Written evidence from the Clerk of the House of Commons (SCC0001)

Powers and select committees

The extent and enforcement of the powers of the House in relation to select committees and contempts

Memorandum from the Clerk of the House

1. Introduction and background

1.1. On 27 October 2016 the House resolved, That the matter of the exercise and enforcement of the powers of the House in relation to select committees and contempts be referred to the Committee of Privileges. The immediate circumstances which led to the passing of this resolution were your inquiry into the *Conduct of Witnesses before a Select Committee* and the House's agreement, on the basis of your recommendations, to admonish two of those witnesses; and concerns over two recent cases earlier in the year where it was possible that high profile witnesses might defy an order to attend a committee hearing.

1.2. In recent years this has not been considered a serious or regular problem or one that requires immediate remedy. You will be aware, however, of recent cases in addition to that which led to your inquiry. You may wish to seek the views of select committee chairs and of the Liaison Committee on whether they believe it to be a growing problem.

1.3. Although infrequent, when the issue arises it can have serious consequences for the committee concerned, for the inquiry it relates to and potentially for the House. It also highlights an underlying lack of clarity or certainty of process, which is itself increasingly difficult to justify. Processes, particularly processes which may lead to some form of sanction, should be certain, consistent and readily comprehensible to those subject to them.

2. Options

2.1. Although there is general agreement on the problem, finding a solution has proved harder. Following the Government's publication of a Green Paper on Parliamentary Privilege in 2012[1], a Joint Committee was appointed to consider and report on it (the 2013 Joint Committee). That committee discussed three options for addressing the perceived inability of the House to exercise its penal powers:

- To do nothing;
- To reassert the House's existing powers by amending Standing Orders or by Resolution; or
- To legislate to provide a statutory regime, whether administered by Parliament or the courts.

The first two of these options rely solely upon Parliament itself for a resolution of the problem; the third would conceivably involve the courts in some degree in the enforcement of Parliament's powers. These options are explored below.

[1] Cm 8318

Do nothing

2.2. In 1978, the House resolved that it its penal jurisdiction should be exercised (a) as sparingly as possible and (b) only when the House is satisfied that to exercise it is essential in order to provide reasonable protection for the House, its Members or its officers, from such improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with the performance of their respective functions.[2] Having agreed this approach, the House has found little cause since to exercise its powers. Although select committees have been identified as the arena where the House's powers are most likely to be tested, evidence has been taken from thousands of witnesses over the years without any difficulty. The delegated powers held by select committees, to require the attendance of witnesses and to send for papers and records, are clearly set out in Standing Orders. Problems arising from the refusal of witnesses to attend, or to provide information, are extremely rare.

2.3. There have, however, been a small number of instances where a committee has considered that it must insist upon access to certain information in order to function effectively and without obstruction.[3] In the majority of those cases, the individuals and organisations involved have complied with the committee's request. These instances would appear to support the view of those who argue that the House's powers, while exercised sparingly, remain effective.

2.4. The lack of clarity about "how far [the process of enforcing the House's powers] can be taken" [4] has encouraged a few individuals to test the effectiveness of these powers. As the 1999 Joint Committee on Parliamentary Privilege (the 1999 Joint Committee) noted, "unless a residual power to punish exists, the obligation not to obstruct will be little more than a pious aspiration."[5]

On the other hand, the continued effectiveness of the House's powers may be reinforced by public expectations that individuals and organisations should be willing to co-operate with and assist formal parliamentary investigations. Recent cases where witnesses have refused to co-operate with an inquiry, such as the joint inquiry by the Work and Pensions and Business, Innovation and Skills Committees into the collapse of BHS and the Business, Innovation and Skills Committee inquiry into working practices at Sports Direct, have received widespread media coverage.[6] While the effect in specific cases cannot be proved, the tone of the public commentary may on occasion have a bearing on the individual's subsequent actions. Both the committee concerned and the wider public would be likely to draw conclusions from any sustained refusal to co-operate with an inquiry.

2.5. The potential reputational consequences of a refusal to co-operate were described by the Leader of the House, Rt. Hon. David Lidington MP:

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[2] CJ (234) 170, 6 Feb 1978, by agreeing to recommendations from the Committee of Privileges
[3] For example, Culture, Media and Sport Committee, Formal Minutes, Tuesday 19 January 2010 http://www.parliament.uk/documents/commons-committees/culture-media-sport/cmsfm0910.pdf
[4] Report of the Joint Committee on Parliamentary Privilege HC 100 (2013-14) paragraph 49
[5] Report of the Joint Committee on Parliamentary Privilege HC 214-I (1998-99) paragraph 302
[6] See for example http://talkradio.co.uk/highlights/bhs-collapse-green-will-be-vilified-rest-his-life-if-he-avoids-select-committee-claims; https://www.theguardian.com/business/2016/jun/12/mps-penalties-philip-green-attend-inquiry; 'Sports Direct shares hit by Mike Ashley's bluster' at http://www.theweek.co.uk/67811/sports-directs-keith-hellawell-faces-shareholder-revolt/page/0/5.

