



House of Commons  
Committee of Privileges

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**Matter referred on 21  
April 2022: comments  
on joint opinion of Lord  
Pannick QC and Jason  
Pobjoy**

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**Third Report of Session 2022–23**

*Report, together with formal minutes relating  
to the report*

*Ordered by the House of Commons  
to be printed 8 September 2022*

## Committee of Privileges

The Committee of Privileges is appointed to consider specific matters relating to privileges referred to it by the House. The scope of any inquiry comprises all matters relevant to the matter referred.

### Current membership

[Ms Harriet Harman MP](#) (*Labour, Camberwell and Peckham*) (Chair)

[Andy Carter MP](#) (*Conservative, Warrington South*)

[Alberto Costa MP](#) (*Conservative, South Leicestershire*)

[Allan Dorans MP](#) (*Scottish National Party, Ayr, Carrick and Cumnock*)

[Laura Farris MP](#) (*Conservative, Newbury*)

[Yvonne Fovargue MP](#) (*Labour, Makerfield*)

[Sir Bernard Jenkin MP](#) (*Conservative, Harwich and North Essex*)

### Powers

The powers of the Committee are set out in House of Commons Standing Orders, principally in SO No. 148A. These are available on the internet via [www.parliament.uk](http://www.parliament.uk).

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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 Miguel Boo Fraga (Committee Operations Manager), Paul Connolly (Media Officer), Arvind Gunnoo (Committee Operations Officer), Dr Robin James (Clerk), Robi Quigley (Second Clerk), Duncan Sim (Committee Specialist) and Mike Winter JP (Chair Support Officer).

### Contacts

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# Report

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1. On 21 April 2022 the House of Commons referred to us a matter relating to the conduct of the Rt Hon Boris Johnson MP, the Member for Uxbridge and South Ruislip.<sup>1</sup> On 21 July we published a report setting out our proposed method of proceeding in this inquiry.<sup>2</sup> We now publish a further report commenting on a legal opinion relating to the inquiry recently published on the Government’s website.

2. The Committee’s work, and by implication the House as a whole, has been subject to much groundless criticism and comment, extending to personal attacks from some quarters on members of the Committee. Such a campaign is unprecedented and should be regarded as unacceptable; in some instances these attacks constitute a potential contempt of Parliament because they appear to be designed to impede the functioning of the House.

3. The joint opinion of Lord Pannick QC and Jason Pobjoy, of Blackstone Chambers (hereafter, for simplicity, referred to as “Lord Pannick’s opinion”), was published on 2 September 2022.<sup>3</sup> At the time of publication we received a letter from Mr Johnson informing us of the publication - we print this letter as an appendix to this report. In the letter Mr Johnson requested that we consider the opinion a formal representation on his behalf. We understand, though this has not been confirmed, that the opinion was commissioned not by Mr Johnson in a personal capacity but by HM Government. We had received no notice, either from Mr Johnson or the Government, that the opinion would be published. This is despite its being made clear in our published material that written submissions should be made directly to the Committee. This is the case with all select committees. It is highly irregular for Government to publish its evidence to a committee itself, in advance of the Committee considering that evidence.

4. Lord Pannick’s opinion criticizes our proposed conduct of the inquiry. In particular it identifies “six important areas” where, it is alleged, “the Committee is proposing to adopt a fundamentally flawed approach”.

5. We are grateful for the advice we have received, in compiling this report, from the Clerks of the House and Office of Speaker’s Counsel, and from our legal adviser Rt Hon Sir Ernest Ryder (former President of Tribunals in the UK and Lord Justice of Appeal). Their impartial advice is clear and unambiguous. As a Committee we have followed their advice, to ensure we are acting in a fair and non-partisan way.

