Memorandum submitted by Daniel Greenberg, Counsel for Domestic Legislation, Office of Speaker's Counsel, House of Commons (SCC0021)

The problem

1. To restore Parliament's powers to fine or imprison directly for contempt of Parliament is not a realistically achievable proposition.

2. It would certainly be contrary to the European Convention on Human Rights, as it would be impossible to establish anything amounting to due process for the imposition of penalties[1].

3. That and other legal objections apart[2], moreover, it is inconceivable that in the present state of the public perception of politicians it would be politically practicable to permit politicians to penalise the public for failure to cooperate with Parliamentary inquiries or for other acts in contempt of Parliament.

4. Equally, however, recent events have created a reputational risk for Parliament, as well as threatening the efficiency and effectiveness of its inquiries and other proceedings, if, in particular, witnesses summoned to provide information or evidence to Select Committees can simply ignore the summons with impunity.

Proposed solution

5. A possible way of reconciling the need for effective sanctions for contempt with the unattainability of powers to punish directly, would be to seek to enact primary legislation giving the High Court the power to grant remedies for failure to obey a summons, including by issuing an injunction in support of a request made by a Parliamentary Committee or by either House.

---

[1] At least, it would be inconsistent with the Convention without providing for judicial oversight of a kind inconsistent with Article IX of the Bill of Rights; the advantage of the model proposed in this Note is that it involves Parliament choosing to invoke judicial remedies, rather than the judges being compelled to supervise Parliamentary remedies.

[2] Such as the breach of natural justice involved in Parliament being seen to be the judge of its own cause against the citizen.

6. Breach of the injunction or other remedy would then be a contempt of court in the normal way; the responsibility for enforcement, although not the initiative, would pass from Parliament to the courts in accordance with their standard procedures.

7. The principal advantage of this is that it would remove any suggestion that Parliament was granting to itself dictatorial and oppressive powers.

8. Although it would be for Parliament to seek an injunction, this would as always be a discretionary remedy, and it would be for the court to determine whether and how to use it.

9. So long as the judiciary of the High Court continue to be perceived as independent of government and Parliament, the use of a judicial remedy with all the safeguards that this entails should avoid reputational damage for Parliament should be capable of being avoided in this way.

10. At the same time, the High Court injunction could be a fast and effective way of preventing people from withholding cooperation from Select Committee inquiries.

Precedent: Parliament and Perjury

11. An advantage of this model is that, in so far as it seeks to allow Parliament to make use of existing legal processes for the purposes of supporting its own proceedings, it is not entirely without precedent.

12. Section 1 of the Parliamentary Witnesses Oaths Act 1871 (Examination of witnesses on oath by the House of Commons and committees of the House) provides—

> The House of Commons may administer an oath to the witnesses examined at the bar of the said House.
>
> Any committee of the House of Commons may administer an oath to the witnesses examined before such committee.

13. This power was invoked by the Public Accounts Committee[3] in 2011 when examining Anthony Inglese, General Counsel and Solicitor, HMRC—

> **Q294 Chair**: Right, Mr Inglese, we are taking a very unusual step this afternoon. From here onwards, we are going to examine you on Oath-that is a power that we have. The Oath will be administered by the Clerk. I gather there are two forms of words that you can give, which the Clerk will read out to you.
>
> **Anthony Inglese**: Can I have a minute's time out?
>
> **Mr Bacon**: No, I don't see why you should have a minute's time out at all. This Committee has the power to make witnesses[4] give evidence under Oath,

---

[3] Minutes of Evidence – HC 1531 – 7 November 2011.

[4] This was not, of course, entirely accurate: the statute gives the House power to administer oaths, it does not give the House the power to compel witnesses to take them; its purpose is to engage the law of perjury, as the purpose of the proposed model would be to engage the law of contempt of court, by converting contempt of Parliament into a contempt of court.

and we are doing so because we have not been able to get answers otherwise, so I think we should just get on with it.

