Written evidence submitted by Nigel Pleming QC (SCC0005)

Introduction:

1. This written evidence is prepared in response to the call for submissions from the Committee of Privileges. There are three options identified at paragraph 2.1 of the Clerk of the House of Common's memorandum regarding the extent and enforcement of the powers of the House in relation to select committees and contempt:
    a) To do nothing;
    b) To reassert the House's existing powers by amending Standing Orders or by Resolution; or
    c) To legislate to provide a statutory regime, whether administered by Parliament or by the courts.

2. The Committee identifies the issues more generally, in a series of questions, as follows:

    - What are the benefits and drawbacks of the options for change? Is change necessary?
    - What are appropriate sanctions for non-compliance or other contempts on the part of witnesses? How should these be applied?
    - What protections or safeguards are necessary for witnesses within either a changed or the current system?
    - Are there any other issues which the Committee should consider?

Executive Summary

3. Notwithstanding the existence of its ancient privileges the better view is that Parliament cannot now impose sanctions which take away property (fines) or liberty (imprisonment) without risk of a successful challenge in the courts, here or in the European Court of Human Rights (ECtHR). Against that background my summarised responses to the questions posed are:

    - Do Nothing is a reasonable option, but on the basis that the House accepts that its powers to punish for contempt are restricted to public criticism, by formal admonishment, reprimand or rebuke, and a report or statement describing the contempt.
    - If the House decides that now is the time to re-use its old powers of sanction, the better view is that the amendment of Standing Orders or Resolution will not protect the exercise of those powers from the risk of successful challenge particularly if the sanctions are imposed by the House or a Committee of the House which is not sufficiently independent and impartial, and without affording strong protections to the accused person.

- If the House decides that sanctions to punish, or deter, contempt of its committees is required, the better way forward is either by legislation creating criminal offences (following, or adapting, the model in countries such as Australia and New Zealand, and in the devolved assemblies) or by legislation creating (or recognising) the power of the House to impose sanctions, but creating a new body or committee (perhaps along the lines of the old Judicial Committee of the House of Lords), to exercise that power.
- If the decision is taken to create/establish such a committee, it must have a strong element of independence and impartiality, to include a members (or members) of the judiciary (perhaps retired judges), and providing full fair process protections for any person appearing before it, who are at risk of a substantial fine or any period of imprisonment.
- If such a new committee is established, further decision will have to be taken as to the extent of its jurisdiction. Will the committee have jurisdiction to hear and decide all allegations of Parliamentary contempt referred to it, or will some contempts (for example, those currently covered by statutes such as the Perjury Act 1911) remain in the criminal law system? Who is to have the power/ability to refer? Will the House retain to itself the power to admonish/reprimand?

Preliminary matters

4. The focus is on non-members. It is assumed that the House is capable of controlling, regulating and if necessary disciplining its Members if they behave improperly in relation to the business of a Select Committee. I take it as accepted that Parliament enjoys the traditional and established privilege, or power, to regulate its internal proceedings and protect its reputation and the integrity of its functions, and in so doing impose proportionate punishments on its members, and (perhaps) on its officials. The position of ministers, and their officials, remains unclear, but is not the subject of this inquiry.

5. I proceed on the basis that the House has inherent power to protect its privileges and to punish those who violate its privileges or commit a contempt of the House. In order to understand the powers of Parliament, if any, over non-members (members of the public who are invited to be witnesses before select committees) it is necessary briefly to examine the state of the law in relation to existing privileges.

6. There are 3 preliminary matters. Please accept my apologies for the repetition of material already well known to the Committee.

7. First, what effective powers does the House already possess in relation to non-members who act in contempt of the proceedings of its Select Committees? They are generally listed as follows:

a) The House can summon a person (including a non-member) to the bar of the House to reprimand, censure or admonish them, which may (in some cases) have a reputational or even financial impact;[1]
b) The House has the power to fine non-members but this was last used in the Commons in 1666 (or 1667), and in the Lords in 1801, and the power may since have lapsed;[2]
c) The House can order a person's imprisonment - committal by warrant from the Speaker to the governor of a prison, but not beyond the end of the current session of the House.[3]

8. The power to imprison deserves special mention, and is at the heart of the contempt debate. Imprisonment is regularly listed as an existing power, but it has not been used since 1880, and the 1999 *Joint Committee on Privileges* recommended its abolition. In §77 of the *Report of the Joint Committee on Parliamentary Privilege*, 2013-2014, it is said that the mechanisms for committal "have not been rescinded". This may be true , but it is to be noted that it committal to prison is unlimited in duration during the sitting of the House, and (so far as I am aware) there are but limited procedural protections in place. I find it difficult to see how the power in a body (even a body as powerful as Parliament) to deprive a person of their liberty, for whatever period, can fail to attract examination under Article 6 of the ECHR. If the penalty of imprisonment attracts Article 6 protections, the same logic may also extend to imposition of a fine (particularly if it carries the risk of loss of liberty for non-payment).[4] See, for a brief summary of the Article 6 arguments, *Select Committees and Coercive Powers - Clarity or Confusion?* Gordon and Street (2012) at pp38-40.

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[1] As pointed out by the Clerk in §3.3 of the Memorandum, Mr Tom Crone and Mr Colin Myler were admonished in October 2016, without the need for their attendance. The Memorandum does not address what would happen if Messrs Crone and Myler had been ordered to attend the House for their admonishment, but refused. What then? Could they be brought, forcibly, before the House?