6. In this report we set out our response to the major issues raised in Lord Pannick’s opinion. We reject Lord Pannick’s criticisms. The view of our impartial legal advisers and Clerks, which we accept, is that his opinion is founded on a systemic misunderstanding of the parliamentary process and misplaced analogies with the criminal law. In order to put a response in the public domain without delay, we have concentrated in this report on the “six important areas” he has identified. In what follows we tackle each in turn, setting out in italics his headline criticism in each case,<sup>4</sup> followed by our response. That response draws upon our [previous report](#) (hereafter the “July report”) and upon the [‘Frequently](#)

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1 See Votes and Proceedings, [21 April 2022](#), item 3

2 Committee of Privileges, [Second Report of Session 2022–23, Matter referred on 21 April 2022: proposed conduct of inquiry](#) (HC 632)

3 [Legal Opinion](#) by Lord Pannick QC relating to the Privileges Committee - GOV.UK ([www.gov.uk](http://www.gov.uk))

4 Taken from the opinion summary, para 5

[Asked Questions](#)’ (hereafter “FAQs”) we published on our website on 19 August. We may make more detailed comments at a later stage on aspects of Lord Pannick’s opinion, including the manner in which it was conveyed to us.

*Pannick criticism (1): “The Committee has failed to understand that to prove contempt against Mr Johnson, it is necessary to establish that he intended to mislead the House.”*

7. In our July report we made clear that “intent has been considered relevant when a Committee has been considering whether or not there should be penalties for a contempt, or the severity of those penalties”.<sup>5</sup> On the matter of misleading, the Clerk of the Journals’ advice notes that it will be for the Committee to decide “on the basis of its assessment of the evidence, whether, in the circumstances in which they were made, Mr Johnson’s statements ‘amounted to misleading the House’”.<sup>6</sup> Nothing in the impartial advice from the Clerk of the Journals precludes the Committee from considering intent.

8. Lord Pannick fails to recognise that the contempt jurisdiction is not limited, even though the opinion notes the Report of the Joint Committee on Parliamentary Privilege in 1999 which said:

The scope of contempt is broad, because the actions which may obstruct a House or one of its committees in the performance of their functions are diverse in character. Each House has the exclusive right to judge whether conduct amounts to improper interference and hence contempt. The categories of conduct constituting contempt are not closed.<sup>7</sup>

9. The impartial advice from the Clerk of the Journals makes clear that “context is important in privilege cases” and that it is for the Committee to take decisions on this matter in the light of the evidence it receives.<sup>8</sup> In accepting that advice, the Committee accepted this proposition.

10. Our published FAQs make clear likewise that the Committee may consider intent. They state that “The three questions the Committee will set out to answer are: (1) whether the House was misled; (2) if so, whether that was a contempt – which has been defined as an action or omission which may have obstructed or impeded the functioning of the House of Commons; and (3) if so, how serious was that contempt. The Committee has not yet assessed the evidence nor has it prejudged any of these questions. The issue of whether the House was deliberately misled may arise under steps (2) or (3) of the Committee’s inquiry.”

11. It would require a Resolution of the House to alter precedent and the approach described in Erskine May concerning contempt of the House. Neither the existing Resolution of the House nor Erskine May support Lord Pannick’s opinion. The fact that the motion referring the matter to the Committee does not make any specific reference to intent is irrelevant. It is implicit in the word “mislead” in the motion that there may be an intent to mislead.<sup>9</sup> The motion is not inconsistent with Erskine May.

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5 Advice from the Clerk of the Journals (Annex 3, para 15) which the Committee endorsed (July report, para 6).

6 Advice from the Clerk of the Journals (Annex 3), para 26

7 Joint Committee on Parliamentary Privilege, [Report](#), Session 1998-99 (HC 214), para 264

8 July report, Advice from the Clerk of the Journals (Annex 3), para 34

9 Joint Committee on Parliamentary Privilege, [Report](#), Session 1998-99 (HC 214), para 264

12. Lord Pannick’s opinion argues that our interpretation of intent will have a “chilling effect on Ministerial comments in the House”.<sup>10</sup> We consider this concern to be wholly misplaced and itself misleading. Our published FAQs state that “There are already well-established ways for Ministers to correct the record, with the understanding that they do so at the earliest opportunity to avoid misleading the House in line with the rules that apply to all MPs”. Ministers have made use of these formal mechanisms for correcting the records at a rate of more than 200 a year in recent years.<sup>11</sup> Mr Johnson in his ministerial career has made formal corrections, including on five occasions when he was Foreign Secretary.<sup>12</sup> If we find that the House was misled, one question the Committee is likely to consider is how quickly and sincerely Mr Johnson sought to correct the record.