" refusing to attend Select Committees as a witness or otherwise committing a contempt of Parliament itself causes reputational damage for the perpetrator. We should not underestimate that impact. Being designated as having committed a contempt of Parliament or having even been described as not a "fit and proper" person to hold a particular office or exercise a particular function can cause reputational damage to the individual and can also cause commercial damage to the organisations they represent."[7]

2.6. Both the Liaison Committee in 2012 and the 2013 Joint Committee, while recognising that the current system was not broken, concluded that action should be taken now to head off a potential crisis in the future. They accordingly rejected the option of doing nothing.[8]

Assertion of powers

2.7. The Liaison Committee in 2012 concluded that "a clear and realistic statement of [Parliament's] powers" was the minimum requirement for a solution.[9] The House might restate its powers by passing a Resolution which:

- affirmed the House's continuing powers to punish contempts;
- illustrated the types of action or behaviour which would be likely to amount to interference with the exercise of Parliamentary functions; and
- confirmed and clarified the House's Resolution of 6 February 1978, regarding the instances when the House would exercise its powers.

The 2013 Joint Committee proposed draft resolutions a) defining actions which may be treated as contempts and b) setting out the House's approach to the exercise of its penal jurisdiction (attached in annex).

2.8. The 2013 Joint Committee also proposed setting out in Standing Orders the procedures which committees and the House should follow in cases where the exercise of powers was contemplated. Establishing in Standing Orders those procedures which, the Joint Committee said, "in most cases, [were] already common practice" might provide assurance for witnesses and for the public that the procedures met modern standards of fairness.[10] The Joint Committee therefore offered drafts for new standing orders, which were annexed to its Report.

2.9. The Joint Committee believed that the exercise of Parliament's jurisdiction over contempt was "fundamentally, a test of institutional confidence" which required the two Houses to be confident and certain in the assertion of their existing powers and the circumstances in which they would be prepared to use them.[11] The Joint Committee favoured this option over the other options available, and urged the House to "rise to this challenge", re-asserting its historic jurisdiction and meeting the corresponding requirement to demonstrate the fairness of its procedures by explaining them clearly and publicly.[12]

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[7] During debate on the First Report from the Committee of Privileges ('Conduct of witnesses before a select committee: Mr Colin Myler, Mr Tom Crone, Mr Les Hinton, and News International', HC 662) on 27 October 2016. *[Official Report, 27 Oct 2016 cols 444-445]*

[8] HC 100 (2013-14) paragraph 61, citing HC 697 (2012-13) paragraph 134

[9] *Select committee effectiveness, resources and powers*, HC 697 (2012-13), paragraph 134

[10] HC (2013-14)100, paragraph 85

[11] HC (2013-14)100, paragraph 77

[12] HC (2013-14)100, paragraph 77

2.10. While neither House has formally considered the report or its recommendations, your actions and those of the House in passing a resolution formally admonishing Mr Colin Myler and Mr Tom Crone for misleading the Culture, Media and Sport Committee in relation to phone-hacking at News International were in line with the Joint Committee's recommendations. The procedures by which the specific case against Mr Myler and Mr Crone was examined were established in advance and were designed to comply with the principles of natural justice. However, although your report drew attention to the recommendations of the Joint Committee in respect of the conduct of proceedings in the House during consideration of reports on individual cases, you also noted that, because those recommendations had not been considered or accepted by the House, they were not enforceable.[13]

Statutory provision

2.11. Assertion alone can neither add to the existing powers of the two Houses nor require the compliance or co-operation of others (eg the police or the courts) in their enforcement. For that legislation would be needed.

2.12. The 1999 Joint Committee pointed out that the UK already had statutory provision relating to two specific types of contempt:

- The Witnesses (Public Inquiries) Protection Act 1892 created an offence of threatening or punishing any person on account of evidence given by them to a committee of either House, unless that evidence was given in bad faith, and provided for damages to be payable to the witness in certain circumstances.
- The Parliamentary Witnesses Oaths Act 1871, superseded by the Perjury Act 1911, created an offence of perjury before the House or a committee.

