Written evidence submitted by Professor Tom Hickman QC and Harry Balfour-Lynn

1. In this note we respond to the Committee of Privileges' consultation on its First Report of Session 2019-21 and the draft Bill that it has proposed. We have decided to respond in a generic fashion rather than seek to dissect our views by reference to the specific questions asked by the Committee. In doing so we respond to several of those questions, although not all of them.

2. For the reasons that we gave in our evidence dated 5 October 2020, we agree with the Committee that the options of doing nothing or the House of Commons seeking to reassert theoretical, historic, powers should not be recommended. We agree that legislation should confer powers on Select Committees to assist them in obtaining the evidence necessary for them to pursue their inquires effectively.

3. In our view the case has been made out that it would be of assistance to Select Committees to have such powers in the performance of their functions.

4. The powers that are proposed are not excessive. This Committee has itself noted the range of comparative examples of other Parliaments that have similar powers and we drew attention in our evidence to the analogous powers that the Westminster Parliament has itself conferred on the Scottish Parliament, the Senedd and the Northern Ireland Assembly under the devolution legislation.

5. Enforceable powers to call for witnesses, documents and sometimes information are also enjoyed by a range of other bodies and authorities, as diverse as the Parliamentary Ombudsman (and various other ombudspersons), ecclesiastical commissions, the Welsh Children's commission, inquiries under the Land Drainage Act and inquiries under the Merchant Shipping Act, and even the Letchworth Commissioner, who is responsible for conducting investigations into complaints of maladministration made against Letchworth Garden City Heritage Foundation. We have set out a list in Annex 1 below.

6. The conferral of such powers will of course require a degree of judicial supervision, but for the reasons we explain, we do not consider that this will encroach on the merits of Select Committee inquires.

7. Given these observations, it may be helpful if we address some criticisms of the Committee's report made by Alexander Horne in *Prospect* magazine in May 2021 ("Should select committees be able to compel attendance?" 7 May 2021). Addressing these criticisms is helpful in drawing attention to an important distinction between the substance of Select Committee reports and the procedure adopted by Select Committees.

8. Horne's objections are essentially twofold. First, in his view Select Committees do not have the "legal capacity to run the type of fair hearing that would be needed to forcibly examine the conduct of private individuals". He also notes that witnesses cannot complain of defamation by Select Committees or challenge the fairness of proceedings before Select Committees. Second, he expresses concerns that the Courts might become entangled in "internal committee processes, or the merits of the summons".

9. In responding to these concerns, it is helpful to keep separate two distinct issues. The first is the consequences of Select Committees adopting an investigative function which may lead to the criticism of private individuals or employees of public bodies. The second is the ability of Select Committees to sanction persons for failing to provide documents or evidence. The first of these issues relates to the substance or outcome of Select Committee inquiries, the second to the process adopted by Select Committees. As we will explain, these are different issues that give rise to different problems and solutions.

10. There is no doubt that Select Committees today engage in more wide-ranging inquiries into issues of contemporary public policy than they previously did; and that this can more readily result in adverse findings or comments against individuals who are not members of the Government, usually in relation to their professional activities. Because Select Committee reports can make criticisms of private individuals or persons holding positions in public authorities, Select Committees must ensure that their proceedings are fair.

11. But this issue is separate from the question of Committees' powers. Committees can and do already make adverse comments about individuals without exercising any coercive powers. And Select Committees are not alone in this. There are a wide range of bodies and authorities that engage in investigations and inquiries of all types, without exercising any formal powers, which can result in adverse findings about individuals, often with serious professional or personal consequences (see e.g. one example that reached the courts *R (Shoesmith) v Oftsted* [2011] EWCA Civ 642). In many cases, bodies observe self-restraint in not singling out individuals for criticism – examples are independent reports of institutions such as immigration facilities – but often criticism of particular individuals is implicit. All such forms of investigation and inquiry need to comply with principles of fairness – this has nothing to do with whether they have powers to call witnesses to attend or powers to obtain documents.

12. There is also a further important point. Whilst such investigations need to comply with principles of fairness, it is not the case that they need to be run like mini-criminal or civil trials. The relevant principles are set out in a report commissioned in November 2016 by the Treasury Select Committee (*A Review of "Maxwellisation"* A. Green QC, T. Peto QC, P. Saini QC, F. Campbell and A. Ratan). That review explained that the law generally requires only that individuals are given an opportunity, which can be given in writing, to respond to criticism prior to conclusions being finalised and published in a report.

13. In light of the fact that Select Committees are not subject to judicial review, there may be a case for Select Committees adopting a narrower approach to the scope of their inquires than they sometimes do. That, however, is not a matter on which we express any opinion.