13. In the event that a Minister were to be alleged to have committed a contempt by inadvertently misleading the House, the current privileges system contains effective safeguards against trivial or vexatious complaints. Our FAQs note that “it is a matter for the House as a whole to consider whether or not to refer complaints that a contempt of the House may have been committed to the Privileges Committee, and any decision to put this to the House requires prior approval from the Speaker.” It is very rare for a matter to be given by the Speaker the precedence accorded to a matter of privilege – there have been only six such motions since 2010. Ministerial mistakes, if corrected promptly, are extremely unlikely to become the subject of a successful privilege complaint.

*Pannick criticism (2): “The Committee has failed to recognise that for an allegation of contempt to be established, it would need to be persuaded that the allegation is made out to a high degree of probability.”*

14. In its resolution on procedure published with our July report, we stated that “When considering the allegations against Mr Johnson, the Committee will decide whether the allegations are proved on the balance of probabilities” (para 15). Our FAQs state that “this is in accord with the past practice of the Committee”.

15. Lord Pannick’s opinion seems to be arguing for a standard of proof somewhere in-between “beyond reasonable doubt” (the criminal standard) and “balance of probabilities” (the civil standard). Lord Pannick quotes the standard used in previous cases, but does not acknowledge that those cases were applying the civil standard. Sir Ernest Ryder, who is a former Lord Justice of Appeal, has advised us that in recent years the courts have moved away from using an interpretation of the civil standard of proof which suggests there is a so-called “sliding scale”, even in cases with very serious consequences.

16. Sir Ernest Ryder commented on this issue in his review of fairness and natural justice in the House’s standards system, which was commissioned by the Committee on Standards and published by that committee in a report to the House in February 2022 and subsequently endorsed by that committee in another report to the House.<sup>13</sup> Sir Ernest there stated that “the standard of proof on an inquiry is the balance of probabilities; there is no higher standard but the more serious the allegation the more attention should be

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10 Opinion, paras 23, 45

11 Source: House of Commons Library

12 Source: House of Commons Library

13 Committee on Standards, [Sixth Report of Session 2021–22, Review of fairness and natural justice in the House’s standards system](#) (HC 1183); [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)

paid to the quality of the evidence that is needed to satisfy the standard”.<sup>14</sup> Sir Ernest has given the same advice to us, and we accept that advice. In the present inquiry, because the allegations are very serious, we are mindful that evidence to be relied upon should be of especially high quality and cogency.

*Pannick criticism (3): “The Committee is proposing to apply an unfair procedure in that it says it may well not tell Mr Johnson the identity of witnesses whose evidence may be relied on to establish a contempt of the House.”*

17. In our July report we stated that we “would be willing to take oral or written evidence from people who wish to remain anonymous, subject to the Chair being able to identify the individual’s identity in conjunction with Committee staff, as well as the relevance and probity of their evidence” (para 9). The report added:

Some witnesses may only be willing to give evidence if their identity is not made public. If in those circumstances we consider that their evidence is necessary to our work, we will both protect the identity of such witnesses and ensure that the Member under investigation is aware of the content of the evidence and is able to challenge it if he chooses to do so. There is a range of measures we will use to protect the identity of any particular witness and we will apply these on a case by case basis. (para 11)

18. The report also stated: “Responses received from witnesses will be shared in confidence with Mr Johnson, save that the Committee may take steps to conceal the identity of a witness where this is appropriate”.<sup>15</sup>

19. Our FAQs stated:

The Committee needs to be able to hear any evidence which is relevant to its inquiry and there may be witnesses who may not be willing to give that evidence if their identity is made public. The Committee will not take evidence from witnesses whose identity is not publicly disclosed unless it has established that they are credible witnesses with relevant evidence to the inquiry, and unless their identity has been verified by the Chair and Committee staff.

