Written evidence from Richard Gordon QC (SCC0003)

Pt 1: Introduction

1. This Memorandum is structured as follows. The remainder of Pt 1 sets out my qualifications in constitutional matters generally and, specifically, my expertise on the subject of select committee powers.[1] Pt 2 contains an Executive Summary of my views in respect of the four questions identified by the Committee of Privileges ('the Committee'). Pts 3-6 set out my reasoning in relation to each of these questions in turn.

2. I am a Queen's Counsel practising in administrative law and fundamental rights with a predominant focus on constitutional law. In that respect, for example, I advised the Electoral Commission in relation to the 2016 EU Referendum. I was also Leading Counsel for Wales in the recent high-profile 'Brexit case' decided earlier this year by the Supreme Court *(R (Miller) v. Secretary of State for Exiting the EU)*. I have acted for each of the main political parties (including UKIP) in relation to constitutional issues. I have frequently given evidence to select committees on constitutional questions and in 2014 I was appointed as a special adviser to the Public Administration Select Committee (as it then was) in relation to its inquiry into civil service impartiality.[2]

3. I have written several papers on constitutional issues including, most relevantly for the Committee, *'Select Committee Powers: Clarity or Confusion'* (co-authored with Amy Street and published by the Constitution Society in 2012). Our analysis was adopted by the then Clerk of the House of Commons Sir Robert Rogers (now Baron Lisvane) and he kindly acknowledged the influence of our paper on his thinking in his evidence to the Liaison Committee on select committee powers in 2012.

4. My preferred approach to the questions posed by the Committee is anecdotal. Since co-authoring the paper on select committees in 2012 my practice has included advising witnesses who are required to appear before select committees. The same questions arise time after time and suggest that the present set of arrangements could usefully be improved. However, they also suggest that wholesale reform carries with it dangers that it would be wise to avoid unless and until they have to be confronted.

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[1] A more detailed cv is provided on my website at Brick Court Chambers www.brickcourt.co.uk/

[2] *'Lessons for Civil Service impartiality from the Scottish Referendum'* Fifth Report of Session 2014-15.

Pt 2: Executive summary

5. The Committee has identified four questions on which it welcomes views:

   (i) What are the benefits and drawbacks of the options for change? Is change necessary ('Question 1')?

   (ii) What are appropriate sanctions for non-compliance or other contempt on the part of witnesses? How should these be applied ('Question 2').

   (iii) What protections or safeguards are necessary for witnesses within either a changed or the current system ('Question 3')?

   (iv) Are there any other issues which the Committee should consider ('Question 4')?

6. As to Question 1, there are clear benefits in clarifying the powers and procedures of select committees. Doing nothing leaves the present somewhat illogical set of arrangements in place. Not only do these arrangements lack adequate safeguards for witnesses and third parties, they can also detrimentally the work of select committees thereby operating to prevent some inquiries from being as effective as they might otherwise be. Real and difficult questions arise as to whether change should be by way of legislation involving the courts or whether the current standing orders need to be rationalised, more carefully drafted and made clearer. However, some form of change is necessary. Incremental change rather than wholesale reform may be the better way of making progress that can later be consolidated.

7. As to Question 2, Devising appropriate sanctions for non-compliance or other contempt is, necessarily, dependent on the nature of the body imposing the sanctions. A scheme whereby the House imposed sanctions that affected fundamental or other constitutional rights is, in my view, fraught with risk and runs the danger of unwelcome court involvement. There is much to be said for, at least initially, the creation of a clear and reformed process whereby formal admonishment with attendant publicity would automatically be imposed by the House following if certain and easily understood conditions were satisfied. My experience suggests that this would be an improvement on the present uncertainty that prevails but would not place Parliament and the courts in tension with each other. This could be achieved by reform of standing orders and a resolution of the House. Only legislative reform could achieve sanctions such as fine or imprisonment but the reform that would be needed would probably have to be rather wider than simply creating new criminal offences. It would also be likely to involve the courts more in scrutinising the conduct of Parliamentary proceedings which would create undesirable tension with Article IX of the Bill of Rights.