14. The question of Select Committee powers is a separate and distinct issue. It is of course important that such powers are themselves exercised fairly, but that is a different issue of fairness to the one discussed above. What is required is that individuals must be given (i) a fair opportunity to object to a summons being issued and (ii) a fair trial if they are prosecuted for failing to comply with it. The requirements of fairness applicable at each of those two stages are quite different. A fair opportunity to object to a summons will require the ability to respond in writing to the reasons why a Committee might exercise such powers. A fair opportunity to defend any prosecution for breaching such a summons requires the protections of a criminal trial – but it does not require that a person is able to challenge the merits or reasonableness of the decision to issue a summons.

15. It can therefore be seen that the criticism referred to in paragraphs 7 and 8 elide these two different issues, one of procedure and one of substance. Endowing Select Committees with powers to obtain documents and evidence does not alter the already existing obligation on them to ensure that their proceedings are fair where they may result in express or implied criticism of individuals. That arises from the substance of the inquiries that a Committee makes and findings that a Committee might reach.

16. The additional issues of fairness that arise where such powers are conferred on a Committee relate to the exercise of those powers as explained in paragraph 14 above, not the substance of the Committee's proceedings. Of course, if this Committee was proposing that Select Committees should have power to back criticisms of the behaviour or conduct of individuals that are made in Select Committee reports with sanctions or penalties then the position would be quite different. But that of course is very far from what the Committee is proposing.

17. Turning to the proposed Draft Bill, we have the following comments:

    a. First, in our view the Bill lacks clarity as to the respective roles of the Select Committee that wishes to exercise the powers, the Privileges Committee and the Speaker. As drafted, a summons would be issued by a Select Committee, but the Speaker would certify that the summons has not been complied with. In addition, it is proposed that the Privileges Committee would act as a "gatekeeper" to the exercise of a Select Committee's powers. In our view the respective roles of the authorities, and their roles in decision-making, lack precision.

    b. Second, the fact the Speaker would be issuing a certificate that is conclusive as to whether a summons has been complied with raises an issue of compatibility with Article 6 ECHR. In *Tinnelly & Sons Ltd and others v United Kingdom* App. Nos. 20390/92 & Anor 10 July 1998 the European Court of Human Rights ("ECtHR")

found a violation of Article 6 where a certificate issued by the Secretary of State prevented a judicial determination of the merits of a civil claim. The principle in *Tinnelly* was subsequently applied by the ECtHR in equivalent contexts in *Devlin v United Kingdom* App. No. 29545/95 30 October 2001 and *Devenney v United Kingdom* App. No. 24265/94 19 March 2002. In another line of case law, the ECtHR has held it to be incompatible with Article 6 for the executive to determine issues arising in legal proceedings: *Beaumartin v France* (1994) 19 EHRR 485. The courts must have "full jurisdiction" to determine whether the elements of a crime have been committed.

c. In the present case, whilst the certification would not determine that the offence had been committed – since as drafted the requirement for an absence of reasonable excuse is an element of the offence – nonetheless it risks being found to determine an element of the offence against an individual. In the vast majority of situations, it is hard to see that this would be considered material, as there is unlikely to be any dispute as to whether a summons has been complied with (as opposed to whether there were reasonable grounds for not complying). However, in principle if a defendant wished to dispute a certificate on the basis that they had in fact supplied documents or that they had offered to attend to give evidence, a violation of Article 6 would probably arise in circumstances in which this is conclusively determined against them.

18. To avoid such issues, we suggest, the regime and the Bill could be structured in the following way (we attach at Annex 2 a draft Bill that would reflect this):

a. Presented with a recalcitrant witness, a Select Committee should send a "minded to" notice to the witness, warning them that a summons may be issued. The witness can then make representations to the Committee on paper if they consider that they should not need to give evidence.

b. Unless the Committee accepts such representations, it should then ask the Chair of the Privileges Committee (or another "gatekeeper" such as the Speaker) to issue a summons on behalf of the House. At this stage, an individual could make any further representations in writing to the Privileges Committee.

c. A summons could then be issued. The summons would need to comply with certain prescribed formalities, such as that it contained a statement of the documents requested, the identity of the person required to provide the documents and the timescale in which they were to be provided. These and other formalities could be set out in a Schedule to the Bill.

d. The Bill would make it an offence to fail to comply with a summons. In any criminal proceedings, failure to comply with the summons and the absence of reasonable excuse would be in issue (the absence of reasonable excuse could be framed either as an element of the offence or as a defence). Importantly, however, the validity of the

summons and therefore the merits of the summons would not be capable of being raised in the criminal proceedings (other than the extent to which the formal conditions set out in the Schedule were complied with).

19. This model combines the provisions contained in the devolution statutes with that relating to planning enforcement notices, as discussed in our previous evidence at paragraphs 51-52.

