Memorandum submitted by Ms Eve Samson, Principal Clerk, House of Commons (SCC0019)

1. In making this submission I draw upon my experience as one of the Clerks involved in the Joint Committees on Parliamentary Privilege of both 1999 and 2013, the client in prominent privilege cases at the ECtHR, Clerk of the Committee of Privileges at the time of the phone hacking inquiry and an associate editor of the current edition of Erskine May.

2. There have been two Joint Committees on Parliamentary Privilege in the last 25 years. The 1999 Report, chaired by a Law Lord, and containing many senior legal figures among its membership, recommended codification of privilege. The 2013 Report, chaired by the Lord Chairman of Committees, and with a membership drawn from across Parliament, recommended that Parliament assert the continuing existence and usability of historical powers. There was no political will to implement either set of recommendations. The Committee will need to consider political practicality in deciding on its recommendations.

3. But there are also important constitutional issues at play here about the relationships between Parliament and the court. As discussed below, the current principle is one of comity: the courts and Parliament do not trespass on one another's sphere. If Parliament wishes to give the courts responsibility for deciding some matters relating to its internal proceedings it would be well advised to consider precisely the limits of those judicial decisions, and the practicality of enforcing those limits, given the courts' responsibility for interpreting legislation, and the difficulty of producing effective ouster clauses. It is also worth bearing in mind that any decision of the Commons will have knock on effects for the House of Lords.

<u>The way forward</u>

4. It is possible that if either Joint Committee's recommendations had been followed current problems would not have arisen. Assertion of powers could have worked in 2013, but is probably not politically or practically possible now, since the House has demonstrated its lack of certainty in the interim. As matters stand, doing nothing is only an option if the Commons accepts it does not have and does not need the power to compel the attendance of witnesses or the production of papers.

5. That means that legislation is necessary if powers are to be enforceable. Clear and enforceable powers would reduce the likelihood that witnesses would defy a summons to appear before a Committee or produce papers. A proper system will need to be established, and may be tested occasionally, particularly at the outset, but is unlikely to be used frequently in the longer term.

<u>Fairness</u>

6. If it endorses legislation, the Committee will need to consider what should or should not be reviewed, and by whom. I would strongly suggest it should not be for the courts to decide whether or not a particular witness was necessary for an inquiry. To allow this would allow the courts to determine the course of parliamentary inquiries and would be a grave change to the constitution.

7. That does not mean there should be no check on Committee powers to summon: simply that the proper place for that check is within Parliament rather than outside it.
8. Fairness is applied daily in Committees. In almost every inquiry, witnesses with good reasons not to attend are excused without fuss or formality, and staff make sure witnesses know what is expected. It might be sensible to make explicit this usual practice.

9. But there are also explicit legal standards of fairness. Article 6 of the European Convention on Human Rights sets out the standards required for the determination of civil rights, and for those charged with a criminal offence. While appearance before a Committee with consent does not engage Article 6, decisions about whether someone is *required* to attend would determine a right or obligation and any penal consequence would require the safeguards applied to criminal offences. So any decision on using powers of compulsion needs to be fair in the sense of the ECHR.

10. One possible route to ensure fairness would be to remove Committee's powers to summon and require them to request a summons from the Committee of Privileges,[1] setting out their reasons, and for the person resisting the summons to have the right to appeal with legal assistance if desired.

11. There may also need to be wider procedural reform. The current system for raising issues of privilege was intended to restrict Members' ability to make accusations of breach of privilege as a means for publicity, but in practice it gives the impression that the House has prejudged an issue. Consideration could also be given to whether Members involved in making or determining a complaint should vote on a matter which reaches the floor of the House.

12. Having processes which are demonstrably fair will be beneficial whatever the way in which legislation on powers is structured (or even if legislation is rejected). There are many different approaches to reform of the procedures by which the House deals with privilege matters. The detail would depend on the broader approach taken to the enforceability of the House's powers, so I do not explore it here.

