Paragraph 105)

23. We have redrafted our draft Bill to make clear, for the avoidance of doubt, that Members of the two Houses (which would include all Ministers) are excluded from its provisions. (Paragraph 106)

24. Our revised version of the draft Bill at Annex 1 includes a clause which states that rules of court may include provision about "forum (including the appropriate venue where an individual or an alleged offence has connections with a particular part of the United Kingdom)". (Paragraph 109)

Conclusion

25. We are pleased that our May 2021 report has acted as a catalyst for informed discussion of this difficult but important issue. As indicated in this report, we have made some modifications to our original proposals, as well as mounting a defence of them where we feel criticisms were misplaced. In essence, we are balancing the risks of action (with its potential concomitant infringement of exclusive cognisance) over the risk of inaction which could leave Parliament toothless and unable fully to discharge its responsibilities. It will be for the House to decide which alternative it prefers. (Paragraph 110)

Annex 1: Draft Parliamentary Committees (Witnesses) Bill - revised text

Parliamentary Committees (Witnesses) Bill

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B I L L

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Create an offence of failure to comply with a summons to attend a House of Commons Select Committee.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: –

1 Failure to comply with summons

(1) The Speaker of the House of Commons may issue a summons requiring an individual—

(a) to attend a specified Committee of the House;

(b) to provide documents or other records to a specified Committee of the House; or

(c) both.

(2) A summons must—

(a) state that it is issued under this section; and

(b) explain the effect of this section.

(3) A summons may not be issued to a Member of either House of Parliament.

(4) It is an offence for an individual to fail without reasonable excuse to comply with a summons.

(5) An individual guilty of an offence under subsection (4) is liable on conviction on indictment to imprisonment for a term not exceeding six months, a fine or both.

(6) Subsection (7) applies where a court is considering—

(a) whether an individual had a reasonable excuse for the purposes of subsection (4); or

(b) what punishment to impose.

(7) The court—

(a) may consider whether the summons was reasonable in the context of the Committee's proceedings;

(b) may consider the circumstances of the individual and the extent to which the individual engaged or tried to engage with the Committee (before or after the issue of the summons); and

Parliamentary Committees (Witnesses) Bill

(c) may not consider any other aspect of the Committee's proceedings (including, in particular, whether it should or should not be conducting a particular inquiry).

(8) Rules of court may make provision about proceedings under this section; and rules may, in particular, include provision about:

(a) timing of prosecutions; and

(b) forum (including the appropriate venue where an individual or an alleged offence has connections with a particular part of the United Kingdom).

2 Commencement, transitional, extent and short title

(1) This Act comes into force on the day on which it is passed.

(2) An offence is not committed under section 1 in respect of a summons issued before the commencement of this Act.

(3) This Act extends to England and Wales, Scotland and Northern Ireland.

(4) This Act may be cited as the Parliamentary Committees (Witnesses) Act 2022.

Annex 2: Steps to be followed in the case of a recalcitrant witness summoned by a select committee

[The text below is a modified version of that originally set out at Paragraphs 140–41 in the Committee's May 2021 report.]

The following steps set out a possible route for what might happen in the case of a recalcitrant witness.

a) After seeking but failing to secure the voluntary co-operation of a witness through informal correspondence, a select committee might issue a more formal summons to that person specifying a day, time and place at which the named person is to attend or provide any requested documents, or by which they should have provided a reasonable excuse for not complying.

b) The named person does not comply with the summons because they neither attend nor provide a reasonable excuse by the specified date.

c) The select committee reports to the House that this constitutes a failure to comply with a summons without reasonable excuse. The case stands automatically referred to the gatekeeper committee (the Committee of Privileges) to consider the matter.

d) The Committee of Privileges considers the select committee's case for issuing the initial summons and provides the witness with a chance to provide an explanation of any reasonable excuse for non-attendance by a specified date.

e) If satisfied that (a) the select committee has a legitimate need to require the individual's attendance, or the documents requested, (b) has treated the person fairly, and (c) that the individual has not provided a reasonable excuse for non-compliance, the Committee of Privileges puts a motion before the House, stating that the individual has failed to comply with a summons and instructing the Speaker to issue a statutory summons to attend.

f) The House agrees to the motion put before the House by the Committee of Privileges.

g) The Speaker issues a statutory summons to the individual to attend or provide requested information.

h) If the individual fails to comply with the statutory summons, they may be committing a criminal offence and can be prosecuted.

i) The Court would then determine whether the individual had a reasonable excuse and, if not (a criminal offence having therefore been committed), what punishment to impose.