20. We have made clear that the prospect of anonymous evidence may raise issues in relation to fairness which will need to be tackled, but this would necessarily be on a case by case basis, and even then the Committee would have to be satisfied that the evidence was relevant and credible. We have not yet identified any credible evidence where a witness wishes to have their identity withheld from Mr Johnson, and it may be that this situation does not arise. In the exceptional circumstance that the public interest makes such a step necessary, we will publish proposals for a fair process and Mr Johnson will be invited to comment. He will, of course, be entitled to obtain legal advice on the proposals.

*Pannick criticism (4): “The Committee has failed to recognise that a fair procedure requires that before Mr Johnson gives evidence, he should be told the details of the case against him.”*

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14 Committee on Standards, [Sixth Report of Session 2021–22, Review of fairness and natural justice in the House’s standards system](#) (HC 1183), Appendix 1, para 35, footnote 53

15 July report, Resolution on Procedure (Annex 1), para 18



21. Mr Johnson is already aware of the matter being investigated by the Committee: it is specified in the resolution of the House of Commons referring the question. The Committee's resolution on procedure makes clear that there will be multiple opportunities for Mr Johnson to consider the evidence and respond to points made by other witnesses or the Committee, concluding in an opportunity to comment on any criticisms included in the draft of the final report. The July report makes clear that all evidence is going to be shared with Mr Johnson. It is not the case that Mr Johnson would be called to give evidence without knowing the detail of the case that he has to meet. That is a fundamental misunderstanding of the Committee's procedure.

*Pannick criticism (5): "The Committee has failed to recognise that a fair procedure requires that Mr Johnson should be able to be represented at a hearing before the Committee by his counsel."*

*Pannick criticism (6): "The Committee has failed to recognise that a fair procedure also requires that Mr Johnson should also be able, through his counsel, to cross-examine any witness whose evidence is relied on to establish a contempt of the House."*

22. These two points are essentially the same.

23. Select committees can only hear counsel if authorised to do so by the House.<sup>16</sup> It has not been considered necessary in previous privileges cases. A resolution of the House would be needed to change this situation. It is not expected nor within the power of the Committee to decide this for itself. Lord Pannick's assertion that the Committee has discretion to make such a change of its own initiative is wrong in fact. The July report makes clear that Mr Johnson may be accompanied by a legal representative to the oral evidence hearing, and may receive legal advice throughout the inquiry process.

24. The case cited by Lord Pannick involving the Maxwell brothers in 1992<sup>17</sup> did not involve counsel representing their clients but rather appearing as witnesses alongside them. The Social Security Committee in that case stated that the legal representatives of Mr Ian Maxwell and Mr Kevin Maxwell "attended as witnesses before the Committee so that they could, at the Committee's discretion, respond to questions that it was felt appropriate for them to answer".<sup>18</sup> This was clearly a different, and much more limited, role for counsel than that of representing their client, speaking for them, and conducting cross-examination of witnesses on their behalf, of the kind that Lord Pannick envisages in the present case.

25. In addition, there were specific reasons why the Social Security Committee chose to adopt this unusual expedient which do not apply in the case of Mr Johnson. That committee was told by the Maxwells' legal representatives that their clients were facing the imminent risk of criminal prosecution, and they raised concerns that questioning by the committee presented a risk that their clients would incriminate themselves or would otherwise jeopardise the fairness of any future trial.<sup>19</sup> The committee stated that it had kept such considerations in mind when making its decisions, and that throughout its inquiry it had sought to "balance a free and uninhibited inquiry against its wish to do

16 *Erskine May's Parliamentary Practice*, 25th edition (2019), para 38.38

17 *Opinion*, para 69

18 Social Security Committee, [First Special Report of Session 1991–92, The Conduct of Mr Ian Maxwell and Mr Kevin Maxwell](#) (HC 353), para 7

19 *Ibid.*, para 8

nothing which might be used by others to claim that its activities had prevented a fair trial”.<sup>20</sup> Mr Johnson is not facing a similar threat of criminal prosecution relating to the referred matter.