Anthony Inglese: I swear by almighty God that the evidence I shall give before this Committee shall be the truth, the whole truth and nothing but the truth, so help me God.

Q295 Chair: Thank you. I am no lawyer, but clearly, as you have taken the Oath, you will not want to give answers that are incorrect, because you might find yourself with an accusation of having committed perjury, as I understand it.

Disadvantage of model

14. The main disadvantage of the model proposed would be to give the High Court jurisdiction in relation to proceedings of Select Committees and their requirements, further eroding the exclusive cognisance principle[5], that proceedings in Parliament are not to be questioned or challenged through the courts.

15. That principle has, of course, been qualified, restricted or eroded in a number of recent decisions, partly simply reflecting the different administrative legal and political contexts of today.

16. More importantly, however, it is inconceivable that any system of sanctions that Parliament might devise would not be susceptible to some kind of review by the courts; so probably nothing is lost, and possibly much is gained, by Parliament defining the acceptable parameters of judicial oversight itself, rather than leaving them to be developed by the courts.

---

5 Article IX of the Bill of Rights.

Draft

17. The Annex exhibits a draft of a provision that would enable – but not require – a High Court judge to grant any one of a range of remedies, potentially including the issue of an injunction compelling attendance of witnesses or submission of evidence or documents, at the discretion of the judge as is usual for injunctive remedies.

18. The statute would expressly require the judge to consider the single question of whether or not the Select Committee reasonably required the evidence, documents or information sought, in order to pursue its enquiry effectively.

19. It would expressly prohibit the judge from second-guessing Parliament as to whether the inquiry was a proper enquiry to undertake, and from making any other judgments about, or attempting any other interference in, Parliamentary proceedings.

Balance

20. The House might be nervous about permitting even this degree of judicial interference: but, in my judgment, there is a straight choice between—

    (a) retaining the present unsatisfactory position where Parliament is seen as impotent to enforce its requirements[6], and

    (b) introducing a statutory mechanism which by involving the courts expressly avoids legal objections and minimises reputational damage[7].

---

[6] And recent high-profile failures in cooperation may encourage the trend to become more widespread.

[7] Indeed, this method could actually give additional reputational traction as Parliament is seen to balance its duty to hold government and others to account and to investigate matters on behalf of the public, against a desire to respect privacy and due process.

21. To give an example of how this might work in practice—

(a) Were a Select Committee to summon the CEO of a multinational company to give evidence about an aspect of policy of the company, the High Court might refuse an injunction to compel attendance on the grounds that the presence of the CEO herself or himself was not necessary to the inquiry, where they had offered to send an appropriately knowledgeable and experienced representative.

(b) In another case, however, where a Select Committee had decided to investigate on an *ad hominem* basis, the judge would be expected to conclude that anybody other than the witness summoned would be incapable of giving the information required by the Committee; whether or not the Committee was wise to conduct an *ad hominem* investigation, would not be something on which the court could opine.

Conclusion

22. I will be happy to expand on any matter in this Note if helpful.

23 October 2019

ANNEX

DRAFT LEGISLATION

Failure to attend Commons Select Committee

(1) This section applies if the Speaker of the House of Commons certifies that an individual—

(a) was summoned by a Select Committee of the House of Commons to attend the Committee to answer questions or to provide information or documents, and

(b) has failed to attend, or to answer questions or to provide information or documents.

(2) The Speaker may certify in writing to the High Court that the individual has failed to comply with the summons.

(3) Where a failure to comply is certified under subsection (2), the court—

(a) shall inquire into the matter, and

(b) may deal with the individual as if for a contempt of court.

(4) The court may act under subsection (3)(b) after hearing—

(a) any witness who may be produced on behalf of the Committee,

(b) any statement that may be offered on behalf of the individual, and

(c) any witness who may be produced on behalf of the individual.

(5) The court may consider the nature and purpose of the Committee's summons and proceedings for the purposes of determining what action (if any) to take under subsection (3)(b) (but not for any other purpose, and this section does not diminish or qualify any existing right or privilege of the House of Commons).