[2] Joint Committee on Parliamentary Privilege, *First report of Session 1998–99*, *Parliamentary Privilege,* HL 43-I / HC 214-I, para 272. *Green Paper on Parliamentary Privilege*, Cm 8318, para 252. In *R v Chaytor, and others* [2011] 1 AC 684 ("Chaytor"), Lord Phillips, at §61, refers to this as a "theoretical power". As noted by the Clerk at §3.7 of his Memorandum, the 2013 Joint Committee referred to the New Zealand Parliament exercising the power to fine. The text book *"Constitutional Law in New Zealand"* by A.H. Angelo, at para 129(e) refers to the fines being imposed in 1896, 1901 and 1903 adding: *"It is doubtful now whether the House would fine without legislation to back it up"*.

[3] The origin of the power is explained in *Kielley v Carson* 13 E.R. 225, (1842) 4 Moo PCC 63 (an 11 man court): *"by virtue of ancient usage and prescription; the* lex et consuetudo Parliamenti *, which forms a part of the Common Law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one"* - see *Halsbury's Laws*, Volume 78, §1097. The appellate jurisdiction of the High Court of Parliament was vested only in the House of Lords from the 15th century. It would appear to be accepted that the House of Lords, unlike the House of Commons, has (or at least had) a power to imprison indefinitely - 1999 Parliamentary Privilege - First Report (chaired by Lord Nicholls) - at para 271.

[4] It is unclear what the House does, or believes it can do, if the fine is not paid? Is the fine a civil debt that can be enforced through the courts, or is failure to pay a further contempt, punishable with loss of liberty? Or is the correct position that there is no means of enforcement, and payment is entirely voluntary?

9. I note that the House of Commons Committee of Privileges, *First Report of Session 2016-17* accepted at §47 that *"the House of Commons ...does fall within the scope of the European Convention"*, but, at §51, states that *"we do not accept that Article 6 applies"*. The explanation for the refusal to accept that Article 6 applies may be found in §48 of the Report in which it is said that there is a *"crucial difference between [Demicoli v Malta - (1992) 14 EHRR 47] and the one before us now"*. The crucial difference was that in *Demicoli* the insulting words were published outside the House and not *"directly related to proceedings in Parliament over which only the House has jurisdiction"*. And - *"Unlike the Demicoli case this is a matter relating to the internal regulation and orderly functioning of the House"*. But this reasoning fails to recognise that the ECtHR in *Demicoli* decided that the breach of privilege was akin to a criminal offence, rather than merely disciplinary, not only because the offence applied to the whole population (the publication outside Parliament point) but because there was power to impose a penal sanction (§33), and because of the degree of severity of the penalty that could be imposed, which included imprisonment for up to 60 days (§34). This third criterion, the severity of the penalty which may be imposed, will often be decisive.[5] It is likely, although not certain, that the same decision would have been reached in *Demicoli* if the breach was confined to persons engaging directly with the proceedings of the House.[6]

10. I will return to sanctions at the end of this submission. In light of the concerns set out above, my view is that it is difficult to justify retaining a power to imprison without substantial changes to the Parliamentary Committee system.

11. Second, where is the line between control by the Courts and control by the House (without supervision by the Courts)? The Courts have traditionally, with or without Article 9 of the Bill of Rights, backed away from any supervision over, or questioning of, or interference with, proceedings in Parliament.[7] This extends to rejecting attempts to seek a judicial review of the Parliamentary Commissioner for Standards,

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[5] See Lester, Pannick & Herberg *Human Rights Law and Practice*, at §4.6.3, referring to *Brown v United Kingdom* (1998) 28 EHRR CD 233, and *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787, Lord Steyn at §30. In addition to *Demicoli*, see *Karácsony and others v Hungary* [2017] 64 EHRR 10, at §§142-147 for an important recent statement by the ECtHR on respect for, and the limits of, Parliamentary autonomy, in the context of freedom of speech and minority rights in Parliament - "*parliamentary autonomy should not be abused*".

[6] In the Committee of Privileges' 2016 Report (at §63) there is reference to an assertion that *"an application alleging multiple violations of Article 6 of the Convention would immediately be made"* to the ECtHR. I cannot find any evidence of an application being made.

[7] From many cases, see *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, Lord Browne-Wilkinson at p.332D, referring to Blackstone's Commentaries on the Laws of England (1830):

> *"the whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere'."*

or the Standing Committee responsible for supervising the activities of the Commissioner.[8]

12. However, the precise limits of Article 9 remain unclear as the Courts have accepted *"proceedings in Parliament"* as covering actions which are not, strictly, proceedings, but acts *related* to such proceedings[9].

13. The courts have recently identified situations where the Courts may examine, or at least consider, what would perhaps have been no-go areas under the traditional, stricter, approach. These developments are summarised in the 2013 Report, and not here repeated. [10]

14. Although the edges of what falls within or outside *"proceedings in Parliament"* may remain unclear, I consider that contempt of Parliamentary Committees (whether sitting in, or away from, the Palace of Westminster) - such as non-attendance, giving false evidence, refusing to answer questions, and generally interfering with its processes, is very likely to fall fairly and squarely within Article 9.[11]

15. Third, in the Parliamentary context, what is meant by contempt? Again, my apologies if this is all familiar territory. It may be helpful to look at the kind of behaviour that could fall within the concept of contempt:[12]

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[8] *R v The Parliamentary Commissioner for Standards, ex parte Mohamed Al Fayed* (Court of Appeal) [1998] 1 WLR 669. However, and importantly, where the line is drawn is ultimately a matter for the Courts - see *Chaytor*, at para 17, and for a detailed consideration of Article 9, see paras 26-47, and 51-61, concluding (at 61): *"There are good reasons of policy for giving article 9 a narrow ambit that restricts it to the important purpose for which it was enacted—freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown's judges. The protection of article 9 is absolute. It is capable of variation by primary legislation, but not capable of waiver, even by Parliamentary resolution. Its effect where it applies is to prevent those injured by civil wrongdoing from obtaining redress and to prevent the prosecution of members for conduct which is criminal. As to the latter, Parliament has no criminal jurisdiction. It has limited penal powers to treat criminal conduct as contempt."*

[9] See, for example, *Stockdale v Hansard* (1839) 9 Ad & E 1, and *Prebble.* In *Canada (House of Commons) v Vaid* [2005] SCR 667, the Canadian Supreme Court adopted a purposive approach when deciding an employment question, concentrating on the functions of Parliament and recognising the need to ensure that the claim of privilege does not immunise the consequences of conduct by Parliament or its officers from the ordinary law.

