Submission from Dr Sarah Wollaston MP, Chair of the Liaison Committee (SCC0015)

Exercise and Enforcement of Select Committee Powers

I apologise that it has taken so long to respond formally to your letter of 20 February concerning the Committee of Privileges' inquiry into the matter referred to it by the House on 27 October 2016, namely the exercise and enforcement of the powers of the House in relation to select committees and contempts. The Liaison Committee has been giving careful thought to the matter, and it has taken us some time.

The Committee recognises that the issue of enforcement of the powers to send for persons, papers and records, delegated to almost every select committee, has been growing in significance in recent years as the range and scope of select committee scrutiny has grown. The annex to this letter sets out the occasions over the last 15 years on which select committees have had recourse to issuing formal orders in order to secure the attendance of witnesses or the deposit of papers. In some cases the exercise of the formal power has been by mutual agreement, to ensure a witness who is uncertain of their legal position has the clear evidence of acting in response to an order of the House in case of any legal challenge. This has been most often in relation to orders for papers. But in most cases, recourse to an order has been necessary because a potential witness or the person holding evidence has declined voluntarily to respond to an invitation to submit written or give oral evidence. So far as our records reveal, wherever an order has been made the witness has complied. But you will be aware that on 7 June, for the first time since 1920, the House agreed an order for a potential witness who had defied an order of a committee to attend. The witness has subsequently failed to comply with the order of the House.

The issue which directly gave rise to the reference of this matter to your Committee by the House was not, however, attendance but the deliberate misleading of a select committee by witnesses in the evidence they gave having agreed to attend. There is a sense that the punishment of admonishment was insufficient to deter future witnesses from taking the risk of committing a similar contempt.

There are, therefore, at least two connected issues in play. One is whether a clearer mechanism is needed to enable committees to ensure the attendance of witnesses and to provide a penalty for defiance of such an order. The other is how contempts committed in the course of giving evidence should be investigated, what penalties might be appropriate, and how they might be enforced.

The Liaison Committee has considered the recommendations of both the 1999 and 2013 reports of the Joint Committees on Parliamentary Privilege. The earlier report recommended legislation on a number of topics, including the definition of proceedings in Parliament and contempt of Parliament, legislation to confirm that both Houses had the power to levy fines but not to imprison, and a concurrent jurisdiction with the courts to punish non-Members for contempts such as failing to attend proceedings or to answer questions. The later report took a different line, rejecting (at that stage) a legislative solution but proposing a more robust assertion of the House's penal jurisdiction, suggesting some codification by the House of what constituted a contempt; and a clearer

specification of what due process committees had shown they had followed before alleging a contempt.

There is not a consensus in the Liaison Committee on which of these two routes (statutory or non-statutory) is the right one to follow, although there is probably a majority in favour of the former (and it is the solution I personally support). While there is some scepticism within the Committee about the effectiveness of a non-statutory solution there are also significant anxieties about the risks of involving the courts in the proceedings of the House. These two points of view are eloquently summarised in papers presented to the Committee by Chris Bryant and Sir Bernard Jenkin, which are also annexed to this letter.

As these papers and the contrasting conclusions of the 1999 and 2013 Joint Committees illustrate, the answer is not self-evident. But my own view is that it would, perhaps, be wrong to overstate the risks of the statutory solution as compared to the risks of the present situation. In reality, it is the existence of the powers that matters most, not their enforcement. It seems unlikely that the statutory path would lead to regular conflicts between the courts and the House, and by and large the courts strive to respect the role of Parliament. But, in general, witnesses comply with the requests of the House's committees voluntarily and, if not, usually comply with an order. There are probably two key issues to be weighed in considering whether the statutory route would be appropriate:

- first, is the psychological impact on potential contemnors of the existing powers more or less persuasive on them to comply than the existence of a criminal offence?
- second, is the effective limiting of the House's penalties to admonishment a sufficient retribution for those who do treat its committees with contempt?

Despite the differences of opinion described above, there is clear agreement across the Liaison Committee that the situation cannot be allowed to remain as it is. Addressing themselves to the Joint Committee which was then considering these issues, our predecessor Committee concluded in in November 2012 that, "at the very least Parliament should set out a clear, and realistic, statement of its powers — and perhaps also its responsibilities — in a resolution of the House and set out in more detail in Standing Orders how those powers are to be exercised", and that "this would at least show Parliament's determination to retain the powers it has", noting that "Evidence of such determination is altogether lacking at present". Despite these urgings, the recommendations of the 2013 Joint Committee have not been debated in this House, let alone acted upon.

