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1. This note responds to the Call for Evidence by the House of Commons Committee on Privileges.

2. We provide a summary of our views before addressing the issues in turn.

Summary

3. The option of **doing nothing** would in reality represent a decision to endorse and continue the current confusion and uncertainty as to whether the Houses of Parliament have powers to punish strangers to Parliament for contempt by fine or imprisonment. It is wrong in principle for individuals to be required to provide documents or information to a House of Parliament where to do so may be unwelcome, damaging to them or even potentially in contravention of the law, in circumstances where they do not know what the powers of the House are and cannot foresee what may befall them if they do not comply.

4. Continuing the current situation also gives rise to a risk that the courts will be asked to pronounce on the existence and scope of Parliament's powers which we expect will be unwelcome to both Parliament and the courts but which it would be the duty of the courts to rule upon.

5. The option of **reasserting** Parliament's historic powers to punish by fine and committal should also be rejected.

   (1) In our opinion, the powers to fine and commit strangers to Parliament no longer exist in law. Since the powers were last used or considered by the courts, the tectonic plates of constitutional law have shifted and the principle of the separation of powers has become accepted. Furthermore, in the nineteenth century the courts of law established that, whether or not each House could be considered a court, the penal powers and privileges of Parliament were recognised because and to the extent that they were considered *essential* to the proper functioning of each House, as opposed to being merely desirable. Since the power to commit has not been used for well over a century and in the case of fines for many centuries—and in either case *never* in the context of the work of select committees—it cannot in our view be said that such powers are essential to the modern Parliament in the strict sense in which that term is used in the authorities. Indeed, one of the options that is under consideration by this Committee, and which has received support from some, is the option of doing nothing which shows that the work of Parliament could continue without such powers being used. In our view, if each House wishes to exercise a penal jurisdiction it must be based on an Act of Parliament and we consider it likely

that if the courts were asked to rule on this question this would be what they would decide.

(2) A resolution by a House of Parliament reasserting privileges is not capable of altering the law or establishing privileges that do not exist. Doing so would simply add to the uncertainty already mentioned and make it more likely that the courts would eventually be asked to rule on the question.

(3) A further fundamental objection to the reassertion of such powers is that, unless put on a proper statutory basis with a degree of judicial supervision, their exercise would contravene the United Kingdom's international obligations under the European Convention on Human Rights (1953) ("ECHR") and the International Covenant on Civil and Political Rights (1976) ("ICCPR").

6. In our view therefore each House of Parliament should either clearly renounce any claim to its historic powers to fine and commit or an Act of Parliament should be enacted to establish a modern penal jurisdiction.

7. **Legislating to put in place a regime of penal sanctions** is in our view clearly the preferable course, given that it is desirable that the Houses of Parliament and their committees have such powers. The only significant argument against doing so is a concern that it will involve judicial scrutiny and second-guessing of parliamentary proceedings. We are of course sensitive to the concern and it is important that Parliament's core privileges are preserved. However, the concern seems to overlook the role that the courts have long had in preventing abuse of parliamentary privileges, including in scrutinising the exercise of the penal powers of each House to ensure that they are not used in error of law or in a capricious manner. This provides a precedent for the courts having a role under a modern statute.

8. In terms of the regime itself, there are various models that could be adopted. Our suggestion is that:

(1) A suitable model, which could be adapted, is provided by the provisions contained in the devolution legislation making it a criminal offence for witnesses to fail to appear before a committee or fail to provide evidence. This is a regime which Parliament has itself designed and endorsed. Such a regime could sit alongside the ability for each House to admonish a person for contempt.

(2) In addition, Parliament should have a similar power to that contained in s.36 of the Inquiries Act 2005. This is an additional power of enforcement which would allow a committee, at its option, to ask the High Court to assist it in obtaining evidence. Since the principle of exclusive cognisance is itself capable of being waived and is not an absolute privilege, enabling a House of Parliament to have

the *option* to use such a power would be entirely consistent with the principle of exclusive cognisance and would be a valuable tool in Parliament's armoury.