[10] https://www.publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/30.pdf, at pp.85-88.

[11] See *Weir and others v Secretary of State for Transport and another* [2005] AllER (D) 160, at §§233-243, particularly §240: "*On the authorities cited to me* [Prebble v New Zealand Television and Hamilton v Al Fayed] *I hold counsel to have been right to concede that the privileges of Parliament are such that he could not, at the hearing before me, question Mr Byers with a view to showing that Mr Byers had deliberately told an untruth in Parliament and could not address me on the basis that Mr Byers had done so."*

[12] A list of actions which may be treated as contempts was attached, as Annex 2, to the Joint Committee on Parliamentary Privilege 2013/2104 Report. Example (ix) *"attempting to bring legal proceedings in respect of proceedings in Parliament"* seems to me best left to the courts. See also 1999 Parliamentary Privilege - First Report - at para 264.

(1) failing (without good reason) to attend a Committee oral session when asked to do so;[13]
(2) failing to submit written documents/information when asked to do so (perhaps subject to such reasons as legal privilege);
(3) refusing (without good reason) to answer questions when appearing before a Committee;
(4) giving dishonest answers/information to a Committee (lying to the House, or misleading the House);
(5) interfering with, or preventing/dissuading, a witness from giving evidence to a Committee;
(6) interfering with, or punishing (such as dismissing from employment) a witness because they have given (truthful) evidence before a Committee;
(7) deliberate premature publication of the proceedings of a Committee;
(8) obstructing members or officers of either House in the discharge of their duties (to include bribing or threatening members or officials);
(9) interfering with the workings of Parliament[14];
(10) disorderly conduct by persons within the precincts of the House;
and
(11) disrupting the proceedings of a Committee (such as the pie-in-the-face incident).

I do not suggest that it would be sensible to attempt to set down, in any prescriptive or limiting way, such a list. General words, as set out below, allow all circumstances to be considered. But setting out some basic examples in freely available literature (and on the Parliamentary website) will at least alert the public as to what conduct is prohibited.

16. Contempt of Parliament is defined in *Erskine May*[15] as "*any actions which, while not in themselves breaches of any specific privilege, obstruct or impede [either House of Parliament] in the performance of its functions, or are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its Members of its officers."* [16]

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[13] I assume that an invitation to appear makes it clear that a refusal, or non-attendance, could be seen as a contempt. This example of contempt, the subject of much discussion, also begs some questions. Does it apply to a limited class of persons (such as British citizens, and/or UK residents, subject to the jurisdiction of Parliament), or to all persons, everywhere? If the invitation/demand to attend goes to a person who is not resident in the UK, and fails to attend, what then? Does Parliament claim to be able to fine/imprison *in absentia*? Or begin extradition proceedings?

[14] Hacking a Member's phone has been held to amount to a contempt - Standards and Privileges Committee, Fourteenth Report of the Session 2010-12, *Privilege: Hacking of Members' Mobile Phones,* HC 628, paras 279-280.

[15] *Erskine May, Parliamentary Practice* - 24th edition (2011), p 203 - now some years out of date. And see also Chapter 15, "Contempts", and pp.251-271, and specifically in relation to Select Committees, see pp.837-841,

[16] In the context of the Courts of England and Wales, see the definition of the strict liability rule in section 1 of the Contempt of Court Act 1981(applying to publications) - *"conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so"*.

17. For an example of contempt of Parliament in other jurisdictions, very familiar to the Select Committee, see the Australian[17] *Parliamentary Privileges Act* 1987. Section 4 focuses on the effect of the conduct rather than the act itself: "*Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member."*[18]

What are the benefits and drawbacks of the options for change? Is change necessary?

18. It is clear that the prominence of Select Committees has increased significantly since the reforms initiated by the Wright Committee in 1999. In evidence given to the Political and Constitutional Reform Select Committee of the House of Commons in 2013, Dr Wright observed that:

> *'The [external, media] attention that the House gets comes far more now from the Select Committee system than from anywhere else. That is affecting perceptions, behaviour, incentive structures. It is making a big change'.*[19]

This is further supported by an analysis from Democratic Audit of the most important UK press database comparing variations in press coverage from 2008 to 2012 which shows a substantial growth in the overall mentions of Commons' Committees across this five year period in the UK press[20].

19. This greater activism and increased media coverage has also arguably led more witnesses to challenge the authority of Select Committees by refusing (temporarily or permanently) to appear before them, with memorable examples being Rupert Murdoch's initial refusal to give evidence to the Culture Select Committee in 2011[21], Mike Ashley's initial refusal to appear before the BIS Select Committee in 2016[22] and

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Common law contempt is recognised in section 6(c) - *"conduct intended to impede or prejudice the administration of justice"*. For a detailed description of what is and what is not *"contempt of court"* see the standard text books, *Arlidge, Eady & Smith* and *Borrie & Lowe.*

[17] https://www.publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/30.pdf, at §35 and §55.