These are considered below (paragraphs 4.2 and 4.9).

2.13. There are difficulties with legislating to criminalise contempt. While categorising contempts would provide clarity in some cases, and enable specific offences to be prosecuted, it would be extremely difficult to define all those types of action or conduct which might obstruct, or appear to obstruct, the work of the House, its committees or members in their parliamentary duties. Actions which did not fall within the statutory definition of contempt could not be prosecuted by the courts; the House's own powers to act against the contemnor, if not effectively repealed by the passing of legislation, would remain at least as doubtful as they are now. Indeed, the 2013 Joint Committee noted that the transfer of authority over some contempts to the courts would be likely to increase doubt about the House's ability to deal with other types of contempt.[14]

2.14. A separate difficulty relates to the issue of jurisdiction over Parliamentary proceedings. The 2013 Joint Committee, reflecting on the Government's 2012 Green Paper, offered an example of an instance where the courts might be asked to determine whether an individual had committed a contempt by withholding information from a committee inquiry:

[13] HC(2013-14)100, paragraph 337
[14] HC(2013-14)100, paragraph 66

> Information might be withheld because it was not relevant, or because to give it would breach a duty of confidentiality, or legal professional privilege. As Nigel Pleming QC said: "it is fundamental to the working of both Houses that you have the fullest information with which to make your decisions" [Q48]. Currently Parliament and the courts each respect the other's right to decide what information is necessary in an individual case … Permitting the courts to decide whether a Committee should have access to certain information would be a significant reduction in exclusive cognisance. Indeed, in this area at least, it would destroy the concept of "two constitutional sovereignties" and replace it with an asymmetric system in which the courts had power to evaluate Parliamentary proceedings while Parliament was, quite properly, unable to interfere in individual cases before the courts.[15]

2.15. Rather than defining specific contempts in legislation, it might be possible to put a more general framework in place. In Australia, the Parliamentary Privileges Act 1987 made contempt of either House a criminal offence and empowered each House to fine or imprison individuals found to have committed such contempts. The process by which each House would consider a case of possible contempt is formally set out in a Resolution of the Senate, and in Standing Orders in the House of Representatives; the statute provides the courts with a limited power to review whether the conduct complained of "amounts to or is likely to amount to an improper interference" with the work of the House, its committees or members. The New Zealand Parliament has also recently passed a Parliamentary Privilege Act. The statute does not define either the privileges or the process by which the House should assert those privileges. The processes for treatment of witnesses are set out in Standing Orders. These arrangements would place the courts at one remove: Parliament determines whether a contempt has been committed and if it has imposes a penalty. But because the regime is statutory, the courts could be the final judges of the conduct of the parliamentary proceedings. The 2013 Joint Committee was opposed to this route also:

> Either the courts could review those processes, thus setting aside exclusive cognisance in such cases, or exclusive cognisance would render the statute unenforceable.[16]

2.16. A further option might be to empower the House to use the courts to enforce its Orders. Powers of this sort exist in the USA where, in addition to its inherent contempt power and a criminal contempt statute, Congress in 1978 enacted a statute which enables the Senate to bring a civil action in the US District Court for the District of Columbia to enforce, secure a declaratory judgment concerning the validity of, or to prevent a threatened failure or refusal to comply with any subpoena or order of the Senate or of a committee or subcommittee. The Senate may at its discretion ask the court either to directly order compliance with the subpoena or order, or to make a declaration concerning the validity of that subpoena or order. This second option provides a two-step process by which the party who is the subject of the subpoena or order is given an opportunity to comply before being directly ordered to do so by a court. If the party still refuses to comply they may be tried for contempt of the District Court, and imprisonment or a fine may be imposed until their compliance with the subpoena or order is secured. While this system

[15] HC (2013-14) 100 paragraphs 68-69
[16] HC (2013-14) 100paragraph 74

punishes non-compliance, it also creates an incentive for compliance; however, the process has limitations since it is inapplicable in the case of a subpoena issued to an officer or employee of the federal government acting in their official capacity.[17] If it would be helpful to your inquiry I would be willing to find out more about the operation of these congressional powers.

2.17. There are also examples within the UK, where tribunals which lack their own enforcement powers can apply to a higher court to act for them. Under such a system, if the House determined that an Order, for example to attend as a witness before a select committee, had not been complied with, the Speaker would certify in writing to the High Court to that effect. The court would then initiate proceedings against the individual, by issuing an order to that witness to attend the committee. If that order were refused by the witness, the court might then pursue the matter as a contempt of court.