8. As to Question 3, witnesses appearing before select committees need, even under the current system, greater clarity. Identifying a contempt of Parliament is, at present, not at all easy. There are no criteria that I have found other than those referred to in the 1998-9 Inquiry chaired by Lord Nicholls.3 It is therefore very difficult for witnesses to know whether, and if so when, they may reasonably refuse to answer a question. It is no answer to say that witnesses must respond to every question since this may place a witness in an impossible position. Nor is it an answer to say that witnesses are covered by parliamentary privilege since the cloak of parliamentary privilege neither protects third parties not appearing before committees and may not protect a witness from offending against the law of the land even if not liable to criminal penalty. Nor does Parliamentary privilege necessarily prevent against a violation of fundamental rights. If the current system were to be changed, much would depend upon the changes. For example, if the House were itself to be able to impose sanctions, then a hearing before the House would have to comply with the guarantees accorded by Article 6 of the European Convention on Human Rights ('ECHR').

9. As to Question 4, if any option other than incremental change were to be adopted it would be necessary to consider more wide-reaching questions. In particular, the relationship between fundamental rights and parliamentary process would need to be legislated for (whether in terms of new standing orders or primary or secondary legislation). This would have to embrace the rights of third parties not appearing before select committees as well as witnesses appearing before such committees.

Pt 3: Question 1 – options for and desirability of change

10. I would suggest that the Committee look at the question of change quite broadly. It ought not simply to be a question of enforcing contempt violations and/or ensuring that contempt does not occur or frustrate a select committee's work. A narrow approach of that kind begs too many questions that need to be resolved by clearer processes. What is a contempt of Parliament? Who decides? What, if any, limits are there to the questions that may be asked? What respect must select committees pay to the fundamental rights of witnesses and third parties alike?

11. In order to function properly and to maximum effect those appearing before select committees need to understand that there are limits to what they may be asked as well as procedures in place to ensure that they may not behave unreasonably without being sanctioned. There is a necessary relationship between the limits that need to be placed upon the kind of questions that a select committee may ask a witness as well as the obligations that lie upon a witness where appropriate questions are asked.

[3] Joint Committee on Parliamentary privilege session 1998-9.

12. The present situation is unsatisfactory. I am frequently asked to define a contempt of Parliament for potential witnesses so that they have a clear idea when they must answer questions put to them. I find myself unable to answer the question. There is no accessible definition of the nature of a contempt of Parliament, or when questions may reasonably not be answered or where questions are inappropriate.

13. Nor does the decision as to whether an act or omission constitutes contempt rest with a select committee. As I have understood the position, the select committee may consider that an act or omission amounts to a contempt but has then to prepare a report for the Committee of Privileges which, in turn, makes a recommendation to the House.

14. There is an element of Kafka in all this, at least from the perspective of a practising lawyer. As if this were not unsatisfactory of itself, there is uncertainty as to what powers the House has in the face of an act or omission that it considers may constitute a contempt.

15. This lack of clarity has adverse knock-on effects as far as: (i) the select committee, (ii) witnesses, (iii) third parties affected by evidence given before select committees, (iv) the work of select committees, (v) the legitimacy of the House's consideration of whether contempt has taken place and (vi) the relationship between Parliament and the courts are concerned.

16. I would be happy to spell this out in more detail in oral evidence. However, put simply, if select committees believe, as I infer some do, that they may ask any question without limits and that parliamentary privilege is sufficient protection for witnesses and third parties, such committees will not secure all the information that they need and will be met with recalcitrant witnesses. Third parties may, in extreme cases, seek to test the boundaries of the Bill of Rights and bring court challenges to particular select committee proceedings. The House will be brought into disrepute if it is seen as toothless in the face of real contempt but may equally provoke a court challenge if it seeks to punish a contempt by historical sanctions such as a fine or imprisonment.

17. It seems to me, therefore, that the need for change is undeniable. Yet caution should be urged. There the more that powers are strengthened in a way that may affect fundamental or constitutional (i.e. legal rights) the more is there a real prospect of conflict with the courts or of courts scrutinising what happens before a select committee in order to determine its compliance with hypothetical legislation. In my view, neither risk is worth running.