[18] For an interesting paper on early Parliamentary contempt proceedings in Australia, and the evolution of the statutory regime, see Harry Evans (Clerk of the Australian Senate) *"Fitzpatrick and Browne: Imprisonment by a House of the Parliament"*, at http://www.aph.gov.au/~/~/link.aspx?_id=2933BA0273E4485580018726E15978E9&_z=z , part of a series of papers on Parliamentary Privilege in December 2009 - http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop52

[19] PCRC, Oral evidence session, 21 March 2013: Q83.

[20] http://blogs.lse.ac.uk/politicsandpolicy/parliament-bounces-back-how-select-committees-have-become-a-power-in-the-land/

[21] https://www.theguardian.com/media/2011/jul/14/phone-hacking-rupert-murdoch-summonsed-appear-mps

[22] https://www.theguardian.com/business/2016/mar/21/sports-direct-founder-mike-ashley-snubs-call-mps-

Sir Philip Green's initial refusal to give evidence to the BIS Select Committee again in 2016[23]. The approach to such refusals has been far from clear and it has become apparent that no one is entirely certain what coercive powers, if any, Select Committees have in these circumstances - as Committees, or with the assistance of the House. Put simply, recent reforms/changes have increased the powers and role of Select Committees but failed to identify the fact that there is no adequate infrastructure of enforceable rules to deal with this enhanced role. This lack of clarity, or muddling through in the British way, can of course be maintained - the Do Nothing approach - to await an occasion when the House needs to enforce the decisions of a Committee with something more than an admonishment, but either cannot, or the enforcement is challenged through the Courts. I will consider the benefits and drawbacks as I address the 3 options.

***Do Nothing**:*

20. I have little to add to the analysis in the 2013 Report.[24]

21. I can readily understand that for the reasons listed above, namely the increased activism and scope of the work carried out by Select Committees, coupled with the increased and increasing media coverage of their activities, Do Nothing may no longer be regarded as the right option in that it would leave unaddressed the additional concerns raised by the Liaison Committee in 2012[25], the Joint Committee in 2013[26], and the 2016 Committee of Privileges Report at §§327-238.

22. However, I accept that there may be benefits in Do Nothing. The Committees, and the House, will continue to rely on the light touch of repeated requests, the risk of adverse publicity, and naming and shaming, the risk of public admonishment or similar methods of putting indirect pressure on those who are reluctant to attend to give evidence. Do Nothing also maintains the ability of the House, by its Committees, to make detailed findings of behaviour amounting to contempt of Parliament, which are published in publicly available reports. And, applying Article 9, the content of the reports - no matter how critical of individuals - cannot be challenged/questioned in the courts.

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[23] https://www.theguardian.com/politics/2016/jun/14/philip-green-case-shows-select-committees-power-and-weakness

[24] https://www.publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/30.pdf, at §§58-62.

[25] "*Select committee effectiveness, resources and powers*", Second Report of Session 2012-2013 (printed 25 October 2012)

[26] "*Parliamentary Privilege"*, Report of Session 2013-14 (printed 18 June 2013)

23. I am not convinced that doing nothing would allow the House to say to witnesses that it retains, and if necessary will use, its ancient abilities to fine and commit to prison. After yet another inquiry this will mean that the House has to accept the status quo - that even if *"it is satisfied that to exercise [the power of sanction against contempts] is essential in order to provide reasonable protection for the House, its Members or its officers"*,[27] there are no other available coercive powers (whatever the historical position) to punish for contempt of the proceedings of its Committees, other than admonishment. The House cannot proceed on the basis that there are powers, long unused, but available to be dusted down and deployed when needed.

24. Overall, whatever the advantages in the Do Nothing approach, arguably, there is at least a case for doing something. If the concern focuses on the risk of witnesses lying to the House, which may require substantial penalties, then perhaps it is time for an amendment to the Perjury Act 1911 - addressed below. That will create a criminal offence, and be investigated and (if the evidence is there) prosecuted by the appropriate bodies, and any charge heard by the criminal courts - with the inevitable risk that the processes of the Committee to whom the witness is said to have lied will be subject to close examination (and its members summoned to give evidence). If that is an unattractive course, and the focus shifts to concerns over non-attendance where financial penalty may be more appropriate, the change would be to legislate to create (or confirm) a power to fine (to an identified maximum). These possibilities are discussed below.

***To reassert the House's existing powers by amending Standing Orders or by Resolution**:*

25. This approach was advocated by the Joint Committee in the 2013 report[28], in part on the basis that this is *"a test of institutional confidence"*, the Committee urging the two Houses *"to rise to the challenge"*. The benefit of such an approach is that it could serve to clarify the powers of Select Committees to an extent and, if needed, give the Committees something tangible to rely upon (with the assistance of the House) in the event of non-compliance or some other form of contempt by a witness.

26. An assertion of existing powers by resolution, as proposed by the Liaison Committee in 2012, seems to me to be an ineffective measure. As pointed out by the Clerk (at para 2.11 of the Memorandum) *"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 of the courts) in their enforcement"*. Putting it in simple terms, if there is now no effective power to fine a person held to be in contempt, or imprison that person, asserting there is such a power by resolution will not create the power. It either exists in law, or it doesn't exist.[29] The resolution can only *"assert"* powers that

[27] HC 34 (1967-8), para 15; and HC Deb, 6 February 1978, cols 1155-98.

[28] [ibid], pages 16-27, particularly §§76-79.

exist, and are there to be used if needed. If there is to be some form of resolution then, subject to the caveat set out above, I can see value in passing a Resolution to over the three points listed in para 2.7 of the Clerk's Memorandum.