9. The focus of the Call for Evidence is on the powers of the Houses of Parliament to punish so-called "strangers to Parliament" in the particular context of the powers of select committees to summon witnesses and call for papers. This note is therefore focused on this issue. We begin however by making some observations about the powers of Parliament to punish members because this draws attention to the fact that the two contexts are very different and that in the context of disciplining its own members Parliament has much greater freedom to impose sanctions without judicial or external involvement.

Contempt by members

10. The issue of contempt of Parliament by members was considered by the Grand Chamber of the European Court of Human Rights in *Karácsony and Others v Hungary*. The Court conducted a survey of the disciplinary measures applicable to parliamentarians for disorderly conduct in parliament in 44 of the 47 Council of Europe Member States.

11. The most severe sanction identified was exclusion of a member, which 28 Member States' parliaments could impose.

12. In 18 of the Member States surveyed, disciplinary measures included some form of pecuniary sanction, either as a corollary to other sanctions such as suspension (applicable in 14 Member States, including the United Kingdom) or as a penalty in its own right (applicable in four Member States). 24 Member States including the United Kingdom did not have a means for challenging the decision to impose disciplinary sanctions on members. Of the 20 that did have a means of challenge, in 14 Member States this was an internal process and in only six was there a means of challenge in the courts: in each case to the Constitutional Court rather than the ordinary courts. The Grand Chamber also noted that a number of Member States "enjoy certain procedural safeguards, notably, the possibility of providing explanations, mostly prior to, but sometimes also after, the imposition of disciplinary measures."[1]

13. The survey makes clear that external judicial oversight of parliamentary discipline over members is not the norm in the Council of Europe Member States. It is also notable that the Grand Chamber did not identify the possibility for committal of members to detention or prison as a power wielded by any of the parliaments, including the United Kingdom parliament. The United Kingdom government, which intervened in the case,

[1] *Karácsony and Others v Hungary*, App. nos. 42461/13 and 44357/13 (17 May 2016), at [57] to [61].

does not appear to have made any suggestion that either House of Parliament has any such power today.

14. The case itself concerned fines imposed on opposition MPs in Hungary who had used a placard, banners and a megaphone on the floor of the House to object to policies of the Government. The issue was examined under Article 10 as an interference with political expression. The Grand Chamber held that disciplining MPs for such conduct was in principle legitimate and, accepting the submission made by the United Kingdom Government, that "the margin of appreciation to be afforded in this area should be a wide one".[2]

15. The Grand Chamber did not rule on whether the penalty imposed on the MPs was proportionate in the circumstances and instead focused on the procedural protections for the MPs in the Hungarian system. It found a violation of Article 10 because the MPs had not been given an opportunity to provide a defence to the disciplinary charges, but the Grand Chamber accepted that in principle an internal procedure was acceptable. It stated, the "manner and mode of implementation of the right to be heard should be adapted to the parliamentary context"[3] and it stated that a change in the law that had occurred in Hungary which allowed a fined MP to make representations before a parliamentary committee would satisfy Article 10.[4]

16. *Karácsony and Others v Hungary* therefore demonstrates that as long as there are fair procedures in place and a means of challenging a contempt charge, the imposition of pecuniary sanctions on non-members does not require the involvement of judicial authorities. It may however require some modification of current procedures to ensure consistency with the ECHR.

17. We now turn to the question of fining and imprisoning strangers to Parliament.

[2] At [146]
[3] At [157]
[4] At [160]

Should the House, (a) do nothing, (b) reassert the House's historic powers to punish contempt by amending the SOs or by resolution, or (c) seek to legislate to set out new powers?

(a) Do nothing?