Were the statutory path to be chosen, it is obvious that legislation would take some time to enact. In the meantime, we believe the House should take action on the recommendations of the 2013 Joint Committee to test how usable and effective they might be. If they prove to be insufficient, that will give a firmer basis for pursuing the statutory solution. The Liaison Committee would be able to offer advice and assistance in drawing on those recommendations, and perhaps simplifying them into a series of proposals which it would be practical to implement. In the meantime, we would urge your Committee to initiate the process of drafting legislation relating to exercise and

enforcement of these powers, so that it may be carefully and thoroughly considered in draft and consulted upon – not least with our colleagues in the other House of course. The range of statutory solutions would seem to run from a full dress Parliamentary Privileges Act to a limited provision engaging the criminal justice system solely in the enforcement of the order of a committee. We are aware that there are a number of international examples on which to draw.

Thank you for the opportunity to contribute to your Committee's deliberations. The key message from the Liaison Committee is, I believe, that your Committee should take steps to ensure that finally, after several decades of dithering, something is done to clarify the extent and nature of these powers and to provide a persuasive basis for select committees to continue to undertake the task which the House has set them to do on the public's behalf.

ANNEX 1: Committee and House Orders/Summons papers or witnesses to attend committees 2001-2018

A number of papers have been Ordered by the House and sent to Committees, independently of any order from the committee itself (eg ExEU Committee). These are listed after the end of the table.

Committee/type of Order	Date and details
Digital, Culture, Media and Sport Committee (current) (2018) ***Orders for witnesses*** ***Order for papers***	On 10 May 2018, the DCMS Committee ordered Alexander Nix, former CEO of **Cambridge Analytica**, to attend and give evidence in connection with its inquiry into Fake News**.** Mr Nix attended and gave evidence on 6 June. On 10 May 2018, The Digital, Culture, Media and Sport Committee ordered Dominic Cummings, campaign director for **Vote Leave**, to attend and give evidence on 22 May 2018 in connection with its inquiry into Fake News. Mr Cummings failed to attend and on 5 June the Committee published a report stating it would seek an Order of the House for Mr Cummings to attend. On 7 June 2018 the House ordered that Mr Dominic Cummings give an undertaking to the Committee, no later than 6pm on 11 June 2018, to appear before that Committee at a time on or before 20 June 2018. He failed to do so. On 16 April 2018, the DCMS Committee issued an Order for papers from Dr Emma Briant at the **University of Essex** under the Fake News inquiry. The order was complied with.
Treasury Committee (current) (2018) ***Order for papers***	On 7 February 2018, The Treasury Committee ordered the **Financial Conduct Authority** to produce a specific report regarding the treatment of customers in RBS's Global Restructuring Group which it had previously been unwilling to provide. The document was received and subsequently published by the Committee.
Treasury Committee (2016) ***Order for witness***	On 3 May 2016, The Treasury Committee ordered the attendance of Matthew Elliott, Chief Executive **Vote Leave**. He attended and gave evidence on 7 June 2016.
Business, Innovation and Skills Committee (2016) ***Order for witness***	On 15 March 2016, the Business, Innovation and Skills Committee ordered the attendance of Mike Ashley, owner of **Sports Direct.** Mr Ashley appeared before the Committee.
Northern Ireland Affairs Committee (2014) ***Order for witness***	In two separate instances, the Northern Ireland Affairs Committee issued orders for attendance, in connection with its **'**On the Runs' inquiry. The Committee ordered Tony Blair, former **Prime Minister,** to attend on 10 December 2014. He attended and gave evidence on 13 January 2015. On 7 January 2015 the Committee ordered Mark Sweeney and Simon Case of the **Northern Ireland Office** to attend. They attended and gave evidence on 19 January.

Home Affairs Committee (2014) ***Order for witness***	On 28 October 2014, the Home Affairs Committee ordered the attendance of Sir Paul Kennedy, **Interception of Communications Commissioner**. He attended and gave evidence on 4 November.
Home Affairs Committee (2014) ***Order for witness***	On 25 February 2014, the Home Affairs Committee ordered the attendance of Sir Mike Walker, **Intelligence Services Commissioner**. He attended and gave evidence on 18 March.
Public Accounts Committee (2011) ***Order for witness***	On 9 November 2011, the Committee of Public Accounts ordered the attendance of Dame Helen Ghosh, former Head of the **Rural Payments Agency**. She attended and gave evidence on 14 November.
Culture, Media and Sport Committee (2011) ***Order for witness***	On 14 July 2011 the Culture, Media and Sport Committee ordered the attendance of Rupert Murdoch, Chair and CEO of **News Corporation** and his son James Murdoch, Chair and CEO of **News Corporation International**. Both Rupert and James Murdoch attended and gave evidence on 19 July.
Public Accounts Committee (2011) ***Order for witness***	On 11 July 2011, the Committee of Public Accounts ordered the attendance of Sir Ian Kennedy, then chair of the **Independent Parliamentary Standards Authority**. He attended and gave evidence on 13 July.
Welsh Affairs Committee (2009) ***Order for witness***	On 24 November 2009, the Welsh Affairs Committee ordered the attendance of Edwina Hart, **Welsh Assembly Government** Health Minister. She attended and gave evidence on 15 December.

