# Written evidence submitted by Mark Hutton

## Introduction

This paper is a contribution to the committee's consultation. Its structure broadly follows the list of questions in Chapter 5 of the committee's report, but it does not attempt to answer all of them.

At the heart of committee's inquiry is the question of whether a power which cannot be enforced is a power worth the name, or worth having. There is little challenge to the proposition that select committees should be able to obtain the information and testimony which they judge necessary to fulfil their responsibilities to the House and that that includes by the attendance of individuals. It is evident I think that co-operation with a select committee is widely accepted to be a public duty, the failure to perform which can cause reputational and practical damage.[1]

The huge expansion of select committee activity and influence in recent years has been achieved largely without explicit reference to powers.

Introducing a statutory provision to enforce the power to compel attendance or require the production of papers by making non-compliance a criminal offence would be a significant change to the character of select committee activity overall and might have unintended and unwelcome consequences.

The history of legislative efforts to address particular privilege issues has not been a notable success. It might be argued that the existence of legislation such as the Witnesses (Public Inquiries) Protection Act 1892 or the Perjury Act 1911 has had a salutary or even minatory effect on those who might wish to obstruct or punish witnesses or might be tempted to lie under oath, but no legal proceedings have ever been taken under either act. Similarly the infamous section 13 of the Defamation Act 1996 served only to foster the impression that Members were prioritising their own interests, was never successfully used and was repealed in 2015.

These objections would have less force if it was proposed to provide for the enforcement of powers as one part of legislation establishing an overarching modern statutory framework for parliamentary privilege. In that case the placing of committee powers within the wider regime of proper checks and balances might be an appropriate and effective solution.

The committee is much better placed than I am to assess the achievability of each of the options in its report and in particular of its preferred option, but it might be worth considering what can be done now and with the tools available alongside pursuing what new tools ought to be made available.

## The Questions

1. *What is the primary role of select committees and what should be the practical limits of the application of their powers?*

The primary role of select committees is the scrutiny of government and government agencies. In recent years one of the principal means of making that scrutiny effective has been to ensure that it is founded on the widest possible range of experiences and views. The scrutiny select committees (departmental and cross- cutting) have worked hard to broaden the field of

[1] Eg Rt Hon David Lidington when Leader of the House quoted by the committee in paragraph 32 of its report.

potential contributors to their inquiries, to get beyond the 'usual suspects' and bring in the voices of those with direct lived experience. An important part of that effort has been making engagement with committees and participation in their inquiries easier, less formal and less intimidating. This approach, championed, as it has often has been, by the personal commitment of elected chairs has been at the heart of the increased profile, reputation and influence of select committees.

It has been a success based on communication, encouragement and persuasion, not on powers.

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

No: I do not agree with the characterisation of the first option as 'do nothing'. If the committee and the House decide not to pursue either of the other two options (and I agree that the second option, 'reassertion of existing powers', would be little more than 'an empty gesture'), there is scope to build on the excellent public communications work of select committees and the Committee Office in recent years in order to further explain the value of select committee work, to position that work as key to providing the accountability and transparency in respect of government and other public activities which is essential to a functioning democracy, to emphasise that those with public responsibilities have a public duty to co-operate and assist with that work, and to contrast the approach of committees and Parliament with that of differently constituted inquiries which may be more appropriate forums for reaching judgement on the conduct of private individuals.

If it is concluded that the House needs to be able to conduct forensic inquiries of that character, and to have enforceable powers to compel attendance etc, it might be worth considering the German model under which the Bundestag can by motion appoint a committee of inquiry with enforceable powers.

3. *The draft bill*

It is the responsibility of Parliament and particularly of the House of Commons as the elected Chamber to scrutinise and where necessary challenge any proposal to grant a person or body legally enforceable powers over other citizens. Such powers should be the minimum necessary. They should always be accompanied by appropriate protections. In principle the protections should be commensurate with the powers, so legally enforceable powers should have legally enforceable protections.

I don't believe that the draft bill meets these requirements. The powers are not, in my view, necessary and the protections are not sufficient.

The draft bill seeks to limit the scope for a court to examine parliamentary proceedings by providing that it may consider 'the nature and purpose of the Committee's summons, but not any other aspect of the Committee's proceedings.' I am not clear what the scope of the phrase 'nature and purpose' is intended to be. The only summons seems to be that issued by the original committee. The 'gatekeeper' committee (the Committee of Privileges) and the House simply confirm that that summons was properly issued (or that it was not). Does 'nature and purpose' include, for example, the terms of reference of the relevant inquiry (which might justify the purpose) and what other evidence from what other parties the committee has sought (which might go to the nature of the summons) as well as the committee's dealings with the individual concerned? Is it intended to exclude the court from considering the conduct of the

Committee of Privileges in exercising its gatekeeper role or the content of any debate on the motion proposed in the House?

The committee's preference for the 'criminal offence' model over the 'contempt of court' model is at least in part because it believes that the latter would give the courts jurisdiction in relation to proceedings of select committees, as opposed to 'a degree of review over parliamentary proceeding when considering what sanctions to be imposed.'[2] It may be that in practice that is a distinction without a difference.