2.18. A draft clause illustrating this proposal is annexed to this memorandum.

2.19. More fundamentally, doubts have been raised about whether it is appropriate for the House to pursue and to punish non-Members for contempt. The 2013 Joint Committee noted concerns that the processes involved in consideration of potential contempts should be in keeping with modern expectations of fairness. Particularly important in this respect is Article 6 of the European Convention on Human Rights, which provides that, in the determination of their civil rights and obligations or of any criminal charge against them, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[18] Unlike domestic courts, the jurisdiction of the European Court of Human Rights is not constrained by the provisions of Article IX of the Bill of Rights. It is competent, and has shown itself willing, to examine the internal proceedings of member state Parliaments. In 1991 the Court found that the proceedings of the Maltese Parliament against a non-member breached Article 6.[19] In 2016 they arguably went further in a judgment in respect of the actions of the Hungarian Parliament against two of its members stating that:

> … parliamentary autonomy should not be abused for the purpose of suppressing freedom of expression of MPs, which lies at the heart of political debate in a democracy. … The Court attaches importance to protection of the parliamentary minority from abuse by the majority. It will therefore examine with particular care any measure which appears to operate solely, or principally, to the disadvantage of the opposition.[20]

3. Sanctions

3.1. The sanctions which might be available, or have in the past been considered to be available, to the House in dealing with non-Members fall into three categories: admonishment, fining and imprisonment. Of these, only admonishment has been employed in the last hundred years. Additionally, and separately, the House does have the power (through the Serjeant) to

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[17] *Congress's contempt power and the enforcement of congressional subpoenas: law, history, practice, and procedure*, Todd Garvey and Alissa M. Dolan, Congressional Research Service May 2014, pp23-26

[18] HC (2013-14) 100, paragraph 51]

[19] Demicoli v Malta, Judgment given on 27 August 1991

[20] Karácsony and others v Hungary, Judgment given on 17 May 2016

take into custody persons who misconduct themselves within the precincts. This power is used and useful, in addition to the powers of the police, within the parliamentary precincts.

Admonishment

3.2. This was considered by yourselves and by your predecessors in the successive inquiries into evidence given to the Culture, Media and Sport Committee to be 'the only sanction to be contemplated in the event that [the] inquiry resulted in a finding of contempt.'[21]

3.3. Traditionally admonishments have been delivered by the Speaker to an individual who has been required to attend at the Bar of the House. The admonishments to Mr Crone and Mr Myler were the first to non-Members to be made by the House agreeing to a resolution without their attendance.[22]

3.4. The consequences of an admonishment for the person admonished will vary according to circumstances, and may be unclear in advance. In evidence to the Standards and Privileges Committee in connection with its inquiry into Phone Hacking in 2011, Lord Nicholls stated:

> I find it very difficult to see how the House has any effective remedy here and I do wonder, going through with a full and thorough investigation, where it can lead. You can rap the editor of a newspaper over the knuckles and admonish him, which will not give him the loss of a wink's sleep, but there is nothing else, as I understand it, that, effectively, you can do[23]

On the other hand, as noted above, the Leader of the House has argued that admonishment could have a considerable reputational (and in some cases, financial) impact.[24]

Impact

3.5. Although the nature and extent of any impact will depend on factors specific to the individual case, some of which may be outside the control of the House, you may wish to consider what the purpose or purposes of admonishment should be. There are, I suggest, three options: punishment; deterrence; assertion of the status of the proceedings.

3.6. In respect of all three, the amount of publicity given to cases of admonishment is likely to have a determining effect on the impact. You might want to consider to what extent the House service should be involved in promoting coverage of individual cases. It is perhaps worth noting that, in the most recent case, there was significantly more coverage in national media of the outcome of your inquiry than there was of the debate and resolution in the House. I conveyed the House's Resolution to the two individuals involved by letter, but have no way of knowing the impact.

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[21] HC 662, Session 2016-17, paragraph 330

[22] Mr Tom Crone, Legal Manager at News Group Newspapers Limited and News International and Mr Colin Myler, editor of the News of the World 26 Jan 2007- July 2011, were formally admonished by the House on 27 October 2016. The House agreed a resolution approving the First Report of the Committee of Privileges (HC 662, Session 2016-17). In the past Members have received a reprimand or admonition from the Speaker in the Chamber (CJ (1967-68) 362. More recently Members have been reprimanded by resolution of the House rather than being censured standing in their place or at the Bar (CJ 1994-95, 286).

