Written evidence submitted by Joshua Rozenberg QC (hon)

As the then leader of the House of Commons said in 2016, in remarks quoted by this committee, “select committees play an important role in parliamentary and national political life”. I believe they should continue in their current role. My concern is that the committee’s proposals would cause more harm than good.

Far from enhancing the dignity of parliament, I fear that bringing in the courts – even as a distant threat – would appear heavy-handed and inappropriate. Parliament should not need the courts to buttress its authority.

If anything, creating new criminal offences would make witnesses less willing to give evidence. Although the draft bill is less than clear on the point, witnesses might reasonably expect to face criminal proceedings under the new law if they are found to have given false evidence.

If parliament believes that individuals are obstructing its work then parliament should say so. Admonishment may have little or no immediate effect on the individuals concerned. Some, indeed, may see it as a badge of honour. But that says more about them and those who support them than it does about parliament.

In an instant response to the committee’s proposals, I argued that “empty-chairing” people who refuse to give evidence was often far more eloquent than seeking to prosecute them. I stand by that view.

The committee has now invited me to answer the specific questions it raised:

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)?

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, they better they are likely to be at assessing policies and proposals put forward by ministers and others. Their powers should be limited to questioning witnesses, considering evidence and making recommendations in the light of their findings.

Committees should continue to question witnesses in public. Oral evidence should be live-streamed, recorded and transcribed. Written evidence should be published.

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

Those are certainly the three options. But I am not persuaded that legislation is the way forward.

For one thing, it would change the nature of select committees. While some committees would continue to investigate, others would interrogate. Instead of asking witnesses for information, they would seek out those suspected of wrongdoing with the aim of holding them to account.

That would no doubt be very entertaining and it could also be informative. But some members would seek to make political capital out of their new powers. They would try to persuade committees of which they were members to call in high-profile witnesses for questioning. We should not be surprised if members of parliament occasionally behave like politicians.

How would reluctant witnesses respond to a summons of this nature? Some would refuse to attend and face enforcement proceedings (see below). Others would attend – but with their lawyers. Those lawyers would advise witnesses that the committee must respect their private life and correspondence (article 8 of the human rights convention). Lawyers would also advise witnesses of the privilege against self-incrimination (article 6 as interpreted in *Saunders*). As a result, hostile interrogations would create more heat than light.

Of course, members would do their best to get information out of unwilling witnesses. But very few members are likely to have the necessary forensic skills.

In due course, committees might well delegate the job of questioning to their specialist legal advisers – in the same way as high-profile inquests and public inquiries now rely on counsel to the inquest/inquiry to question witnesses. But the more that committee hearings resemble judge-led proceedings, the more that witnesses will demand the sort of protection they would expect in court. At the very least, they would expect advance disclose of evidence that might be put to them. They might even demand the opportunity to put questions to other witnesses.

Is this a counsel of despair? Surely these powers will be held in reserve? Most legislatures have not needed them. You have to go to to the United States to see the sort of outcomes I fear.

I suspect that, sooner or later, these reforms would be put to the test. Of course, there would continue be rules against grandstanding and aggressive cross-examination. Individual members would not be able to act without majority support on a committee. But one should never ignore the law of unintended consequences.

For these reasons, I support the first option: do nothing. Select committees would continue as before. Parliament would retain the power to admonish those who withhold information.

Do you think the proposed draft Bill provides an appropriate solution to the issue of recalcitrant witnesses before committees?

The bill tries to reconcile two irreconcilable objectives and ends up satisfying neither. It limits parliament's "exclusive cognisance" of its own proceedings by sharing

powers with the courts. But it gives the courts insufficient powers to resolve the problems the committee has identified.

Lord Thomas of Cwmgiedd, the former lord chief justice, suggested reviving the High Court of Parliament by allowing peers who had previously served as judges to deal with the issues covered by this bill. Though this might attract ridicule – the 26th Baron de Clifford was the last person to be tried by his peers in 1935 – it is at least consistent with article 9 of the Bill of Rights.

The fundamental problem with the bill's drafting is the way in which it deals with the defence of reasonable excuse.