27. Standing Orders? I am not convinced, if this be the suggestion, that Standing Orders can be used to *create* coercive powers. They do however have a clear role, as noted by the 2013 Joint Committee, in setting out the procedures to be followed in cases where coercive powers can be, or are to be, used.[30] The intention must be to create certainty so that persons engaging with Parliamentary Committees know where they stand in terms of risks of penalty in a case of non-compliance with the rules of the House, and that there are clearly defined opportunities to explain apparent breaches, and explain why any available penalties should not be imposed. It would be regrettable if such Standing Orders were regularly changed, and without good reason.[31]

To legislate to provide a statutory regime, whether administered by Parliament or by the courts:

28. Such an approach would provide clarity and would enable Select Committees to carry out their functions, including summoning relevant witnesses and accessing the necessary evidence to conduct their inquiries, in the knowledge that severe sanctions available if needed. In addition to a new legislative regime, there are existing criminal offences that could be amended (if necessary), to discourage (and if necessary penalise) false evidence before a Committee such as the Perjury Act 1911[32] and the Witnesses (Public Inquiries) Protection Act 1892[33].

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[29] See the summary of the evidence of the then Lord Chief Justice, Lord Judge, at https://www.publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/30.pdf, §38 read with §37 and the judgment in *Stockdale v Hansard*.

[30] See *Erskine May* at pp 275-276. See 1999 Parliamentary Privilege - First Report - at paras 281 for a list of the *"minimum requirements of fairness"*, even absent Article 6. These requirements are described as *"providing safeguards at least as rigorous as those applied in the courts and professional disciplinary bodies"*.

[31] In July 2014, the Clerk of the House noted that Standing Orders had been changed 200 times between 2000 and the end of Session in 2014, which amounted to an average of more than 17 revisions a Session, with each revision containing several individual amendments - https://www.publications.parliament.uk/pa/cm201415/cmselect/cmproced/654/65404.htm

[32] The 1911 Act punishes false evidence given on oath before Committee of either House, but as noted in *Erskine May* at p.824, *"it is not usual ... for select committee to examine witnesses upon oath, except upon inquiries of a judicial or other special character"*. It may be seen as odd, and unsatisfactory, that false evidence under oath is punishable as a crime, but false evidence without an oath is merely a contempt. Surely, truthful (and reliable) evidence is the object. Lord Judge, LCJ, said when giving evidence to the Committee in 2013 *"I take the view that lying to Parliament is akin to perjury, even if you have not sworn an oath to tell the truth"* - Q272. Section 5 currently addresses false statements without oath. It would be possible to add, as section 5(d), wording along the lines: *"In any oral answer given, or written evidence provided, to a committee of either House of Parliament"*. Under section 5, if a person knowingly and wilfully makes a false statement he or she is guilty of a misdemeanour *"and shall be liable on conviction thereof on indictment to imprisonment, for any term not exceeding two years, or to a fine or to both such imprisonment and fine"*. Prosecution would be under the criminal law, and an exception under Article 9 of the Bill of Rights would be needed. If the criminal law

29. There are, at least, two models of a statutory regime. First, Parliament could enact legislation recognising (and enshrining in statute) its own ability to punish for contempt of its proceedings, and (perhaps) give to itself express power to set up a Committee to sit as a form of court or tribunal for that purpose (or enshrine in statute a recognition of its existing status as the High Court of Parliament[34]). Alternatively, Parliament could expressly enable the courts (probably the High Court rather than the criminal courts) to enforce specified orders - for example an Order to attend a Select Committee. The illustrative draft clause, annexed to the Clerk's memorandum, is an example of the second model. The first model would accord with the historical approach to contempt[35], but there are formidable difficulties in making the processes compliant with Article 6, particularly if the powers to punish include the imposition of a substantial fine (with the loss of liberty in default), or (as currently suggested) a deprivation of liberty.[36]

30. If Parliament wishes to ensure that it has sufficient powers to protect its processes, and adequate sanctions to encourage compliance, then in my opinion there must be clear procedural protections in place. Indeed, what can be the objection, in our modern human-rights compliant society, to Parliament affording to those subject to sanctions similar protections to those who are punished by the Courts for contempt of their proceedings? What is the sensible and principled objection to ensuring that Members of the House who sat on the Committee where the contempt took place are obliged to recuse themselves from any consideration of whether a contempt had been committed?

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processes/criminal courts are to be brought into play, and an exception to Article 9 created, Parliament must expect close scrutiny not only of what was said to a Select Committee, but also close scrutiny of the conduct of the committee and its members - if relevant to the defence.

[33] Section 1 already defines "inquiry" to include *"any inquiry held .... by any committee of either House of Parliament, ... whether the evidence at such inquiry is or is not given on oath"*. See *Erskine May* at pp.840-841, and 239-240. Again, prosecution is under the criminal law.

[34] For statutory recognition of this term, see Law Terms Act 1830, section VIII, and the Metropolitan Police Act 1839, section 52. For judicial recognition see, for example, *British Railways Board v Pickin* [1974] AC 765, Lord Morris at page 790, and *Chaytor*, Lord Rodger, at §105. But *Halsbury's Laws* puts it this way - *"Although the House of Commons together with the Sovereign and House of Lords forms the High Court of Parliament it is not strictly speaking a judicial body. Its original jurisdiction, which may be viewed as judicial, is confined to bills of attainder and of pains and penalties. In addition the House has jurisdiction over persons for committing any breach of the privileges of the House or of any of its members."*

[35] *"It is admitted that the normal and natural forum for the hearing of contempt relating to proceedings before this House is the House itself. If any authority be required, it can be found in* Rex v. Flower *(1799) 8 Durn. & E. 314, 323,* per *Lord Kenyon C.J." - In re Lonrho Plc (Contempt Proceedings)* [1990] 2 AC 154, Lord Keith at p.176.