[23] HC 628, Session 2010-12, Q56, quoted at paragraph 59

[24] *Official Report*, 27 Oct 2016 cols 444-445

Fines

3.7. It is generally considered that the House of Commons does not nowadays have the power to fine non-Members. It last did so in 1667, and doubts about its continued competence to do so were expressed as early as the following century.[25] The 1999 Joint Committee regarded the power as lapsed.[26] The 2013 Joint Committee, however, raised the possibility that it could be revived. As part of its argument that the two Houses should reassert Parliament's existing penal powers, it noted that desuetude is not a legal doctrine in England and Wales and that the power to fine had been recently asserted and used in New Zealand.[27] The New Zealand example is relevant because the New Zealand Parliament was, by the Legislature Act 1908 vested with the powers and privileges enjoyed by the House of Commons on 1 January 1865.[28] Since then the New Zealand Parliament has repealed the Legislature Act 1908 and passed the Parliamentary Privilege Act 2014 which, among other provisions, establishes a statutory power to fine in cases of contempt. The fine must be imposed by resolution of the House and may not exceed $NZ 1,000.[29]

3.8. The 1999 Joint Committee believed that there should be a power to fine non-Members, but did not believe that that power could be exercised by the House:

> We do not think it practicable for Parliament to provide, and be seen to provide, the procedural safeguards appropriate today when penalising persons who are not members of Parliament. … Despite the weighty arguments of principle and the break with tradition involved, we have been constrained to conclude that for practical reasons punishment of non-members for contempt of Parliament should in general now be transferred to the courts.[30]

Imprisonment

3.9. The House of Commons has not exercised its power to imprison (as opposed to taking into custody) since 1880. The 1999 Joint Committee recommended that it should be abolished.[31] The 2013 Joint Committee on the other hand noted that the mechanisms for committal by warrant from the Speaker to the governor of a prison had not been rescinded. The Australian Parliamentary Privileges Act 1987 provides that either House may impose on a person a penalty of imprisonment for a period not exceeding 6 months for an offence against that House.[32] As far as I am aware that power has not been used.

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[25] May, p 196 and fn 76
[26] HC (1998-99)214-I, paragraph 272
[27] HC (2013-14) 100, paragraph 77
[28] HC (2013-14) 100 oral evidence Q124 at http://www.parliament.uk/documents/joint-committees/Parliamentary-Privilege/Virtual%20Volume%20II%20-%20All%20evidence.pdf; section 242 of the New Zealand Legislature Act 1908 http://www.legislation.govt.nz/act/public/1908/0101/12.0/DLM168675.html
[29] Section 22 of the New Zealand Parliamentary Privilege Act 2014 http://www.legislation.govt.nz/act/public/2014/0058/latest/whole.html#DLM6136743
[30] HC (1998-99)214-I, paragraph 306
[31] HC (1998-99)214-I, paragraph 303
[32] Section 7.1

4. Other issues

Evidence taken on oath

4.1. Select Committees rarely take evidence on oath because, in most cases, relations between witnesses and a committee are constructive rather than adversarial; and even without the administration of the oath, giving false evidence or misleading a committee would be a contempt of the House.

4.2. The Parliamentary Witnesses Oaths Act 1871 gave select committees of the House of Commons the power to administer oaths to witnesses, and provided that a witness who gave false evidence under oath would be liable to the penalties of perjury. The provision for penalties was subsequently repealed by the Perjury Act 1911 – a consolidation Act which was not intended to make substantive changes in the law. It has therefore been assumed that a witness found guilty of giving false evidence under oath to a committee would be subject to the penalties in the Perjury Act 1911. However, there appear to have been no prosecutions for perjury in respect of parliamentary proceedings since the passing of the 1911 Act and there are several difficulties in relying on the Perjury Act to protect select committees from false evidence:

- The decision to pursue a case would fall to prosecuting authorities outside the House rather than with the House or the Committee itself;
- The Committee's conduct in respect of the witness would be open to scrutiny and it is questionable whether current select committee practice would meet the requirements for fairness to secure a conviction;
- For a successful conviction under the Perjury Act 1911 the statement in question must not only be false, but also 'material' in the proceeding[33]: the court, not the select committee, would make that judgement;
- The court would have to examine Parliamentary proceedings in order to try a case of perjury. It is unclear to what extent the provisions of the 1911 Act amount to a repeal of Article IX to the extent required to enforce its provisions, although Erskine May and others assume that there is an implied repeal because of the legislative history of the provision.