18. The Committee asks whether the House of Commons should "do nothing" and essentially continue in the current state of affairs. The current state of affairs includes the following:

    (1) In 1999 the Joint Committee on Parliamentary Privilege concluded that the powers to fine and commit strangers for contempt of Parliament should be regarded as lapsed and unenforceable respectively.[5]

    (2) In 2012 the House of Commons Liaison Committee referred to "long-standing uncertainties about the extent and enforceability of select committees' powers" having been brought to public attention by recent events.[6]

    (3) In 2013 the Joint Committee on Parliamentary Privilege concluded that the powers had not lapsed and were not unenforceable, even stating that the "mechanisms for committal by warrant from the Speaker to the governor of a prisons have not been rescinded". It concluded that each House should reassert its historic powers by resolution and amendments to Standing Orders.[7]

19. Since these reports, the issue came to the fore again in November 2018 when a Serjeant-at-Arms was reportedly sent to the hotel of a Mr Ted Kramer and demanded that he hand over a cache of confidential documents owned by a company called Six4Three, as US-based software company that he had founded. The Commons Digital, Culture, Media and Sport Committee had reason to believe these documents included confidential communications with Facebook that were relevant to an inquiry it was conducting into Cambridge Analytica. According to a report carried in *The Telegraph*, the Serjeant-at-Arms, "told businessmen Ted Kramer he had two-hours to hand over the documents. When the founder failed, Mr Kramer was escorted to Parliament and

[5] *Joint Committee on Parliamentary Privilege*, *Parliamentary Privilege, First Report of Session 1998-99* HL 43, HC 21 (9 April 1999) 4, ch. 6 at [271]-[272].
[6] *House of Commons Liaison Committee*, *Second Report of Session 2012-13, Select committee effectiveness resources and powers*, HC 697 (25 October 2012), at [129]
[7] *Joint Committee on Parliamentary Privilege, Report of Session 2013-14* (3 July 2013) HL Paper 30, HC 100

was threatened with imprisonment if he did not comply."[8] It was also reported that the documents were under a protective order of a US court at the time.

20. Whatever in fact was going on during this episode, it demonstrates how unsatisfactory it is for Parliament to have such vague and uncertain powers. Had Mr Kramer been inclined to resist disclosure of the documents and call Parliament's bluff by taking the matter to court, or had Facebook or another party whose confidences were disclosed done so, the existence and scope of Parliament's powers would have been thrust under the judicial microscope, a circumstance which we are quite sure both Parliament and the courts would have found unwelcome but which it would have been the duty of the courts to rule upon.

21. Whilst the extraordinary action taken in this instance may have been carefully calculated to avoid such a confrontation, it has added to the uncertainty going forward for people in the future who are required to turn over documents to select committees. One only has to consider how difficult it would be for a lawyer to advise such a person as to their legal obligations and possible consequences to see how unsatisfactory the situation would be. There is real a risk that such a person could raise the matter in court and seek a ruling on what their obligations to a parliamentary committee are and what sanctions could be imposed upon them.

22. Doing nothing is not therefore in reality doing nothing. It would require the House to *endorse* the prevailing uncertainty. This is not consistent with the basic principles of legal certainty which require that a person can ascertain their legal obligations and foresee the consequences of not complying with them. It risks a challenge in the courts to the whole foundation of the House's contempt powers. Moreover, since Parliament is the supreme authority for upholding the rule of law it is especially important that it grasps the nettle to set the law on a straight and sure foundation. We provide our proposals for how this could be done below.

(b) Reassert the House's historic powers to punish contempt?

23. The question then arises as to whether Parliament could remove the uncertainty and create a certain and sure foundation by reasserting its historic jurisdiction by resolution and amendments to standing orders.

24. Such a course however would aggravate rather than alleviate the difficulties already identified.

[8] "Facebook documents seized by MPs using rare Parliamentary mechanism" J Archer, 25 November 2018, *The Telegraph*.