20. A question might arise as to whether the issue of a summons could be challenged by judicial review. In the planning context, there is a form of judicial review of decisions of the Secretary of State to uphold enforcement notices, but on restricted grounds – namely, an error of law.

21. It is however very difficult to conceive of how a decision to issue a summons could be challenged and we have no doubt that the Courts would be exceptionally reluctant to entertain such a challenge. The possibility does not however offend constitutional principle, as we explained in our previous evidence at paragraphs 59-64: the Courts have always ensured that Parliament does not exceed or abuse its privileges – the scope of its privileges is ultimately a matter for the Courts.

22. One way of seeking to further restrict the scope for judicial involvement would be to establish a further right of complaint to a Law Lord or former judge sitting in the House of Lords if it is contended that the issue of a summons would be contrary to law.

23. A final point about the proposed legislation is that whilst a power to compel the attendance of witnesses and provision of documents is one that is shared by a number of authorities, including the devolved assemblies, a power to require information to be provided is more intrusive and controversial, though not unprecedented.[1] Since any evidence given to a Select Committee would be inadmissible in criminal proceedings, there could be no breach of the right against self-incrimination by it being provided. A concern about self-incrimination could not constitute a "reasonable excuse" for not complying with a summons (*R. v. Hertfordshire County Council, ex parte Green Environmental Industries Ltd* ([2000] AC 326).

24. However, as this Committee noted in its 29 March 2019 report on the "*Conduct of Mr Dominic Cummings*" at paragraph 29:

> "…the fact that something is privileged does not mean that saying it might not have consequences. A witness might reasonably have a legitimate concern that although the police could not use anything he or she said to a select committee directly, he or she might inadvertently give them information that would support their case, and which

[1] For examples of authorities with the power to compel the provision of information, see those marked with an "*" in Annex 1.

(once they knew of its existence) they could take steps to obtain from elsewhere through a channel that was not privileged."

25. Moreover, in *Shannon v United Kingdom*, the ECtHR found that compulsory powers in relation to extra-judicial enquiries could breach Article 6, irrespective of whether the information may be used in a subsequent criminal trial, if the information may be used in reaching a decision whether to prosecute (App. No. 6563/03 4 October 2005).

26. In these circumstances, careful consideration would need to be given in particular to any power to require a person to provide information that may incriminate them or expose them to criminal investigation or prosecution. A standard form of words used in other contexts in which there is a statutory power to compel evidence, and in particular where there is a power to compel the provision of information, is that, "A person shall not be compelled to give any evidence or produce any document which he could not be compelled to give or produce in civil proceedings in the High Court."

1 July 2021

Annex 1 – Examples of bodies with equivalent powers of compulsion

The tables below provide examples of bodies and authorities in the United Kingdom with powers to call for witnesses, documents and sometimes information. The powers of those listed in Part 1 are enforceable by reference to a criminal offence. The powers of those listed in Part 2 are enforceable via contempt of court proceedings.

Those bodies and authorities with powers to compel the provision of "information" are marked with an "".*

Part 1 – Criminal model

Body/Authority	Empowering statutory provisions
Local inquiries constituted under the Act	New Towns (Scotland) Act 1968, s. 43
Local inquiries	Local Government Act 1972, s. 250
Local inquiries	Local Government (Scotland) Act 1973, s. 210
Inquiries constituted under the Act	Land Drainage Act 1991, s. 69
Inquiries constituted under the Act	Merchant Shipping Act 1995, s. 68
Local inquiries constituted under the Act	Town and Country Planning (Scotland) Act 1997, s. 265
The Scottish Parliament	Scotland Act 1998, ss. 23-25
The Northern Ireland Assembly	Northern Ireland Assembly Act 1998, ss. 44-46
The London Assembly	Greater London Authority Act 1999, ss. 61-64
The Financial Conduct Authority*	Financial Services and Markets Act 2000, ss. 165-177
The Competition and Markets Authority*	Enterprise Act 2002, ss. 174-174E and ss. 193 and 201
Public inquiries	Inquiries Act 2005, s. 34
The Senedd	Government of Wales Act 2006, ss. 37-39
Senior coroners	Coroners and Justice Act 2009, para. 1 of schedule 5 and para. 6 of schedule 6
Local inquiries constituted under the Act*	Local Government (Democracy) (Wales) Act 2013, s. 49
The Northern Ireland Inquiry into Historical Institutional Abuse	Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013, ss. 9 and 16

