Written evidence from Louise Ellman MP, Chair of the Transport Select Committee (SCC0004)

Summary

1. Putting select committee powers on a statutory basis would be a significant weakening of the principle that the House has control of its own affairs. Codifying such powers in the Standing Orders, as suggested by the Joint Committee on Parliamentary Privilege in 2013, would reduce the flexibility committees have at present without much additional benefit. In the most difficult cases having the detail of the powers codified either in statute or in the Standing Orders could hamper committees in their efforts to obtain the information they need. Given the very small number of cases in which the issue of contempt arises, codification of current procedure, custom and practice is not justified. If the Committee of Privileges considers change is due, a principles based "code of conduct" for both witnesses and committee members may be the most appropriate course of action. It is important that the House is clear about the problem that it would be seeking to resolve and the dangers arising from unintended consequences.

Benefits and drawbacks of options for change

2. The inquiry by the Committee of Privileges raises issues in relation to the powers of select committees and the treatment of witnesses. In my experience as Chair of the Transport Committee since 2008 and a member of a number of other committees since 1997, these issues very rarely arise in practice. During my time as Chair, the Transport Committee has managed its inquiries without the needing to make use of the powers given to departmental select committees.[1] In some inquiries the Transport Committee has had to work harder to get the information it needs to scrutinize the Government and to hold ministers to account.

3. I recognise that witnesses who are unwilling to cooperate with committees or who refuse to appear may potentially be damaging to the committee concerned or the House more generally. This is especially the case if the process is unclear or appears unfair.

4. In his paper, the Clerk of the House proposes three options open to the House: do nothing; formal assertion of powers by the House in the Standing Orders; or statutory provision. If the House wishes the courts and the police to enforce its orders against reluctant or untruthful witnesses, statutory provision is a prerequisite. I fear that it would be very difficult to codify the current flexible arrangements and find suitable statutory definitions for the range of contempts that we currently recognise and which have developed from ancient usage, custom and practice. More fundamentally, the involvement of the courts in the affairs of the House raises constitutional questions about separate roles of the legislature and the judiciary. In my view, it is not appropriate to recast the relationship between Parliament and the courts in order to address the very small number of cases where witnesses are uncooperative or untruthful.

5. An assertion of powers by the House would have the advantage of providing some clarity to the scope of powers claimed by committees. This is important as constructive engagement with witnesses and members of the public more generally depends on an understanding of how committees operate. However, there is a danger that the Standing Orders annexed to the Joint Committee on Parliamentary Privilege's 2013 report could be used by reluctant witnesses to

[1] In relation to sending for persons, papers and records, Standing Order 137A(1)

frustrate the process.[2] This is a problem with any attempt to codify something that is by its nature flexible, adaptable and responsive to a number of factors. The problem is well illustrated by the experiences of the Committee of Privileges when inquiring into the conduct of witnesses who gave evidence to the Culture, Media and Sport Committee in 2012 in relation to the phone hacking scandal at News International:

> Much of the correspondence from certain of the legal representatives could fairly be characterised as aggressive, with a strong focus on procedural objections…in some cases much effort was spent on questioning the jurisdiction of the House of Commons or this Committee over matters relating to parliamentary privilege and the procedures we had adopted, with objections often based on the misleading premise that the Commons should follow court procedure, familiar to legal experts but inappropriate for parliamentary committees.[3]

6. It may be possible for the House to assert its powers in such a way that it sets out the broad principles of how committees are expected to conduct themselves and actions which may be treated as contempts without setting out in detail the processes that must be followed. This would provide a balance between providing greater clarity as to the powers of committees without unduly curtailing the flexibility which is essential to their effectiveness.

Appropriate sanctions for contempts and their application

7. In his paper, the Clerk of the House notes that sanctions which might be available, or in the past have been considered to be available, to the House in dealing with non-members are admonishment, fining and imprisonment. Admonishment is the only sanction which has been used in the last century.

8. Admonishment can be an effective sanction in deterring similar behaviour from other witnesses. Indeed, even short of admonishment, witnesses can face reputational or financial consequences if it is widely reported that they have been reluctant to attend a session or have given evidence which is in some way inadequate. I believe awareness of these risks may have encouraged witnesses who may otherwise have been reluctant to attend (for instance, because they are implicated in a public scandal) to give oral evidence.

9. A fine may not be as effective a deterrent as admonishment. The Clerk of the House notes that the maximum fine in New Zealand for contempts is $NZ 1,000 (or approximately £560). In my view, the possibility of reputational damage for refusing to appear or giving inadequate evidence, particularly when public figures or sector leaders are concerned, is likely to be much more persuasive than a fine of this size. Of course, the potential reputational consequences for witnesses mean it is imperative that committees are seen to be abiding to the basic principles of natural justice, as discussed in paragraphs 11 and 12 below.

10. Moreover, where a public body has the powers to fine or imprison a person, it is right that the process is subject to the procedural safeguards set out in Article 6 of the European Convention on Human Rights. However, accepting as much would necessitate allowing the courts to review

[2] Joint Committee on Parliamentary Privilege, Report of Session 2013-14, Parliamentary Privilege, HC100
[3] Committee of Privileges, First Report of Session 2016-17, Conduct of witnesses before a select committee: Mr Colin Myler, Mr Tom Crone, Mr Les Hinton, and News International, HC662

the decisions of Parliament. For the reasons set out in paragraph 4 above, I do not believe that this is appropriate.

Safeguards for witnesses

11. It is essential to effective scrutiny that committees are able to ask robust questions of witnesses and are not treated as quasi-judicial bodies in applying procedural standards of fairness. At the same time, committees should adhere to the basic principles of natural justice, for instance in allowing witnesses fair opportunity to respond to allegations made against them. While this standard is met in most cases, instances where committees do not treat their witnesses fairly create a reputational risk for committees and the House more generally.[4]

12. Given the undesirability of detailed requirements which can be used by witnesses to frustrate effective scrutiny, a principles based code of conduct can be used to remind members of the appropriate treatment of witnesses. In addition, witnesses should be made aware of who they can contact if they have a complaint about their treatment. It should be emphasised that it is the interest of committees to treat witnesses with courtesy; failure to do so is likely to reinforce calls for formal safeguards which would undermine the flexibility of the committee system.

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[4] See for instance Financial Times, Should grandstanding MPs be allowed to force people to appear?, 10 May 2016; Adam Lent, Select Committees are becoming the ugly face of Parliament: it's time to rein them in, 12 February 2013