25. Resolutions of a House of Parliament do not have legal force. As the Supreme Court recently reaffirmed, a resolution is an "important political act". But a "resolution of the House of Commons is not legislation".[9]

26. Secondly, the exercise of such powers would contravene Article 6 (fair trial by an independent tribunal) and Article 7 (no punishment without law) and in the case of committal also Article 5 (1) (deprivation of liberty). We don't think it is necessary to engage in a detailed analysis of those provisions here but at least the following requirements of those Articles would probably be violated:

    (1) The requirement imposed by Article 6 that a person to be tried by an authority which is independent not only of the executive but also of Parliament.[10]

    (2) The requirement imposed by Article 7 that criminal offences are clearly defined in law and that the criminal law should be sufficiently accessible and precise that a person should know whether their conduct is criminal.[11]

    (3) The requirement imposed by Article 5 that no person be deprived of their liberty save in specified circumstances which include where a person has been "convicted by a competent court" (Article 5(1)(a)).

27. The Human Rights Act 1998 does not apply to persons exercising functions in connection with proceedings in Parliament (s.6) and therefore it may not be possible for a person to object to such violations before a domestic courts. This would no doubt give rise to interesting legal questions on the scope of that exclusion and the meaning of proceedings in Parliament. Such violations could however certainly be raised before the European Court of Human Rights.

28. Such issues do not only arise under the ECHR. The United Kingdom also owes obligations under the ICCPR and many of the rights protected by that treaty are closely analogous to those under the ECHR. Article 14 ICCPR for example requires that persons are tried by an independent tribunal which includes independence from parliament.[12]

29. But leaving aside the United Kingdom's international obligations, in our opinion the power of the Houses of Parliament to fine or detain strangers—other than perhaps brief

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[9] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61; this principle was also articulated by Lord Denman CJ in *Stockdale v Hansard* (1839) 112 ER 1112 at 1153-1154.

[10] *Crociani v Italy, App. No. 8603/79; 22 DR 147.*

[11] *Handyside v United Kingdom* (1974) 17 Y.B. 228, (Com.)

[12] General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14): 04/13/1984. Office for the High Commissioner for Human Rights.

periods of restraint where a person is interrupting proceedings in Parliament[13]—no longer exist as a matter of law.

30. The defining feature of our Constitution, and a product of its unwritten character, is that it evolves over time. It has developed through evolution rather than revolution. It therefore does not follow that because the Houses of Parliament possessed ancient powers that today such powers could be lawfully exercised. The constitution of yesteryear is not the constitution of today.

31. In particular the principle of the separation of powers has developed substantially over the past two centuries. In *Knuller v DPP* Lord Diplock explained how by the middle of the 19th century "*the concept of the separation of judicial and legislative powers in the field of criminal law had been accepted"*. Responsibility for developing the criminal law passed to Parliament which enacted numerous Acts over the course of the century establishing criminal offences and a police force.[14] In *Knuller* the question was whether the historic role of the courts in making the criminal law had been overtaken by the development of the principle of the separation of powers. The Appellate Committee of the House of Lords held that it had been.

32. *Knuller* can be seen as the modern development of the seventeenth century cases of *Prohibitions del Roy* (1607) 77 ER 1342, 12 Co Rep 64, and the *Case of Proclamations* (1611) 12 Co Rep 74 in which Lord Coke ruled that ancient powers claimed by the King to determine criminal and civil proceedings and to dispense with laws could no longer be exercised as they had passed to the courts and Parliament respectively.

33. Parliament has endorsed this general progression, perhaps most significantly in recent years in the Constitutional Reform Act 2005 which created the Supreme Court to exercise the powers of the Appellate Committee of the House of Lords and modified the functions of the Lord Chancellor. An associated development has been the prominence given to the rule of law in judicial decisions, which is also rereferred to in s.1 of the 2005 Act.

34. These tectonic constitutional shifts, sketched in outline here, have reorientated the relationship between the Crown, Parliament and the Courts. Against this background, there would be a powerful argument that the Houses of Parliament no longer have the power to punish strangers in the absence of an Act of Parliament.