26. We note that Lord Pannick’s arguments in support of representation by counsel, and the rights of counsel to cross-examine, in the present case are similar to those he advanced in the House of Lords in 2018 in defence of Lord Lester of Herne Hill, in an attempt to overturn a finding of sexual misconduct by Lord Lester, and that Lord Pannick’s arguments on that occasion were rejected both by the relevant Lords committee and by the whole House of Lords. The Lords Privileges and Conduct Committee, in a report subsequently approved by the House, stated that:

the practice of the Committee [...] has always been to require members appealing a sanction to represent themselves rather than to speak through a representative, legal or not. This does not mean that members cannot receive legal advice and indeed Lord Lester received legal advice throughout the investigation and appeal. [...]

Lord Lester could only have been represented by Lord Pannick during his appeal hearing if there had been a motion in the House to dispense with Standing Order 66 [...].

While the rules around legal representation vary between organisations, a considerable number of them take the same position as the House. For example, when the Government investigates a Minister for alleged breaches of the Ministerial Code (including allegations of bullying and harassment), he or she is not permitted legal representation. Similarly, judges being investigated by the Judicial Conduct Investigations Office have no formal right to legal representation.<sup>21</sup>

27. The approach of the Commons to legal representation has historically been similar to that of the Lords. We endorse the position taken by that House in rejecting Lord Pannick’s arguments and we reject them on similar grounds.

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20 *Ibid.*, paras 11–12, 16

21 House of Lords Privileges and Conduct Committee, [Third Report of Session 2017–19, Further report on the conduct of Lord Lester of Herne Hill](#) (HL 252), paras 46–48; the report was agreed to by the House on 17 December 2018.

## Appendix: Letter dated 2 September 2022 from Rt Hon Boris Johnson MP to the Chair of the Committee

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10 Downing Street

London SW1A 2AA

THE PRIME MINISTER

2 September 2022

Dear Harriet

### **Matter referred on 21 April 2022: proposed conduct of inquiry**

I write further to my letter of 12 August 2022 relating to the Committee's proposed conduct of inquiry.

I note in recent weeks that representatives of your Committee have made observations about the proposed conduct of the inquiry, published a 'Frequent Asked Questions' on the Committee's website, and issued commentary from your legal adviser, Sir Ernest Ryder QC.

I enclose an independent legal opinion by leading counsel, Lord Pannick QC and Jason Pobjoy of Blackstone Chambers on these matters. I believe what Lord Pannick has to say speaks for itself. Please consider this a formal representation on my behalf.

In light of the exceptional circumstances and to ensure public and Parliamentary scrutiny, I am placing a copy of the legal opinion in the Library of the House and on the gov.uk website.

Yours ever

[signed] Boris Johnson

The Right Honourable Harriet Harman MP

# Formal minutes

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**Thursday 8 September 2022**

## **Members present:**

Ms Harriet Harman, in the Chair

Andy Carter

Alberto Costa

Sir Bernard Jenkin

Draft Report (*Matter referred on 21 April: comments on joint opinion of Lord Pannick QC and Jason Pobjoy*), proposed by the Chair, brought up and read.

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

Paragraphs 1 to 27 read and agreed to.

Appendix agreed to.

*Resolved*, That the Report be the Third Report of the Committee to the House.

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

## **Adjournment**

The Committee adjourned.

# List of Reports from the Committee during the current Parliament

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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    |
| 2nd    | Matter referred on 21 April 2022: proposed conduct of inquiry  | HC 632    |

## Session 2022–23

| Number | Title   | Reference |
|--------|---|-----------|
| 1st    | Select committees and contempts: review of consultation on Committee proposals                  | HC 401    |
| 2nd    | Matter referred on 21 April 2022: proposed conduct of inquiry                                   | HC 632    |
| 3rd    | Matter referred on 21 April 2022: comments on joint opinion of Lord Pannick QC and Jason Pobjoy | HC 713    |