4.3. There would be significant reputational risks for the House and select committee if the relevant authorities declined to pursue a case, or if a prosecution failed once embarked upon, particularly if the cause of that failure were shown to be due to a deficiency in the House's or Committee's procedures or conduct.

Powers in respect of Ministers and others

4.4. Select committees, other than the Committee on Standards[34] and the Committee on Privileges[35], do not have the power to summon Members of the House of Commons. If a Member refused to appear as a witness, a select committee could report the

[33] Section 2(1)
[34] Under Standing Order No. 149(9)
[35] Under Standing Order No. 148A(6)

matter to the House. It would be for the House to decide whether any further action should be taken against the Member concerned. The House has not ordered a Member to attend a select committee since the establishment of the modern departmental select committee system. Neither a committee nor the House as a whole has the power to summon a member of the House of Lords.

4.5. Thus Ministers, as Members of the House or of the House of Lords, may only be invited to attend a committee. Ministers have an explicit duty to Parliament, set out in the Ministerial Code, to account for the policies, decisions and actions of their departments and agencies; and to provide accurate and truthful information to Parliament.[36] The Ministerial Code also places a duty on Ministers to require civil servants to be 'as helpful as possible' in providing evidence to parliamentary committees. The obligations of Government departments to provide information to, and attend select committees are set out in successive iterations of the Cabinet Office guidance, known as the 'Osmotherly Rules'.[37] The Rules, together with the Civil Service Code[38], provide guidance to civil servants on their relationships and responsibilities with regard to select committees. However, the Rules have not been endorsed by Parliament.

4.6. The Rules make clear that civil servants are accountable to Ministers who in turn are accountable to Parliament.[39] In most cases, therefore, civil servants give evidence to a Select Committee as representatives of their Ministers. Accounting Officers have a personal responsibility to Parliament, through the Public Accounts Committee, to account for the stewardship of the department's resources.[40] The Senior Responsible Owners[41] of major projects may also be called to account for the implementation and delivery of the projects for which they are responsible.[42] Ministers are accountable to Parliament and in most cases will readily agree to appear before an appropriate select committee.

4.7. It is in the nature of select committee inquiries that relations with Ministers and civil servants are usually robust but cordial. It is when things go wrong and Ministers, civil

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[36] Section 1.2, *Ministerial Code*, Cabinet Office, December 2016 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/579752/ministerial_code_december_2016.pdf

[37] *Giving Evidence to Select Committees: guidance for Civil Servants*, Cabinet Office, October 2014 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364600/Osmotherly_Rules_October_2014.pdf

[38] *The Civil Service code*, https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code. Under Section 5 of the Constitutional Reform and Governance Act 2010 the Minister for the Civil Service must publish a code of conduct for the civil service.

[39] *Giving Evidence to Select Committees: guidance for Civil Servants*, Cabinet Office, October 2014, paragraph 4

[40] *Giving Evidence to Select Committees: guidance for Civil Servants*, Cabinet Office, October 2014, paragraph 6

[41] Senior Responsible Owner for Major Projects is defined in the Government's Major Project Portfolio https://www.gov.uk/government/collections/government-major-projects-portfolio-senior-responsible-owners

[42] *Giving Evidence to Select Committees: guidance for Civil Servants*, Cabinet Office, October 2014, paragraphs 25-30.

servants or select committees are under additional pressure that the interpretation of the rules and their precise boundaries will come under additional scrutiny. The Liaison Committee has considered the Osmotherly Rules and the relationship between Ministers and Parliament fairly recently, as did the Joint Committee on Parliamentary Privilege in 2013,[43] but as new practice and procedures are introduced by select committees it may be time to do so again.

4.8. Both Houses have passed resolutions setting out the accountability of Ministers to Parliament.[44] Broadly the Resolutions reflect the terms of the Osmotherly rules without endorsing them, while at the same time making clear what the House expects of Ministers, rather than what the Prime Minister or the Government does.