[36] Article 6 requires - *"in the determination of [a person's] civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*.

31. If it is correct that Article 6 of the ECHR requires that an independent and impartial court or tribunal should be required to hear and determine allegations of contempt of the House where there is a risk of imprisonment, it may be questionable whether Parliament and the Select Committee process would satisfy these requirements.[37] There is a need to ensure that the members of Parliament do not act, or be seen as if acting, as prosecutor and court. This could probably be avoided by the establishment (by enactment) of a body such as a Judicial Committee, with an independent (judicially trained and experienced) president.[38] This is not a recreation of the former Judicial Committee[39], because it would not sit to hear criminal cases generally, but a tribunal available to sit to hear an allegation of contempt referred to it by, for example, the Committee of Privileges. Its powers would be set out in the creating statute, its procedures in SIs or Standing Orders. It will probably be necessary for the accused person to be represented (or have the right to be represented) before such a Judicial Committee. A downside of the creation of such a committee is that it may be an expensive exercise, and it may never be used. This is clearly a very substantial departure from the existing arrangements, but may create the necessary Article 6 compliant structure to allow for the imposition of a substantial fine or even a period of imprisonment. I put it forward as a tentative suggestion, and no more.[40] If this is an option that the House may be interested in pursuing further, it would be sensible to seek the views of the senior judiciary. If such a new committee is to be established, a further decision will have to be taken as to the extent of its jurisdiction - will it have jurisdiction to hear and decide all allegations of Parliamentary contempt referred to it, or will some contempts (for example, those currently covered by statutes such as the Perjury Act 1911) remain in the criminal law system?

32. If Article 6 can be satisfied by a different court/judge hearing an allegation of contempt of court, it is just about arguable that even a different Select Committee (not a new Judicial Committee) will satisfy the requirement of independence and impartiality. But there is a real risk that it would not, and only the ECtHR could determine that question. The need for recusal, mentioned in an earlier paragraph, would apply to the Privileges Committee so that any member of that Committee who is also a member of the Committee where the contempt is alleged, must (by Standing Order) take no part in the contempt proceedings. Separate consideration may be

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[37] *Demicoli* touches on aspects of independence and impartiality but should not be seen as deciding (or even suggesting) that an entire Parliament lacks the necessary independence and impartiality for Article 6 compliance.

[38] If the suggestion of such a committee finds favour, the name may need to be reconsidered - perhaps "the Contempt and Sanctions Committee", or similar, would be preferable.

[39] See https://www.supremecourt.uk/about/appellate-committee.html, and the Appellate Jurisdiction Act 1876 (eventually repealed by the Constitutional Reform Act 2005, on the establishment of the Supreme Court).

[40] This model may be seen as a variant a variant of Model 3 in *"Select Committees and Coercive Powers - Clarity or Confusion"*, at p.79, but without the listed disadvantages.

needed as to whether there should be some form of appeals or review mechanism - which does not presently exist.

33. As noted in para 2.16 of the Clerk's Memorandum, the US House of Representatives provides another model. It has a number of options should a person fail to appear as a witness before it or a Committee after having been summoned to do so. The first is to use the "long dormant" inherent contempt constitutional power of Congress to detain and imprison a contemnor until he complies with the order (but not beyond the current session); the second is to punish the individual under the criminal contempt statute; and the third is for Congress to appeal to the judicial branch to assist with enforcing a congressional subpoena, by seeking a civil judgment from a federal court declaring that the individual in question is legally obliged to comply with the subpoena.[41]

34. When considering sanctions in the UK, it is perhaps this second choice, the criminal contempt statute that may be considered, with some adaptation. Under 2 U.S.C. Section 192, a person who has been "summoned as a witness" by either House or a Committee to testify or to produce documents and who fails to do so, or who appears but refuses to respond to questions, is guilty of a misdemeanour, punishable by a fine of up to $100,000 and imprisonment for up to one year. Whilst the case law has tended to afford the U.S. Attorney more discretion, the statute lays down a strict procedure to be followed; after contempt has been certified by either the President of the Senate or the Speaker then it is the "duty" of the US Attorney to bring the matter before the grand jury for its action. This is a very brief summary of the US position.

35. Such an option, if deployed in the UK could perhaps cover the difficult territory between parliamentary privilege and Article 6 ECHR. If the House considered that the contempt was particularly serious and warranted a substantial fine or even imprisonment then it (or the Committee of Privileges on its behalf) would have the power to report this to the Speaker who could certify the complaint as of suitable gravity for consideration of the imposition of these severe punishments before passing the issue to the courts to determine the appropriate penalty. If, however, Parliament felt that the process was privileged and should not be open to scrutiny by the Courts then it would not be obliged to pass the matter on but, as a consequence, would be restricted as present to issuing only an admonishment as a punishment in order to comply with Article 6 ECHR. This is by no means a perfect solution, but it might ensure compliance with both Article 9 of the Bill of Rights and ECHR.[42] I will address a further alternative later in this submission.

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[41] See, for a summary of the US system, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: A Sketch* by Todd Garvey and Alissa M Dolan (April 2014) https://fas.org/sgp/crs/misc/RL34114.pdf The full report (May 2014) is at https://fas.org/sgp/crs/misc/RL34097.pdf

[42] I have only referred to the practices of common law countries, such as Australia, New Zealand and the US. It is hoped the Committee will also look at other common law countries, such as India, South Africa etc - but there will usually be a written constitution to protect the lines between Parliament and the Courts. For a recent reference to the disciplinary measures applicable to members of parliament for disorderly conduct,

36. But the major problem with this option is that I do not see how the matter could be passed to the courts for considerations of sentence alone. The person accused of contempt may submit that the sentence should not be imposed at all, because he is not guilty, or kept to a minimum because, for example, of the behaviour of the members of the Committee - he did not appear because he had reason to be believe he would not be listened to fairly, or some similar allegations.