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[13] Such a *"power"* may not go beyond that possessed of any private landowner to remove trespassers. In *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684 Lord Phillips noted at [82] that on two occasions in the 1970s the House authorities invited the police to consider prosecuting those responsible for gross misconduct in the gallery.

[14] *Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* [1973] AC 437, 472-473.

35. This argument is bolstered—in our view conclusively—by an examination of the foundation for the courts recognising parliamentary privileges and the power to punish for contempt, beyond Article IX of the Bill of Rights 1689.

36. *Burdett v Abbot* concerned an action in trespass against the Speaker of the House of Commons who, accompanied by soldiers, had arrested Sir Francis Burdett, Baronet, broken-in his front door and imprisoned him in the Tower of London. Lord Ellenborough CJ reasoned that in order for the House of Commons to have the *"necessary means"* to protect the free and independent exercise of its functions, it must have "*the power of protecting itself from insult and indignity wherever offered, by punishing those who offer it."* ((1811) 83 ER 501, 14 East 3, at 554, [139] also Byles J at 562, [149])

37. Lord Erskine in the House of Lords similarly stated, *"The House of Commons, whether a Court or not, must, like every other tribunal, have the power to protect itself from obstruction and insult, and to maintain its dignity and character"* ((1817) V Dow 165, 3 ER 1289, 1302).

38. In the later case of *Stockdale v Hansard* Lord Denman CJ affirmed not only that the existence and extent of Parliament's privileges is a matter for the courts to determine, but that the test for determining the existence of such a power is whether it is *"essential to the discharge of their functions":* (1839) 9 Ad & E1, 112 ER 1, at 1155 [113] and 1169 [150].

39. The question of whether a privilege is essential is very different from a test of convenience. This was made clear in that case. Denman CJ pointed out that, whilst the printing and publishing of parliamentary papers had a long and valuable usage, this did not establish it as essential to the discharge of the functions of Parliament, meaning no privilege arose. Denman CJ gave another example. He said that whilst parliamentary privilege undoubtedly attaches to the House of Commons' powers in respect of grants and taxation, if it voted to send messengers forcibly to enter and inspect the cellars of residents of London in furtherance of such powers, it would be acting unlawfully and committing a trespass (1156 at [115]).

40. Two points emerge from these and other authorities. The first is that the power to punish for contempt rested on the protection of the dignity of Parliament and was closely related to the law on libel and defamation. Whilst instances can be found of other obstructions to the proceedings in Parliament being punished, such as Members preventing other Members from attending Parliament or strangers disrupting proceedings, the use of fines or commitment as a means of furthering the investigations of select committees has no precedent. Select committees themselves post date the last exercise of the contempt jurisdiction by a century. Furthermore the power of the Commons to impose fines is even more infirm given that in *R v Pitt* Lord Mansfield is recorded as having remarked that the House of Commons did not have a power to fine

(*"there could be no fine set there; it must have been in the Star Chamber"* ((1762) 3 Burr 1335, 97 ER 861).

41. The second point is that the foundation for the courts recognising a privilege or power in the Houses of Parliament is that such powers are essential to their functioning. It is hard to accept that the powers to fine and imprison are essential to the discharge of the business of either House today, when neither House has had cause to resort to them in modern times. No Parliament in the survey conducted by the European Court of Human Rights in *Karácsony* claimed a power to imprison members let alone strangers.

42. It follows that with respect we do not consider the Joint Committee's conclusion in 2013 that the powers clearly exist because desuetude is not a doctrine of English and Welsh law is correct (at [77]). Desuetude has no application in this context.[15] The relevant legal principles, which have been set out above, demonstrate that the powers could not today be lawfully exercised as a matter of common law (leaving aside the ECHR and ICCPR)

43. It follows that we cannot agree that each House should rise to the *"challenge"* and *"reassert"* its powers. This would be an empty act and threaten a contravention of the United Kingdom's international obligations.

(c) Legislate to enact new penal powers?

44. The options therefore reduce to two, (a) each House should clearly and permanently renounce any claim to penal powers, or (b) Parliament should enact penal powers suitable for modern conditions.