Part 2 – Contempt of court model

Body/Authority	Empowering statutory provisions
The Parliamentary Commissioner for Administration (the "Parliamentary Ombudsman", whose role is combined with that of the Health Service Commissioner in the role of the Parliamentary and Health Service Ombudsman)*	Parliamentary Commissioner Act 1967, ss. 8 and 9
A referee or inspector holding an inquiry pursuant to ss. 31 and 32 of the Act*	Local Government Act (Northern Ireland) 1972, s. 32
The Local Government and Social Care Ombudsman (formerly the Local Government Ombudsman)*	Local Government Act 1974, ss. 29 and 34G
The Pensions Ombudsman*	Pension Schemes Act 1993, s. 150
The Letchworth Commissioner*	Letchworth Garden City Heritage Foundation Act 1995, s. 12 and paras 7 and 8 of Schedule 1
The Health Service Commissioner for England (whose role is combined with that of the Parliamentary Ombudsman in the role of the Parliamentary and Health Service Ombudsman)*	Health Service Commissioners Act 1993, ss. 12 and 13
The Welsh Children's Commissioner*	Care Standards Act 2000, ss. 74-75
The Scottish Public Services Ombudsman*	Scottish Public Services Ombudsman Act 2002, ss. 13 and 14
The Northern Ireland Commissioner for Children and Young People*	Commissioner for Children and Young People (Northern Ireland) Order 2003/439, arts. 20 and 22
Public inquiries	Inquiries Act 2005, s. 36
The Welsh Commissioner for Older People*	Commissioner for Older People (Wales) Act 2006, ss. 10-11
The Service Complaints Ombudsman for the Armed Forces*	Armed Forces Act 2006, ss. 340J-340K
The Northern Ireland Commissioner for Older People*	Commissioner for Older People Act (Northern Ireland) 2011, ss. 17 and 19
The Northern Ireland Ombudsman*	Public Services Ombudsman Act (Northern Ireland) 2016, ss. 31 to 33
Ecclesiastical courts and commissions exercising jurisdiction under this Measure	Ecclesiastical Jurisdiction and Care of Churches Measure 2018, s. 25
The Public Services Ombudsman for Wales*	Public Services Ombudsman (Wales) Act 2019, ss. 19 and 20

Annex 2 – Draft Bill

A

B I L L

TO

Create an offence of failure to comply with a summons issued by the House of Commons Committee of Privileges.

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 Obtaining evidence by Select Committees

(1) Upon receipt of a request from a Select Committee, the Chair of the House of Commons Committee of Privileges may, with the consent of that Committee given in accordance with the standing orders of that Committee, issue a summons on behalf of the House of Commons that requires the person to whom it is addressed to—

(a) attend the proceedings of a Select Committee, or

(b) produce any document to a Select Committee.

(2) A summons under subsection (1) must comply with the requirements set out in the Schedule of this Act.

(3) A person shall not be compelled by a summons under this section to give any evidence or produce any document which they could not be compelled to give or produce in civil proceedings in the High Court.

(4) Any person to whom a summons satisfying the requirement of subsection (2) has been issued who—

(a) refuses or fails to attend proceedings as required by the summons,

(b) refuses or fails, when attending proceedings as required by the summons, to answer any question concerning the subjects specified in the summons,

(c) deliberately alters, suppresses, conceals or destroys any document which they are required to produce by the summons, or

(d) refuses or fails to produce any such document,

is guilty of an offence.

(5) It is a defence for a person charged with an offence under subsection (1)(a), (b) or (d) to prove that they had a reasonable excuse for the refusal or failure.

(6) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding __ on the standard scale or to imprisonment for a period not exceeding __.

(7) Where an offence under this section which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—

(a) a director, manager, secretary or other similar officer of the body corporate, or

(b) any person who was purporting to act in any such capacity,

they, as well as the body corporate, are guilty of that offence and liable to be proceeded against accordingly.

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 2021.

S C H E D U L E

Requirements of a summons issued under section 1(1)

1 A summons issued under section 1(1) of this Act must be in writing specifying—

(a) the date on which the summons has been issued and the person who has issued the summons;

(b) the time and place at which the person is to attend and the subjects concerning which they are required to give evidence, or

(b) the documents, or types of documents, which they are to produce, the date and means by which they are to produce them and the particular purposes for which they are required to be produced.

2 A summons issued under section 1(1) of this Act must—

(a) explain the possible consequences of not complying with the summons, and

(b) record that a person shall not be compelled by the summons to give any evidence or produce any document which they could not be compelled to give or produce in civil proceedings in the High Court.

3 A summons under section 1(1) of this Act shall be served in the case of an individual —

(a) , by sending it, by registered post or the recorded delivery service, addressed to them at their usual or last known address or, where they have given an address for service, at that address,

(b) by sending it, by registered post or the recorded delivery service, addressed to the person at the person's registered or principal office, or

(c) by service on them in person.

4 A summons under section 1(1) of this Act shall be served in the case of body corporate at a registered address.