First, the bill treats failure to attend and failure to provide information in the same way. In fact, the two concepts are very different. A witness based in the United Kingdom may have little excuse for not attending but several reasons for not answering questions. A witness based abroad could choose to ignore extra-territorial powers that would be unenforceable outside the United Kingdom. Although the courts can be expected to base penalties on what they regard as the appropriate level of culpability, it would be sensible for parliament to give some non-exhaustive examples of what might be regarded as a reasonable excuse.

A bigger problem is the ouster provision in clause 1(4)(b). How are the courts to assess whether the witness had a reasonable excuse if they cannot consider the context of a select committee inquiry?

The court would be allowed to consider the "nature and purpose of the committee's summons". But are those terms to be defined narrowly? The nature of a committee's summons is presumably an order to attend. Its purpose may be equally clear: the witness is being called to answer questions.

When faced with an ouster clause, though, courts tend to look for ways round it. They may interpret "nature and purpose" more broadly. To do justice, they might have to.

Let's take a simple example. A committee wants to know whether a company was to blame for a failing of some sort. The company refuses to co-operate in any way. Unsure of who might have been responsible for the failing, the committee issues a summons to the chief executive officer. The CEO has ultimate responsibility for the failing but no direct knowledge of it.

After making inquiries, the CEO discovers that another executive was responsible for the failing. That executive has been paid off with a non-disclosure agreement. The CEO takes the view that the committee has chosen the wrong target but, for commercial reasons, does not want to identify the executive responsible.

Does the CEO have a reasonable excuse for non-attendance? The courts may be able to decide this by considering the "nature and purpose" of the committee's summons. On the other hand, the only way of deciding whether the CEO can reasonably argue that the committee has summoned the wrong person might be to ask what information that the committee is really trying to find. But that might be regarded as

"any other aspect of the committee's proceedings" – an area that would be barred to the judges.

I have one further concern about the wording of the draft bill. What if a witness tells lies to a committee? That may be more damaging than saying nothing at all. But does false information still count "information", albeit false? Or is it not information at all? Only the latter interpretation would lead to a criminal penalty under this draft bill. Separate legislation already purports to criminalise false statements made to a committee – but that applies only if the witness is on oath, which is hardly ever the case.

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

The committee seems to have recommended sanctions that are in line with the penalties for contempt of court. But contempt of court can lead to miscarriages of justice: defendants may be wrongly convicted or acquitted and claimants may be wrongly awarded or deprived of substantial assets. Failure to answer a committee's questions is not comparable with undermining the course of justice.

If the ouster provisions referred to above are retained, there is every chance that people will be wrongly convicted of failing to comply with a summons. That's bad enough; but for them to face two years' imprisonment would be unconscionable. As the committee notes, imprisonment is a penalty that parliament has not sought to impose for more than 140 years.

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?

Although I favour a gradual approach, I don't see how parliament can justify depriving Lords committees – and joint committees – of the powers it gives to Commons committees.

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?

Most witnesses agree to give evidence. A few seem to feel that it is inconsistent with their independence to do so and seek the protection of a summons – with which they willingly comply. The "due process" protections should apply at the point when a witness declines to co-operate.

There should be no question of an ambush. The committee would need to give to witness advance notice of the areas to be covered, as it does already. As mentioned earlier, the committee may need to disclose information to the witness in advance if the witness is expected to respond.

The witness will certainly need to be accompanied by a lawyer who can advise the witness whether or not to answer each question. Witnesses should be allowed a reasonable period after giving oral evidence to correct or supplement what they have said.

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?

As I read it, the draft bill is not confined to non-members. Paul Evans CBE correctly observes that no government would agree to legislation that puts its ministers in jeopardy.

The broader issue posed by this question needs further consideration in the light of current powers to suspend and, effectively, expel members. Both houses of parliament hold their members to much higher standards than they did even a few years ago. It would seem strange for a member to enjoy absolute privilege for words spoken in parliament while facing imprisonment for words not spoken in parliament.

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?

The committee has drawn attention to the unenforceability of powers thar parliament thought it enjoyed. As it notes, "any approach that criminalised specific contempts could increase doubt over how other contempts could or should be dealt with".

It would be prudent to ensure that there is a sound legal basis for the power of the serjeant-at-arms to detain strangers who misbehave on the parliamentary estate – and any other powers that are regarded as necessary for the security and proper operation of parliament.

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