45. Our strong opinion is that Parliament should take the latter course because events have shown that it is desirable for Parliament to have such powers.

46. There are a range of possible models that could be used to criminalise contempt of Parliament.

47. We would like to focus however on the specific issue of summoning witnesses and requesting documents or information. There is already a model for addressing this issue ready at hand. It is a model that Parliament has itself created and endorsed in the legislation for the devolved legislatures. Section 23 of the Scotland Act 1998 for example[16] provides that:

[15] Desuetude is a doctrine of Scottish law applicable to statutes which holds that statutes are unenforceable where an inconsistent subsequent practice has developed.
[16] See also ss.44-46 of the Northern Ireland Assembly Act 1998, ss.37-39 of the Government of Wales Act 2006 and also article 49 of the States of Jersey Law 2005.

"(1) The Parliament may require any person—

(a) to attend its proceedings for the purpose of giving evidence, or

(b) to produce documents in his custody or under his control,

concerning any subject for which any member of the [Scottish Government has general responsibility."

48. The section goes on to set out detailed provisions on persons outside Scotland, Members of the Scottish Government, Ministers of the Crown, judges, members of tribunals and other matters.

49. Section 24 provides that a requirement under s.23 shall be imposed by the Clerk giving notice in writing in a specified manner and form.

50. Section 25 then provides that any person to whom a notice under s.24(1) has been given who refuses or fails to attend, or a person who refuses or fails to answer questions, or who conceals a document is guilty of an offence. There is a defence for a person to show that they had reasonable excuse for a failure.

51. Adopting such a model, in a prosecution it would need to be established that a person had been notified by the Clerk and that they had failed to attend or provide documents (etc). If a person contended that they had reasonable cause for the failure, the burden would be on them to show this. However, that would not allow a defendant to go behind the notification.

52. A similar issue arises in the planning context where a planning enforcement notice has been issued by a local authority. The courts have held that when breach of such a notice is prosecuted the only issues before the court are the narrow ones of whether the notice is formally valid and, if raised, whether the defence that the defendant has done "everything he could be expected to do to secure compliance with the notice" is made out. A defendant cannot challenge the fairness or motivations behind issuing the notice.[17]

53. Lying to a parliamentary committee raises different issues, but this is already an offence under the Perjury Act 1911. Even before the enactment of the Perjury Act 1911, in the nineteenth century two people were prosecuted for perjury before parliamentary committees.[18]

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[17] *R v Wicks* [1988] AC 92. Town and Country Planning Act 1990, s.179(3).

[18] *R v Chaytor*, ibid, at [82]. Failure to answer questions put to a person in the course of giving evidence might raise different considerations which may need to be addressed specifically in any legislation. If a person is asked a question they consider to be irrelevant, unclear or if they would like to take legal

54. The possible difficulty with such a regime, albeit one that we believe can be satisfactorily overcome, arises because of the need to ensure that people can challenge the issuing of any summons or notice. In the planning context, a person can object to an enforcement notice by an appeal to the Secretary of State once it is issued. (If they fail to challenge the notice they cannot raise any such issues as a defence to prosecution.)

55. The devolution legislation does not make provision for any appeal or objection but the issue of a notice would be open to judicial review.

56. In our view it would be preferable for a person to be able to object to a summons or a requirement imposed by select committee first to the committee and, failing that, to another parliamentary authority. This would enhance fairness and distance the courts from reviewing such decisions. Such a process would not be remotely similar to a criminal trial and could be a paper exercise.

57. Furthermore, it would not be necessary for committees to issue a formal penal notice in every case: these could be reserved for situations where a person has failed to comply with an initial request by a parliamentary committee. The issue of a penal notice would then trigger some form of internal review of the notice. If the notice were approved through that internal review, it would be a criminal offence to breach the notice.