Orders and Resolutions of the House to provide papers to committees of the House

Date	Papers	Committee	Requested by Committee?
23 May 2018	*Relating to outsourcing and privatisation in the NHS*	*Health and Social Care*	*Opposition motion – negatived on division*
2 May 2018	*Relating to the Windrush generation*	*Home Affairs*	*Opposition motion – negatived on division*
31 January 2018	EU exit analysis	ExEU	Opposition motion
24 January 2018	Relating to Carillion: Assessments of risks of Government strategic suppliers and improvement plans	Public Accounts	Opposition motion
5 December 2017	Universal credit project assessment reviews	Work and Pensions	Opposition motion
1	Brexit impact assessments	ExEU	Opposition

November 2017			motion

ANNEX 2: Paper on Parliamentary Privilege – to legislate or not? By Chris Bryant MP

Previous attempts

1. Parliament has produced two reports on the rights and wrongs of legislating for the disciplinary and penal powers involved in parliamentary privilege in recent years – in 1999 and 2013. The two reports came to opposite conclusions. The 1999 report called for a new Parliamentary Privileges Act which would define 'contempt of Parliament', abolish the power of parliament to imprison (save for temporary detention of persons misconducting themselves within the precincts of Parliament), and introduce a new criminal offence of refusing to attend parliamentary proceedings, answer questions or produce documents punishable with a fine of unlimited amount or up to three months' imprisonment. By contrast, the 2013 report, which followed a Coalition Government Green Paper, concluded 'We do not consider that comprehensive codification is needed at this time.'
2. In advance of the 2013 report the Liaison Committee concluded 'on balance…that, at the very least Parliament should set out a clear, and realistic, statement of its powers — and perhaps also its responsibilities — in a resolution of the House and set out in more detail in Standing Orders how those powers are to be exercised. We note the Clerk of the House's view that this might not be fully effective, but this would at least show Parliament's determination to retain the powers it has within the "exclusive cognizance" of Parliamentary Privilege.' This last point – the need for the House to retain certain powers – is important.

Present Practice

3. The House customarily gives Select Committees the power to send for persons, papers and records. Select Committees have relied on this power in order to pursue their enquiries. As Erskine May points out, 'that power is unqualified, except to the extent that it conflicts with the privileges of the Crown and of Members of the House of Lords, or with the rights of Commons'. That means that a Committee may summon anyone within the UK jurisdiction in order to investigate any matter than might be the subject of legislation or taxation, apart from certain civil servants and other parliamentarians, who are governed by the respective rules of their two Houses.
4. In the main, witnesses respond in a timely fashion to informal requests to attend and no formal summons is needed. There is, however, a further step that a committee may take. As Erskine May points out 'When a committee decides to summon a witness formally, the witness is summoned to attend the committee by an order signed by the chairman. Failure to attend a committee when formally summoned is a contempt and if a witness fails to appear, when summoned in this manner, his conduct is reported to the House… If he still neglects to appear, he will be dealt with as in other cases of disobedience.'
5. There's the rub. Parliament finds it difficult to punish 'disobedience'. In recent years witnesses have refused to respond to an initial Committee request to attend, threatened to refuse to attend even after a formal summons, sought to delay attending and point-blank refused to attend on a specified date or on any date. The list includes Rupert Murdoch, Rebekah Brooks, James Murdoch, Mike Ashley of Sports Direct, Mark Zuckerberg, Alexander Nix and Philip Green. Each instance has led to

substantial public commentary on the Commons lack of power beyond that of embarrassment.