In a number of recent cases, courts have been willing to hear evidence about the substance of parliamentary proceedings (the motives of a Secretary of State in making a statement to the House, the purpose of the procedure for unopposed returns) even if they then go on to conclude that such evidence must be excluded from their considerations under Article 9. I doubt whether that would provide the level of protection for select committee proceedings which the committee is looking for.

As noted above, one of the great successes of select committees in recent times has been to lower the barriers to participation in their work. A central component of this success has been committees' freedom to work flexibly and to adapt their approach to best encourage participation, in short to minimise formality and 'due process'. Even if it was possible to identify from the outset which potential witnesses might need to be ordered to attend, treating some witnesses as liable to be compelled but others as free to participate on their own terms could be considered inconsistent with the principle of fair treatment for all. The possibility of criminal prosecution for not co-operating, however remote it may be in practice, is unlikely to encourage the hesitant or exposed to come forward. The price paid for the satisfaction of exerting a power in a few high profile cases (possibly to no very effective end - how would a committee compel a recalcitrant witness to answer their questions while still demonstrating due process?) may be the loss of the nervous, the excluded and the vulnerable whose personal testimony across the breadth of select committee activity has become so valued by members and chairs.

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

It is worth noting that without that extension, only the first option (the 'do nothing') option would ensure that members and non-members are treated equally in their dealings with select committees.

4. *The House's internal processes and commitment to fair process*

The committee's report asks how due process can be combined with the flexibilities of the current select committee system. The simple answer is that it cannot, at least not to the extent required. Due process, particularly if any dispute may end up in the criminal court, requires a

[2] Paragraph 110.

degree of formality, not least in preliminary exchanges and explanations, which is inconsistent with the preferred approach of many committees.

It would also require Members to behave differently. It is axiomatic that politicians are expected to have opinions (often strongly held opinions) on issues of the day, and are expected to set out and stand by those opinions. On the other hand a key feature of a fair hearing is that the arguments presented are considered objectively and on their own merits, all parties are treated on an equal footing, with equal respect and consideration, and the conclusions are clearly derived from the evidence, not from the prejudices or previously adopted positions of those holding the hearing. One of the strengths of the current committee system is that, by bringing together members from different parties with different views, when a consensus is reached it is more compelling for having overcome those differences.

By contrast, as the committee will be aware, members of private bill committees, which are quasi-judicial in nature, are required to sign a declaration that their constituents have no local interest, and that they have no personal interest in the bill, before they are entitled to attend and vote.

5. *Other issues*

The uncertainties around the ability of the House or its committees effectively to protect witnesses from actions which might taken against them on account of their evidence, by their employers or by others, has if anything a longer history than the issue of compelling attendance.[3] Recent examples include individuals who may be subject to non-disclosure agreements of various types and the disclosure of information which in other circumstances might be a criminal offence. Any proposal to introduce effective powers to compel attendance and/or the provision of information should also provide effective protections not only to those so compelled, but also to those who co-operate willingly.

Under SO No 152 the remit of the departmental select committees is to examine the expenditure, administration and policy of the principal government departments. For many years committees have interpreted this remit to allow them to investigate any issue they choose within (and sometimes beyond) the scope of that department's potential responsibilities. This freedom to set their own agendas and to consider issues substantively on their own merits rather than only through the prism of government action is much valued by committee members. Inquiries conducted on this basis have been among the most high profile and influential of recent years. It is very rare that a committee's interpretation of its remit is challenged by those who might come within the ambit of any inquiry. Although the Liaison Committee has a role in mediating any border disputes between committees, it is well understood that the interpretation of a committee's remit is a matter for that committee.[4]

If committees' power to send for persons and papers were to be bolstered by a statutory authority, the temptation to challenge a committee's remit in the courts might arise. If the committee pursues its currently preferred option, it would be worth considering whether any amendment to the standing orders would be advisable.

6. *Conclusion*

[3] Eg the experience of the Select Committee on Railway Servants (Hours of Labour) of 1892.
[4] May, para 38.11

Annex 1 to the committee's report lists the occasions since 2001 when committees have ordered the attendance of persons or the provision of papers. It is notable how few they are and that within them there is only one occasion on which the person summoned failed to comply. No doubt there are other occasions on which a committee decided that there would be no benefit in formally summoning someone who was refusing to attend. Non-compliance may be a more frequent problem now than it was in the past (although from my own memory it was a regularly discussed issue as far back as the 1980s). It may be that the absence of effective enforcement powers is more widely known than once it was. It may be that the higher public profile and greater activism of select committees, often led by their elected chairs, has increased the likelihood that they will find themselves confronting powerful or obstructive people. It must certainly be the case that any system which relies on threatening the exercise of powers it knows it cannot follow through on, in the hope or belief that those threatened will be unaware of that fact, is not one which has much to commend it. But there is no evidence that the problem poses an existential threat to the work or influence of select committees or that its solution requires the introduction of criminal penalties for non-compliance. On the contrary, introducing the sledgehammer of the criminal law into the sophisticated and flexible machinery of the current select committee system may well cause more harm than good.

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