58. There would ultimately need to be the possibility of judicial review, but the scope for the court second-guessing the decision to issue a notice or summon a witness is likely to be very limited particularly where this has been subject to a process of reconsideration and internal review. In the planning context there is a restricted right to appeal to the court against the decision on a "point of law".[19] In the present context this would mean a right to object where the statute has been misinterpreted or misapplied.

59. Recognising the scope for some, albeit limited, judicial supervision of decisions to call witnesses or require answers to questions by parliamentary committees would of course represent a limited waiver of exclusive cognisance. However, it is often overlooked that the courts have long exercised judicial supervision in this context. It is very far from being the case that the courts would accept decisions to commit a person on grounds of contempt of Parliament without ensuring that no error of law or abuse of power had been committed by the parliamentary authorities.

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advice before answering the question it may be appropriate for them to refuse to answer and therefore some mechanism may need to be introduced to allow for this before a person could be open to prosecution. It may be that the committee should in such circumstances put the question in writing which would enable the individual to object to the propriety or fairness of the question to the committee and put beyond any doubt that a person has failed to answer the question.

[19] 1990 Act, ibid, s.289.

60. Thus, in *Burdett v Abbot* Lord Ellenborough CJ referred to cases where persons committed by the House had applied for habeas corpus and stated,

> if the Judges before whom those applications were made on writs of habeas corpus had felt that the Houses had no pretence of power to commit, or had seen upon the face of the returns- that they had exercised it in those cases extravagantly, and beyond all bounds of reason and law, would they not have been wanting in their duty if they had not looked into the causes of commitment stated ..? (at 558 [149]-[150])

61. He continued,

> "if a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the case of that Court, nor of any other of the Superior Courts, inquire further: but if it did not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the Court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law, or national justice; I say, that [151] in the case of such a commitment, (if it ever should occur, but which I cannot possibly anticipate as ever likely to occur,) we must look at it and act upon it as justice may require from whatever Court it may profess to have proceeded." (558-559)

62. In that case Lord Ellenborough CJ examined the warrant of commitment issued by the Speaker. It referred to a resolution of the House of Commons that a certain paper which was described in the warrant was libellous of the House and that the plaintiff had admitted that it had been printed on his authority. Whilst his Lordship observed that the warrant might have been "*couched in more precise language"* and produced in a more "*workmanlike manner"* fitting for a warrant of commitment, it was intelligible and sufficient to set out a contempt of Parliament. He also said that the court could intervene if "*unjustifiable means"* had been used to give effect to the warrant and examined in detail whether the messenger had been entitled to break open the plaintiff's front door.

63. This represents the clear assertion of judicial supervision of the contempt jurisdiction. The same approach was taken in *Stockdale v Hansard* in which Lord Denman CJ referred to *"monstrous abuses"* of the privileges of Parliament in the past which might have "*called for the interference of the law, and compelled the Courts of Justice to take a part"*. He referred by way of example to a person who had been imprisoned by Speaker's warrant for fishing in Admiral Griffin's ponds (but he might have referred to killing of Lord Galloway's rabbits, or the man imprisoned for assaulting Sir Watkin Williams Wynn's porter in Downing Street). He said that the Court of Queen's Bench would have been bound to inquire into the asserted privilege, "*and to declare that it did not and could not extend to such a case…"*.[20]

[20] At 1156 [116] and for the other examples 1117[13]

64. Therefore assuming that the House of Commons purported to exercise its historic power to commit, for example for contempt of a select committee, even if the courts accepted that a general power to commit existed, they would require a proper case for committal to have been set out and they would ensure that Parliament's powers were not being used in an manner that was arbitrary, unjust or contrary to natural justice. The scope for judicial review of a decision to issue a notice to a witness under new legislation therefore has a precedent. It would also likely be more limited and certain in its scope than the courts' historic jurisdiction to rule on the scope of parliamentary privileges.

65. Legislating would also afford each House of Parliament the ability to acquire additional powers that could significantly enhance their investigative powers. The Inquires Act 2005 provides a model.