Contempts against witnesses

4.9. The extension of the protection of Article IX to non-members appearing before select committees has been tested on several occasions. In 1891 the Montgomery stationmaster, John Hood, gave uncomplimentary evidence about the Cambrian Railway to a committee investigating the conditions of railway workers.[45] Mr Hood was dismissed by the company. The House found the directors of the company had committed a contempt and admonished them at the Bar of the House, but it found itself unable to provide Mr Hood with any other recompense.[46] The following year the House passed the Witnesses (Public Inquiries) Protection Act 1892[47], which provided a mechanism to compensate a witness that had suffered as a result of providing evidence.[48] Despite that legislation, which appears never to have been used, witnesses before select committees have, on occasion, suffered as a result of their actions and the House has been unable, or unwilling, to enforce restorative action. The 1892 Act may have been considered to be unsatisfactory since it relies upon the witness him or herself to bring a case complaining of "any loss of situation, wages, status, or other damnification or injury suffered", in consequence of the evidence they gave to an inquiry, in order for the contemnor to be punished and for the court to consider the award of damages.[49]

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[43] *Select committee effectiveness, resources and powers*, HC 697, Second Report of Session 2012-13; *Legacy Report*, HC 954 [incorporating HC 774, Session 2013-14], First Report of Session 2014-15; *Parliamentary Privilege*, HL paper 30, HC 100, Report of Session 2013-14.

[44] LJ (1996-97) 404 and CJ (1996-97), 328, reaffirmed in the Commons the following Session: CJ (1997-98) 667. For the Speaker's statement on how Ministers' adherence to their obligations under the resolution could be enforce, see HC Deb (2001-02) 375, col 971.

[45] Special report of the Select Committee on Railway Servants (Hours of Labour), HC 125 (1892)

[46] CJ (1892) 166-167. Three Directors of the Cambrian Railway Company, together with the Member of the House, who had passed the evidence to the Directors, were called to appear at the Bar of the House and informed that they were considered to have committed a breach of the privilege of the House in their action towards John Hood. The House debated a motion calling for the Directors to be admonished. Two amendments were moved to the main Motion calling for Mr Hood to be reinstated or recompensed. Neither amendment was successful and therefore the Directors were admonished for their breach of privilege, but Mr Hood received no satisfaction.

[47] The Bill was initially introduced as the Witnesses (Royal Commissions and Parliament) Protection Bill. The Bill was committed to Select Committee, which extended the scope and amended the title accordingly.

[48] Section 4.

- In 1974, the Committee on Nationalised Industries relied on evidence given by an employee of the National Coal Board, Mr Grimshaw, in criticising the Board's policy on buying powered roof supports for underground mines. Mr Grimshaw was promptly made redundant. The select committee drew the matter to the attention of the House.[50] Two years later the Committee of Privileges effectively came to a not proven verdict and Mr Grimshaw received no compensation.[51]
- In 1988, an accountant working for Birmingham Council took a leading role in opposing a Private Bill the council was promoting in Parliament to allow a Grand Prix to be held on the streets of Birmingham.[52] He was moved to an unwelcome job in debt collection and complained. Again, the Committee of Privileges found what it called a "technical contempt" and did nothing.

4.10. A more recent case involved Judy Weleminsky, a Board member of the Children and Family Court Advisory and Support Service (CAFCASS). Ms Weleminsky criticised CAFCASS in evidence to the Constitutional Affairs Committee. She, and the other Board members, were invited to resign as the department had chosen to establish a new Board. Ms Weleminsky refused to resign and the decision was taken to seek to dismiss her from the Board. The documentation supporting that decision gave the impression that her evidence to the select committee contributed to the decision to seek her resignation from the Board.

4.11. The Committee on Standards and Privileges criticised the lack of understanding of parliamentary privilege on the part of the Lord Chancellor and senior officials and concluded that "The difficulties which have arisen in this case might have been avoided if parliamentary privilege had been at the fore-front of the minds of all concerned, rather than at the back".[53]

Treatment of witnesses/fair process

4.12. Relations between witnesses and select committees are usually constructive and cooperative. On occasion, however, the relationship can be combative or even hostile, particularly if a witness has been reluctant to appear. The treatment of witnesses should be of concern both because it is self-evidently right that an individual should be treated fairly and also because any subsequent action in respect of the evidence given by that witness, whether through the courts or within Parliament, is likely to consider the treatment of that witness.

4.13. The work of select committees can be high profile and in recent years there have been a number of instances when committee evidence sessions have become the focus of media attention. This can be particularly true when a committee

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[49] C.4, 55&56 VICT, Witnesses (Public Inquiries) Protection Act 1892, s.4
[50] Select Committee on Nationalised Industries, Second Special Report (HC 237) (1974-75))
[51] Committee of Privileges, Third Report (HC 274 (1975-76))
[52] Mr Anthony Dagnan had acted as Agent for a Petition against the Birmingham City Council (No. 2) Bill. The Matter was referred to the Committee of Privileges, CJ (1988-89) 377
[53] *Privilege: Protection of a Witness* Fifth Report Session 2003-04, HC 447, paragraph 58.

examines issues at the interface between private individuals or companies and ministerial or departmental responsibilities. It is on these occasions when the tension between witnesses and committees can be more acute.