37. On balance, perhaps the best option is for Parliamentary contempt to continue to be regulated by the House but with clarity, and (if needed) a fair process, introduced by legislation.[43] My concern with taking the entire process out of Parliament, and into the Courts, is that so long as Article 9 remains, there will be endless debates/litigation/appeals as to what aspects of proceedings in Parliament can be investigated, and questioned in the High Court.[44]

38. Amending Article 9, or creating an exception to its terms, is not the difficulty. It is the practical consequences of allowing the Courts to investigate the workings of Select Committees. If a non-attender is the subject of the contempt allegation, and there is a court hearing to consider the reasonableness, or even the credibility, of any reasons advanced to justify the non-attendance, can the Court examine why he/she refused to attend and answer questions based, for example, on suspected personal animosity by a member of the Committee? Such practical consequences were touched on by Lord Judge LCJ in his answers to the Select Committee in 2013, when considering the example of a person lying to a Committee.[45]

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available across 44 of the 47 Member States of the Council of Europe, see §§56-61 of the summary in *Karácsony v Hungary*. The position of the UK where there is disruptive behaviour by MPs is summarised at §§114-119 where the UK government sets out its submissions on Article 10, and freedom of speech, in Parliament. The decision does not address restrictions on non-members, or punishments for contempt by non-members.

[43] If it is decided to go down the legislative route, this may provide an opportunity to re-consider and address contempt in relation not only to the Houses of Parliament, but also the devolved Parliaments/Assemblies in Scotland, Wales and Northern Ireland. If so, and if within the functions set out in section 5 of the Law Commission Act 1965, the Committee may wish to consider inviting the Commission to provide some research and drafting assistance. For the devolved Assemblies, there are already offences in place to address identified forms of contempt by witnesses, and in relation to documents - see the Scotland Act 1998, section 25, the Northern Ireland Assembly Act 1998, section 45, and the Government of Wales Act 2006, section 39.

[44] There is no problem, in principle, in amending or limiting Article 9 to allow questioning of certain aspects of proceedings in Parliament - see *Chaytor (and others)*, at §67: *"It is, of course, always open to Parliament by legislation to provide for the courts to encroach on matters falling within its exclusive cognisance, or even on article 9 privilege, as did the Parliamentary Elections Act 1695 (7 & 8 Will 3, c 25), the Parliamentary Oaths Act 1866 (29 & 30 Vict c 19), the Perjury Act 1911 , and the Defamation Act 1996."* The MPs all pleaded guilty to the criminal charges laid against them and, therefore, such questioning did not arise in their cases.

[45] Particularly Q284: *"I do not see how you could give him a fair trial if he was not allowed to say, 'I didn't lie—the Members of Parliament were extremely aggressive in their questioning and I was confused.' I just do not see how you could do that. However, if I may say so, if you are going to go down this path, I would respectfully suggest that you would need to legislate for it. I do not think that you can resuscitate the old process by which poor old Sir John Eliot ended up in the tower. You cannot do it."*

39. Finally, if a legislative solution is seen as the best way forward, it should be kept in mind and accepted that the interpretation of any such legislative scheme is for the courts.

What are appropriate sanctions for non-compliance or other contempts on the part of witnesses? How should these be applied?

40. Even if it is accepted that our Parliament has (or at some time has had) a power to fine, and to imprison, is it not time to clarify and fix the extent of the power?

41. The Australian Parliamentary Privileges Act 1987 addresses available penalties in some detail in section 7, with imprisonment limited to 6 months, and fines limited in amount, and differentiated for natural persons and corporations (up to $5,000 for individuals and $25,000 for corporations). Section 16(9) addresses the tension between Article 9 of the Bill of Rights, also law in Australia, and the admission of evidence etc in relation to the prosecution of an offence under the Act.

42. In New Zealand, under the Parliamentary Privilege Act 2014[46], section 22, there is a statutory power by the House to fine for contempt, limited to NZ$1,000. [47]

43. In the devolved assembly statutes the witness contempt penalties are fixed - for example, for Scotland, it is *"a fine not exceeding level 5 on the standard scale or to imprisonment for a period not exceeding three months"*.[48] The House may prefer the ability to impose an unlimited fine - as suggested in 1999 (see fn 52).

44. What is an appropriate sanction will of course depend on the circumstances.[49] Any sanction must be proportionate. If Parliament is to retain the ability to impose sanctions without external court proceedings then imprisonment is problematic, for the reasons explained above. I cannot see any objection to a power to reprimand or admonish, with suitable opportunities to explain the criticised conduct or behaviour.

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[46] Section 3 sets out the purposes of the Act, including (at (1)(a)) *"to reaffirm and clarify the nature, scope, and extent of the privileges, immunities, and powers exercisable by the House of Representatives, its committees, and its member"*, and (at (2)(c)) *" define, for the avoidance of doubt, 'proceedings in Parliament' for the purposes of Article 9 of the Bill of Rights 1688"*.

[47] Section 22(4) is oddly worded: *"This section replaces all other powers, if any, of the House, under any other laws, to impose a fine on a person for a contempt of the House determined by the House to have been committed by that person, but does not limit or affect the House's powers to penalise the person for the contempt otherwise than by imposing a fine on the person (whether the other penalty is instead of, or as well as, the imposition of a fine)."*

[48] Scotland Act 1998, section 25(4).