6. There is little doubt that refusing to attend a Committee when formally summoned, refusing to answer questions and lying to parliament all constitute 'a contempt of parliament'. Previous generations would have been confident that they could effectively subpoena a witness by sending the Serjeant-at-Arms with some police officers – and that they could arraign a contemnor before the bar of the House. However, most modern commentators consider that neither Select Committees nor the Commons continue to enjoy the power to detain, subpoena, imprison or fine someone held to be in contempt of Parliament. The last time the House used its power to arrest was in 1880 (when it arrested a non-Member, Charles Grissell, and a Member, Charles Bradlaugh). In 1978 the House declared that it should use its penal powers 'sparingly'. Although it did not then rule that they had had lapsed it has not attempted to use them since; and the 1999 Report said that the power to fine 'should be considered to have lapsed.'
7. This clearly presents parliament with an anomaly and it leaves Select Committees with no secure means of enforcing its powers to summon witnesses or to penalise those who are in contempt of Parliament. There is a real danger that if a Committee went to the House to request that a formal summons to attend be served on someone in the UK or than someone be penalised for refusing to attend, there would be no effective or effectual means of enforcing such a summons or penalising the disobedience. The Commons would be proven to have no teeth and all subsequent summonses would be in danger of being ignored. Parliament would be prevented from doing its job of holding the powerful to account and investigating every aspect of life on which it might legislate.
8. If Parliament is to do its work properly and effectively there needs to be a fair system for reprimanding, sanctioning or punishing those who have improperly interfered in its legitimate business or prevented it from performing its constitutional role. This is no different from the USA where the Supreme Court ruled in 1921 that Congress needed the power to hold someone in contempt or else it would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it."
9. The demands of common justice, the Human Rights Act and the European Convention on Human Rights require that any adjudication and imposition of such sanctions must allow for due process and fair trial and should be strictly separate from any partisan political process. It is worth noting that Parliament often exercises quasi-judicial functions – for instance when considering contested Private Business and Hybrid Bills.
10. Some have argued that Parliament should legislate to provide the two Houses with enforceable powers, including giving them the power to fine non-Members. The danger of this course of action is that without very significant changes to the way the Commons works (for instance to allow witnesses the right to legal representation and cross-examination) it would allow for no due process or appeal to a higher court.
11. The alternative is to legislate for a new criminal offence of 'contempt of Parliament', which would be enforced by the prosecuting authorities and the courts. Whilst there is a danger that this might bring every element of 'proceedings in Parliament' into the justiciable ambit of the courts, it would guarantee due process and respect the

separation of powers and it would be a very limited and proportionate incursion into the Bill of Rights prohibition on the courts 'questioning or impeaching' proceedings in parliament. A well-drafted Bill could, for instance, determine that a contempt has ipso facto occurred in any instance where a named witness has been summoned by a Committee in the form specified, the summons has been duly delivered, the witness has not appeared and the House has made an application to the Attorney General. This would parallel the US system whereby either the House or the Senate can resolve by a simple majority that a contempt has occurred and then hands the matter over to the District Attorney for the District of Columbia. The court then decides what to do. A Bill could determine the maximum penalty for such a contempt – although it would make sense for it to be the same as for contempt of court.

Lying to Parliament

12. There is the further problem of witnesses lying to Parliament. Under the Parliamentary Witnesses Oaths Act 1871, as amended, any committee of the House of Commons may administer an oath to the witnesses examined before such a committee. Standing Order 132 further specifies that 'any oath taken or affirmation made by any witness before a select committee may be administered by the chair, or by the clerk attending such committee.' These provisions are rarely used except when committees are taking evidence on contested Private Bills (although the Public Accounts Committee did recently require a HMRC official to give evidence on oath). At least in theory, the Perjury Act 1911 provides that any deliberately false evidence given in a judicial hearing, including a Select Committee hearing, can be considered perjury and attract a penalty under the Act. I am not aware of any instances of this being applied and in the most recent instance when Parliament has resolved that it had been lied to, the witnesses were not on oath, the then CMS Select Committee obtained a referral to the then Committee on Standards and Privileges, which led to a lengthy internal process and the eventual 'punishment' of the culprits by mere admonition.

The 'danger' of legislation

13. Parliament has been understandably keen to assert its sovereignty, its exclusive cognisance and its privilege of freedom of speech, whereby within certain bounds MPs and peers can say what they want in proceedings in Parliament without fear of prosecution. We would be reluctant to allow the courts to pore over our deliberations so as to decide the rights and wrongs of an alleged contempt. However, we long ago decided that arrest, detention, imprisonment and sequestration of assets (including fining) were beyond and without our cognisance. There is no reason why Parliament could not decide whether a contempt has occurred – and a court could impose any penalty it thought fit. The Lord Chief Justice has made clear that no court would simply 'rubber stamp' an order of the House, but if the House were to ask a court to force a recalcitrant witness to appear, the court could undoubtedly issue a subpoena and if the witness still refused to appear then the court could consider the said recalcitrant witness as in contempt of court. The court could then determine its own penalty for such a contempt. This would maintain the separation of powers and allow for due process. It requires modern legislation.