18. My view is that the changes that are necessary are, primarily, ones of clarity. The powers of select committees, the questions they may ask, the sanctions that may be imposed need to be spelled out. But they should be spelled out by Parliament in standing orders and/or resolution of the House. The sanctions should, at least initially, be ones

that it is uncontroversial in the modern age that Parliament may impose. Such sanctions should not affect the fundamental or constitutional rights of witnesses or third parties.

19. The advantages of such an approach are threefold.

20. First, witnesses will know where they stand. They will know that if they fail to comply with reasonable conditions specified in standing orders they will (not may) be liable to sanction.

21. Secondly, members of a select committee will know the ground-rules. They will know that there are limits to what they may ask but equally that there are clear powers at their disposal if the witness fails to comply.

22. Thirdly, such changes will avoid the risk of tension, even constitutional clashes, between Parliament and the courts. Such changes will also have the merit of enabling stock to be taken of the improvements have resulted and whether or not further changes are needed.

Pt 4: Question 2 - sanctions

23. This Question answers itself once the analysis in Pt 3 is borne in mind. An appropriate sanction is one that may fairly and legitimately be applied without creating a tension or conflict between the courts and Parliament.

24. Some may feel that the appropriate sanction is a monetary penalty or imprisonment. Yet a moment's thought reveals why this is to move too soon and too fast. The fact that Parliament has not imposed a fine or imprisonment for hundreds of years whilst the select committee system has gone from strength to strength strongly suggests that such draconian measures are not necessary.

25. Yet, even if a case could be made out for the introduction of sanctions of this kind, the potential consequences need to be very carefully considered. There is a 'catch-22' in adopting either a legislative or Parliamentary solution to the question of monetary or custodial sanction.

26. A legislative solution would have the effect that a court could be required to investigate what had occurred in proceedings before a select committee where the question of contempt was raised. Such proceedings are now invariably on Parliament livestream and so the unedifying spectacle of the courts in the Strand looking at proceedings in Westminster would be highly likely. Yet, select committee proceedings are 'proceedings in Parliament' and protected from being questioned in any place outside Westminster.

27. True it is that legislation would permit precisely this but it seems to me that there would for the first time be a cultural proximity between a court and Parliament that would make it much easier for courts in future cases to cross a borderline by treating what happens in Parliament as a variant of that which falls within the remit of the courts.

28. It also seems to me to be the position that some politicians have a mistrust of judges and see them as interfering with the work of Parliament. The introduction of judicial oversight into select committee proceedings would in my view tend to exacerbate this mistrust. I have long advocated the need for dialogue between Parliament and the senior judiciary. The former Lord Chief Justice Lord Judge was keen to improve this even if his successor Lord Thomas (shortly to retire) has, with his unprecedented, very explosive public criticism of the Lord Chancellor for not defending the judges, made things (in my view) more difficult.[4] However, the simple point here is that creating legislation that open up select committee proceedings to judicial scrutiny needs very careful thought before it is introduced. Currently, I do not see the need for it if less radical improvements can be made and evaluated.

29. The Parliamentary introduction of monetary or custodial penalties for contempt of Parliament runs even greater risks. A resolution of Parliament or new standing orders are not law and might encounter immediate conflict with Article 7 of the ECHR (no penalty without law). That consideration aside, any penalty sought to be imposed by Parliament (if it included imprisonment as an option) would have to comply with all the safeguards of the ECHR; most notably the procedures that would have to be in place would be required to be Article 6 compliant. Contempt proceedings would be likely to be regarded as criminal proceedings for the purposes of Article 6 ECHR and so the spectacle of witnesses and cross-examination in oral hearings (required by Article 6) in Westminster would have to take place before any penalty of these kinds could be imposed.