[49] I cannot improve on the response of Lord Judge, LCJ, when giving evidence (with Lord Justice Beatson) to the 2013 Committee: *"Golly! It depends on how serious the contempt is."*- Q270 .

This should not require statutory support. I can see good sense in the recommendation in the 2011 Report on Hacking and Privilege[50]:

> *"We recommend that measures to implement the recommendations of the Joint Committee that the House should lose its powers of imprisonment and should be given a statutory power to fine offenders."*

I would only add that the statutory power to fine should set an upper limit, and should include reference to a mechanism for recovery if the fine is not paid.[51]

What protections or safeguards are necessary for witnesses within either a changed or the current system?

45. I have nothing to add to §§4.12 to 4.14 of the Clerk's Memorandum. A witness can reasonably expect to be treated with courtesy, not to be subject to hectoring or grandstanding, and for questions to be clear, and the overall procedure obviously fair. Where possible, and appropriate, witnesses should be given notice of the key topics to be covered by their evidence.

46. §4.15 requires a short comment. I can see advantages in retaining a flexible approach, but there is a lack of transparency (and fairness) if the "rules of the game" are not put clearly to a witness before evidence is given. For example, a witness can be told in advance that full answers will be required, even if the answers could incriminate - on the basis that the answers, although made public or given in public, form part of privileged Parliamentary material, and cannot be relied on to found a prosecution or used in a civil claim. This may provide small comfort to witnesses. The answers are usually provided in confidence, but they are privileged - by Article 9.

47. I do not see any reason why witnesses should not be given suitable warnings that they are expected to tell the truth, and that any failure to tell the truth may the subject of sanction. If and when the available sanctions are agreed upon and identified, that information can be shared with the witness (or his/her/their advisers).

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[50] https://www.publications.parliament.uk/pa/cm201011/cmselect/cmstnprv/628/62806.htm#a17 http://www.parliament.uk/documents/joint-committees/Parliamentary-Privilege/Virtual%20Volume%20II%20-%20All%20evidence.pdf Q270.

[50] https://www.publications.parliament.uk/pa/cm201011/cmselect/cmstnprv/628/62806.htm#a17

[51] The power to fine non-members was considered in the 1999 Parliamentary Privilege - First Report - in the section covered by paras 309-310, preferring contempt generally to be subject to a power by the High Court to fine in an unlimited amount, but non-attendance before the House or a Committee (and related offences) to be criminal offence, triable in the criminal courts, where the maximum punishment would be an unlimited fine or three months' imprisonment.

48. However, it has to be accepted that Select Committees are not courts of law, and should not be expected to act as such. Their essential function is to scrutinise policy, and act at all times in the public interest.

Are there any other issues which the Committee should consider?

49. I think I have covered all the issues in this submission. The main issue remains - does the House want to have available to it sanctions for contempt of Parliament, such as a fine or loss of liberty? And, if so, are those sanctions to be imposed only by the courts (outside Parliament) or by a body (with common law fairness and/or Article 6 protections) within Parliament?

Conclusion

50. It is accepted that Parliamentary Committees would be unable to carry out their general investigative functions effectively if attendance to give evidence before them was considered to be optional. It is also accepted that the quality of legislation passed by the Houses of Parliament is likely to be adversely affected if the compulsory attendance of witnesses and the full disclosure of information could not be enforced.

51. When considering sanctions generally, I agree with the Clerk to the House, in §1.3 of the Memorandum, where he states:

> *"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 or sanction, should be certain, consistent and readily comprehensible those subject to them".*

Those standards of certainty, consistency and comprehensibility would properly be demanded by Members when drafting and approving penalising legislation effective outside Parliament, and I cannot see any justification for different, lower, standards being applied to Parliament's own procedures. Legal certainty is an important aspect of the rule of law.

52. My overriding concern remains the difficulty in enacting legislation that empowers Parliament to impose severe sanctions for contempt, without inevitably bringing the matter before the courts, here or in Strasbourg. Even a transparent and fair procedure wholly within Parliament could be open to criticism and challenge before the ECtHR on the basis that the accused person has not been afforded access to an independent and impartial tribunal (and, if it be the case, without legal representation), such that some form of judicial oversight is required.

53. In answer to the questions posed, my preference is for the introduction of clarity, and suitable safeguards, by legislation - but for any contempt system to be administered

by Parliament, rather than by the courts. The alternative, Do Nothing, will mean accepting that the sanctions available to the House are restricted to admonishment (or similar), or (perhaps) the imposition of some form of modest financial penalty. But even a fine may be challengeable. If lying to the House, or otherwise deceiving its Committees, without requiring evidence under oath, is to be punished (where a more substantial penalty may be necessary), then this could be a crime, punishable in the criminal courts - but this would require a new statute or an amendment to the Perjury Act 1911. Alternatively, this could be addressed in legislation directed specifically to contempt of the House.

54. If Parliament decides that it needs the power to impose more severe sanctions than admonishment, but without engaging the courts (the High Court, or the criminal courts) in the determination of guilt and the imposition of sanction then a possible solution is to establish a Judicial Committee (or some similarly named committee) with power to consider cases referred to it by the Committee of Privileges, or perhaps by the Speaker. The Judicial Committee, whether established by legislation or by internal Parliamentary procedures, should be chaired by a senior independent and impartial judge. If established by internal Parliamentary procedures, its powers to impose sanctions such as an enforceable fine or imprisonment should be the subject of legislation. The procedures of this Committee should be Article 6 compliant and this likely to require not only fair and transparent procedures, before an impartial and independent tribunal, but also the ability for persons accused of contempt, and facing the risk of a substantial fine or imprisonment, to be represented.

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