14. Lack of clarity is now undermining Parliament's reputation and ability to do its work. We have fudged this for far too long. It is time Parliament's powers – and lack of powers – were codified in statute. Members' freedom of speech already attracts only partial, qualified, privilege. We already have wealthy people threatening to sue committees for what they publish under the Human Rights Act and the European Convention.

ANNEX 3: Note on select committee powers in relation to contempt by Sir Bernard Jenkin MP

Introduction

The ability of Committees to enforce their power to send for persons, papers and records – at least formally – is limited. Historically, those found guilty of contempt could be fined or imprisoned, but those sanctions have not been used by the Commons since 1666 and 1880 respectively and are regarded as defunct. For this reason, some have argued that Parliament should legislate to provide a statutory regime. However, there are good reasons why Parliament has always turned away from this option. In particular, it risks disturbing the separation of powers between Parliament and the judiciary. This note considers this debate and how otherwise the powers of select committees could be strengthened.

The scale of the problem

The scale of the problem is limited: witnesses almost always attend, even if they have initially proved reluctant or have had to be formally summoned (Sir Philip Green, Rupert Murdoch and Mike Ashely are a few recent, high profile examples that have initially resisted but ultimately agreed to attend). The capacity of committees to embarrass witnesses in the press has usually be sufficient to ensure cooperation. The two examples of witnesses who did refuse to appear (the CEO of Kraft and Mark Zuckerberg) sent representatives from their organisations. Such examples are potentially a humiliation for Parliament, but being US-based, short of extradition proceedings, they would have been outside the jurisdiction of any legal remedy made available to committees anyway. However, it is important that committees have the powers they need to function effectively.

Strengthening committee powers

The Joint Committee on Parliamentary Privilege, which reported in 2013, set out three options for addressing the perceived inability of the two Houses to exercise their penal powers:

1. Do nothing;
2. Legislation; or
3. Internal measures, such as amending Standing Orders or agreeing resolutions.

On the first option, the Joint Committee concluded that while committees have been able to function effectively up until now, the growing and increasingly public doubt over the House's penal powers means there is a risk that potential witnesses will be tempted to test those powers. The two Houses must be prepared for that eventuality and it would therefore be wrong to do nothing.

On the second option, the 2013 Joint Committee concluded that giving Parliament powers on a statutory footing under the oversight of the courts would threaten the principle of exclusive cognisance (which says that Parliament alone adjudicates on matters of parliamentary privilege). It would potentially also open up Parliamentary proceedings to court challenge and in particular, in relation to attempts to summon or cross-examine witnesses, challenges could be made on the grounds of fairness or reasonableness.

Opening up parliamentary proceedings to court challenge would also introduce delay and uncertainty regarding how contempts not covered by criminal statute should be dealt with. The danger is that the legal process would become the first recourse for any reluctant witness. Delay has no respectability now, but delay would become legitimised by statute. It also threatens to limit how select committees could question their witnesses, which itself might become subject to judicial oversight. The Joint Committee concluded that gaining enforceable powers is not worth the risks of a reduction in exclusive cognisance, or the uncertainty regarding Parliament's power to punish other contempts.

Alternatives to statute, recommended in 2013 and not implemented

These concerns about the first two options led the Joint Committee to recommend that the third option be adopted. Both Houses should set out in resolutions and standing orders what powers they reserve the right to exercise, what is expected of witnesses, and the means by which they will consider allegations of contempt, including procedural safeguards, to ensure that witnesses are treated fairly. Allegations of contempt by select committees could be automatically referred to the Committee of Privileges. If the Committee of Privileges finds that a contempt has been committed, the House could then vote, with the ability to admonish contemnors by resolution, without any requirement for contemnors to appear in person. Admonishment would have a considerable reputational impact, but the involvement of the Committee of Privileges and the whole of the House would act as safeguards against frivolous allegations of contempt. The annexes to the Joint Committee's report contain draft resolutions and standing orders.

Conclusion

The gains from placing the powers of select committees on a statutory footing are far outweighed by other factors, in particular, the possibility of legal challenge to committees' activities, and the delay and uncertainty that it would entail. It would also lead to a significant reduction in exclusive cognisance, and would lead to uncertainty regarding Parliament's powers to punish other contempts.

For this reason, the Joint Committee recommended that legislation should be avoided and both Houses should instead clearly set out what powers they reserve the right to exercise, what is expected of witnesses, and the means by which they will consider allegations of contempt. This would clarify each House's jurisdiction over contempt and ensure the process for using those powers is fair, without the disadvantages that would result from legislation.

The Liaison Committee should press for the 2013 recommendations to be implemented.

19 June 2018