66. Under s.21 of the 2005 Act a chairman of a public inquiry can issue a notice to a witness to attend to give evidence. If a person claims they cannot comply or it is not reasonable for them to do so, the chairman must consider this and may revoke the notice (s.21(4)).

67. If a person fails without reasonable excuse to do anything required by a notice under s.21 they commit an offence (s.34(1)). Proceedings for an offence can be instituted by the chairman (s.35(5)).

68. Such provisions provide a similar framework to that in ss.23-25 of the Scotland Act.

69. Of particular interest however is that the chairman can also certify non-compliance or threatened non-compliance to the High Court who can make an enforcement notice (s.36). Section 36 provides:

> "(2) The court, after hearing any evidence or representations on a matter certified to it under subsection (1), may make such order by way of enforcement or otherwise as it could make if the matter had arisen in proceedings before the court.
>
> (3) In this section "the appropriate court" means the High Court or, in the case of an inquiry in relation to which the relevant part of the United Kingdom is Scotland, the Court of Session."

70. Since failure to comply with a notice under s.21 is punishable as an offence it may not be immediately obvious what the purpose of an application under s.36 is intended to achieve. It is in effect an additional layer of enforcement, which co-opts the court into the process.[21]

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[21] The Explanatory Note states,
"Enforcement by the appropriate court is an alternative mechanism to prosecution, and could be used in cases where a prosecution might not be the best method of obtaining the relevant evidence. However, the court could also be asked to enforce a wider range of orders…". The example given in the

71. Where the High Court is asked to make an order against an individual the court will invite the person to attend to make representations before it. One of the consequences of this is that it will immediately give rise to costs consequences for an individual, who is likely to incur adverse costs if they do not attend or do not successfully resist an order being made. Furthermore, the High Court will be able to superintend compliance with the order in a way that the inquiry cannot. In effect, the inquiry is able to shift the burden of enforcement to the courts.

72. A further feature of the 2005 Act procedure is that the nature of the court's enforcement is not specified. It may be open to the court to make a wide range of orders, for example relating to preservation of documents, searches and seizures. *Re Paisley Junior (No.3)* [2009] NIQB 40 Gillen J stated that, "*the task of enforcement is left entirely to this court"* (at [34]). These issues have not been tested under the Inquiries Act. But legislating has the potential significantly to add to the armoury of a select committee.

73. Because a court is making its own order, a Judge exercising the jurisdiction under s.36 must be satisfied that the order is justified. This means that the court must consider the reasons given for why the evidence is required and any representations made to it by the affected person. This goes further than a judicial review jurisdiction.

74. Nonetheless, even in this context there is little scope for the court departing from the inquiry chairman's assessment:

> "tribunals have been given the statutory task to perform and exercise their functions with a high degree of expertise so as to provide coherent and balanced judgment on the evidence and arguments heard by them, that does make those tribunals better placed to make a judgment than the court on the need for particular information to be brought before it." (see *Re Paisley Junior* [37]

75. In *Moore-Bick v Mills* [2020] EWHC 618 (Admin) the chairman of the Grenfell Tower Inquiry, Sir Martin Moore-Bick, sent a list of 89 questions to the respondent. Since the individual did not comply, the matter was referred to the High Court and Mr Justice Mostyn made an order that the documents be provided. The judge noted briefly that the questions were obviously relevant to the inquiry and that the respondent was obviously being uncooperative and he made the order sought by the chairman. There was no suggestion that the court was second-guessing or intruding into the inquiry's functions.

76. Therefore, whilst the s.36 process does bring with it an additional layer of judicial involvement it remains at arms-length to the inquiry process. Most importantly, it is something that the inquiry itself initiates as a mechanism for obtaining evidence that it

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explanatory note is where it is considered necessary to order a witness not to disclose the identify of another witness where there is concern that this might be revealed after the conclusion of an inquiry.

requires. It is optional and therefore does not require any derogation from or inroad into the exclusive cognisance principle.

5 October 2020