At various stages in the above process the individual would have the opportunity to change their mind about appearing or provide arguments for why they had a reasonable

excuse for not appearing. The hope and expectation would be that the inevitable attention garnered by the above process and the risk of a criminal conviction would be sufficient to deter the witness from failure to comply before the application of any sanctions set out in legislation.

Formal minutes

Tuesday 13 June 2022

Members present:

Chris Bryant, in the Chair

Andy Carter

Alberto Costa

Yvonne Fovargue

Sir Bernard Jenkin

Draft report (*Select committees and contempts: review of consultation on Committee proposals*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 110 read and agreed to.

Annexes 1 and 2 agreed to.

Resolved, That the Report be the First Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Adjournment

The Committee adjourned.

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the inquiry publications page of the Committee's website.

Tuesday 26 October 2021

Professor Tom Hickman QC, Barrister, Blackstone Chambers; **Professor Alison Young**, Sir David Williams Professor of Public Law, University of Cambridge; **Joshua Rozenberg QC (hon)** Q94–136

Mark Hutton, former Clerk of Journals, House of Commons; **Paul Evans**, former Clerk of Committees, House of Commons Q137–177

Tuesday 30 November 2021

The Lord Gardiner of Kimble, Senior Deputy Speaker, House of Lords; **Christopher Johnson**, Clerk of the Journals, House of Lords; **Rt Hon The Lord Judge,** former Lord Chief Justice of England and Wales Q178–206

Rt Hon Caroline Nokes MP, Chair, Women and Equalities Committee, House of Commons; **Sir Robert Neill MP**, Chair, Justice Committee, House of Commons; **Damian Collins MP**, Chair, Joint Committee on the Online Harms Bill, and former Chair, Digital, Culture, Media and Sport Committee Q207–227

Rt Hon Jacob Rees-Mogg MP, Lord President of the Council and Leader of the House, House of Commons Q228–264

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

SCC numbers are generated by the evidence processing system and so may not be complete.

1 Burnett of Maldon, Lord (Lord Chief Justice of England and Wales) (SCC0063)

2 Butler-Sloss, Baroness (Member, House of Lords) (SCC0053)

3 Carlile of Berriew, Lord (Member, House of Lords) (SCC0056)

4 Carloway, Lord (Lord Justice General, Supreme Courts of Scotland) (SCC0064)

5 Cash, Sir William (Member, House of Commons) (SCC0057)

6 Chaplin, Mr Steven (Fellow, Ottawa Public Law Centre) (SCC0049)

7 Clancy, Mr Michael (Director/Law Reform, The Law Society of Scotland) (SCC0052)

8 Counsel for Domestic Legislation (SCC0066)

9 Counsel for Domestic Legislation (SCC0067)

10 Counsel for Domestic Legislation (SCC0068)

11 Evans, Mr Paul (former Clerk of Committees, House of Commons) (SCC0059)

12 Goodwin, Mr Nicholas (SCC0048)

13 Hickman QC, Professor Tom; and Balfour-Lynn, Harry (SCC0058)

14 Horne, Alexander (SCC0045)

15 House of Commons (Foreign Affairs Committee) (SCC0065)

16 House of Lords (Constitution Committee) (SCC0062)

17 Hutton, Mark (former Clerk of Journals, House of Commons) (SCC0060)

18 Jack, Sir Malcolm (Former Clerk of the House, House of Commons) (SCC0046)

19 Jones, Sir Jonathan QC (Senior Consultant, Linklaters LLP) (SCC0050)

20 Justice Committee, (Justice Committee, House of Commons) (SCC0061)

21 Prescott, Dr Craig (Lecturer at School of Law, Bangor University) (SCC0051)

22 Rozenberg QC, Joshua (SCC0055)

23 Young of Cookham, Lord (Member, House of Lords) (SCC0054)

24 Young, Professor Alison (Sir David Williams Professor of Public Law, University of Cambridge) (SCC0047)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

Session 2021–22

Number	Title	Reference
1st	Select committees and contempts: clarifying and strengthening powers to call for persons, papers and records	HC 350