4.14. Commonly, the comparison is made with judicial hearings and the conduct of courts in dealing with witnesses. However, select committees act in a political rather than judicial context and it should not be expected that a committee will be bound by the same rules as apply in a court when faced by a recalcitrant witness. Nevertheless, the reputation of select committees and the House as a whole could be at risk is if a witness were seen to be treated in an unfair or unreasonable manner.

4.15. In your report on the *Conduct of witnesses before a select committee* you commented on the need for clear questions and fair treatment of witnesses and drew attention to the draft Standing Orders appended to the report of the 2013 Joint Committee. Those draft Standing Orders attempted to codify the rights of witnesses, including access to information prior to an evidence session, conduct of the evidence session, objections to answer, and witnesses' rights in relation to evidence containing allegations (including a right to Maxwellisation of reports).[54] They can be read as a checklist of the circumstances in which a witness could reasonably claim to have been treated unfairly. But, as Standing Orders, they would introduce a rules-based and inflexible approach which might not serve either witnesses or committees well. An alternative, which might work better in parliamentary environment, would be to adopt principles-based guidance endorsed through a resolution of the House, with the drawing up of more detailed rules devolved to the Liaison Committee.

5. Conclusion

5.1. If there was a straightforward solution to the issues raised by the exercise of select committee powers, it would no doubt have been adopted years ago. The 1999 and the 2013 Joint Committees produced very similar diagnoses, though each proposed a different cure. Successive Liaison Committees have expressed varying degrees of concern. The fear is always that a particular crisis will reveal that the Emperor has no clothes and that the consequent damage to committees' ability to scrutinise public policy and hold the Government and other public bodies to account will suffer far-reaching damage.

5.2. That this has not so far happened does not mean that it will not or cannot in future. On the other hand, when it has come down to it, the Emperor has in fact proved to be quite effectively attired, not perhaps with the historic powers to take into custody or to commit individuals, but with other softer, but sometimes equally persuasive, means: the pressure of public opinion; the requirements on individuals to demonstrate that they are 'fit and proper persons'; the risk that failure to co-operate will be interpreted against them.

[54] 'Maxwellisation' is a procedural practice which derives its name from litigation in the early 1970s involving Robert Maxwell. It is the practice whereby a person who faces criticism in a public report is given an opportunity to respond to such criticism prior to publication of the report.

5.3. As you and others have noted, there are steps the House and committees can take to make their procedures and processes clearer and fairer to those subject to them. These would be worth doing whether or not they reinforced the pressure on others to co-operate, which in practice I believe they would also do.

5.4. Substantive changes however are likely to require legislation. I have described several options in this paper: criminalising contempt, providing statutory authority for current powers, using the courts to enforce orders of the House. There are no doubt others. They each draw the courts into considering parliamentary proceedings to a greater or lesser extent. For some that is enough reason to oppose them.

5.5. Before reaching conclusions I expect you will wish to consider the views of others, such as select committee chairs. You may wish to consult colleagues in the House of Lords: the 2013 Joint Committee stated: 'If the House of Commons were to adopt our proposals on how its penal jurisdiction should be exercised, we would expect the House of Lords to adopt similar procedures, adapted to the conventions prevailing in that House, in due course' (para 79). I and my colleagues are, of course, at your disposal for any further assistance you may require.

ANNEX: Illustrative draft clause demonstrating how the House might use the courts to enforce Orders to attend a select committee (see para 2.18) above).

Failure to attend Commons Select Committee

(1) This section applies if the Speaker of the House of Commons certifies that an individual—

(a) was summoned by a Select Committee of the House of Commons to attend the Committee to answer questions or to provide information or documents, and

(b) has failed to attend, or to answer questions or to provide information or documents.

(2) The Speaker may certify in writing to the High Court that the individual has failed to comply with the summons.

(3) Where a failure to comply is certified under subsection (2), the court—

(a) shall inquire into the matter, and

(b) may make an order, or

(c) may deal with the individual as if for a contempt of court.

(4) The court may act under subsection (3)(b) after hearing—

(a) any witness who may be produced on behalf of the Committee,

(b) any statement that may be offered on behalf of the individual, and

(c) any witness who may be produced on behalf of the individual.

(5) The court may consider the nature and purpose of the Committee's summons and proceedings for the purposes of determining what action (if any) to take under subsection (3)(b) (but not for any other purpose, and this section does not diminish or qualify any existing right or privilege of the House of Commons).

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