[1] Committees of the Oireachtas with powers to send for persons papers and records which seek to exercise those powers of compellability must seek the consent in writing of the Committee on Procedure and Privileges. See https://data.oireachtas.ie/ie/oireachtas/parliamentaryBusiness/other/2016-01-21_guidelines-for-witnesses-and-others-on-compellability_en.pdf

Legislative models

13. Legislation will inevitably involve some possibility of judicial review, unless Lord Thomas's suggestion of an internal parliamentary court is adopted. One issue with such a Parliamentary court is the old problem that it could lead to the House of Lords determining the privileges of the House of Commons – a difficulty recognised in the nineteenth century case of *Bradlaugh v Gosset.*

14. In the United Kingdom, each House claims exclusive cognisance over its own proceedings as an inherent part of privilege, and Article 9 is the statutory form of earlier claims. The courts and Parliament have traditionally not meddled in each other's areas of competence. The Commons and Lords voluntarily restrict themselves by subjudice rule and the prohibition on casual criticism of the judiciary to ensure that Parliamentary views do not colour legal proceedings. Article 9 and exclusive cognisance keep the courts from trespassing on areas best left to Parliament. In passing, I note Article 9 is incidentally a means of securing fairness to witnesses: it means they should not face legal liability or cross examination for evidence given to Parliament.[2]

15. There are many different ways in which legislation might be constructed, from full scale codification of all privilege to a narrow power to compel evidence and papers, policed by the courts. While the courts have been the arbiters of whether or not a privilege exists since the great 1830s constitutional stand off in *Stockdale vs Hansar*d, full codification would change this balance: it would make the courts chief arbiters of privilege, through their undoubted right to interpret statute.

16. The Committee's call for evidence focusses on Committee powers, but those powers are only part of privilege. Many of the key principles of privilege are contested. The statutory foundation for freedom of speech in Parliament, Article 9 of the Bill of Rights states

    "freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".

17. There is little clarity about what are proceedings in Parliament, what is meant by impeaching or questioning or what is covered by "place out of Parliament". At best one can say there is a broad Parliamentary understanding and that this is not necessarily the same as the judicial understanding. In 1981 the House of Commons voluntarily removed the requirement for petitioning the House for use of proceedings in evidence in legal proceedings. Although this was not intended to change anything, and, indeed, the original motion was amended to assert the

[2] Witnesses may suffer other detriment, such as dismissal from their posts, although such detriments could also arise from giving evidence in legal proceedings. While in theory the Witnesses (Public Inquiries) Protection Act 1892 could be used to offer protection, its practical efficacy is unproven. Employment Tribunals would not be able to look at the evidence looking at the circumstances of a dismissal.

continuing application of Article 9, in practice, there has been increasing judicial reference to proceedings, and the ways in which those proceedings are used has gradually widened. Removal of the requirement has also made the courts the sole arbiter of the proper use of proceedings, since it has removed the ability of the House to decide whether or not to grant permission – or, indeed, even to monitor the use courts make of parliamentary material.

18. As a result of judicial decisions which clashed with Parliamentary understanding of privilege, both Australia and New Zealand have passed legislation on privilege which, while it does not amount to a full codification, clarifies many of these points, and which puts the penal powers of their respective Houses beyond doubt. The Acts allow the House to act against a broad range of contempts or "offences".

19. In both Australia and New Zealand privilege rests on statute, and the courts have always had some function. (In Australia the review function is to consider whether a matter is properly a contempt of Parliament; in New Zealand, the New Zealand Bill of Rights Act 1990 applies to Parliament as well as others[3]). In both Australia and New Zealand the legislation is accompanied by internal procedures to ensure fairness. A broad statute, on the lines of the Australian or New Zealand Act, which affirmed and placed on a statutory basis each House's penal powers and was accompanied by internal reform would not exclude the courts completely, since they would be responsible for interpreting the Act, but would limit their review. It would also provide the opportunity for Parliament to define key concepts, and the proper use of proceedings in Parliament by the courts. However, it would require extensive consideration and could well be (small p) politically contentious.

20. The Committee has been presented with a range of options for a narrower statute, which could be modelled on the Inquiries Act powers. These would have the advantage of simplicity and effectiveness and might well be politically possible. Such legislation would mean the House did not have to grapple with enforcement.[4] The downside is that it would also have the consequence of definitively removing the House's powers to act against contempts where there was no statutory provision. It is not impossible to devise mechanisms to reduce the risk of judicial evaluation of a Parliamentary decision to summon a particular witness, such as a Speaker's certificate, but the narrower the judicial evaluation permitted the greater the risk of challenge under Article 6 ECHR – and ouster mechanisms are not always effective. The fairer the House's internal processes, the less there will be a danger of review of decisions to summon individual witnesses.

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[3] https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/chapter-47-proceedings-in-matters-of-privilege/

[4] Though in the past a warrant from the Speaker was effective, and I see no reason why it should not be so if there is statutory backing for it