30. As against this it might be said that Parliamentary privilege would allow less stringent proceedings because proceedings in Parliament are not susceptible to the jurisdiction of the courts. However, the courts decide the limits of privilege and, in any event, even if the UK courts were to refuse to adjudicate it sees probable that in such an extreme denial of fundamental rights the European Court of Human Rights in Strasbourg would rule that Convention breaches had occurred and would not treat Parliamentary privilege as affording legal justification.

31. So, whether introduced legislatively or through a Parliamentary route, it seems to me that monetary or custodial penalties will be likely to cause challenges and raise the need for consideration of still wider reforms. If this were necessary now that would be one

[4] This memorandum makes no point with regard to the content of Lord Thomas' public statement in Parliament with which many lawyers agree. It is the fact that so public a statement was made at all that gives cause for concern in the context of a real need for increased dialogue and a soothing of tension between judges and politicians.

thing. But, as I have sought to show earlier in this memorandum, I do not consider that so drastic a set of reforms are needed immediately.

Pt 5: Question (3) – protections and safeguards

32. Witnesses simply do not know whether they have any immunity against answering questions put to them by members of select committees. Some committees have, it is fair to say, pushed at the boundary of what many lawyers would regard as legitimate questions.

33. I will, for illustrative purposes, take one specific problem but there are many others.[5] A public body may have obligations in law not to disclose information. Disclosure of such information is made a criminal offence. The legislation in question may make no obvious exception for disclosure of information by that body to a select committee. Yet, the committee wishes to have that information and may regard it as a contempt of Parliament for the body in question not to disclose the information. In response to the argument that the law of the land prevents disclosure, a committee may contend that the body/witness is protected by parliamentary privilege.

34. A stance of this kind places the witness in an invidious position. Is it a contempt not to provide the committee in question with the relevant information? If it would otherwise be a contempt, is it permissible not to answer on the footing that the witness has a reasonable excuse for not answering the question?

35. Regrettably, under the current system the witness will have to take a rain check on discovering the correct position. That will only be determined by the House (or in substance by the Privileges Committee) at a later date and long after the proceedings before the select committee have taken place.

36. There is no body of 'law' that will inform those advising the witness. Indeed, Parliament reserves the right to issue its own definition of that which constitutes a contempt of Parliament. The notion that a responsible public body may not legitimately refuse to answer questions because it is immunised from criminal prosecution (though not from the fact of having breached the law of the land) is, to say the least, troubling.

37. This is not merely a question of what question or questions a responsible witness may legitimately refuse to answer; it raises, too, the discrete question of what questions members of a select committee should be permitted to ask.

38. There are other difficulties. A witness may or may not provide an answer. If (s)he does then third parties may emerge seeking to protect their fundamental rights. If an answer

[5] The example that follows is based on a particular committee and particular witnesses. However, rules of professional confidence prevent me from identifying the participants.

is provided in writing prior to the select committee hearing is that answer, in any event, even in theory protected by parliamentary privilege because proceedings in Parliament may only extend to information provided at the committee hearing itself?

39. Currently, witnesses are given no guarantees that information that they provide will be treated as having been provided in confidence and will not be published. Why not? Such failure (and other difficulties of this kind) probably make it more rather than less difficult for select committees to elicit the information that they need.

40. The core point here is that far greater clarity is needed whether the current system is retained or not. The lack of such clarity is counter-productive and increases the risk of an unintended breach of fundamental rights obligations which may be sought to be enforced in the courts by witnesses or by third parties who have not even been required to appear before the select committee.

Pt 6: Question 4 – other issues

41. In my view, the question of reforming select committee powers entails consideration of a host of wider constitutional reforms which will depend upon a better understanding of the relationship between law and politics. For example, the fundamental rights of third parties are not usually referred to when it comes to the issue of whether select committee powers should be strengthened.

42. But if powers are increased they have the potential for adversely affecting the fundamental or constitutional rights of third parties. If, for example, my information can be elicited by compulsion by a public body to whom I have given it under the impression that it is protected by law and such information is then published on the committee's website there is clearly a need to take my position into account when deciding of whether and if so how to augment select committee powers. This in turn raises the need to address the effects and limits of parliamentary privilege and the safeguards that are needed before a select committee may obtain such information.

April 2017