



BRIEFING PAPER

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Select committees: evidence and witnesses

By Richard Kelly

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Summary

After a general overview of the powers of select committees, this Briefing Paper reviews the power of select committees “to send for persons, papers and records”, that is to obtain oral and written evidence. Although select committees have these powers, they can ultimately only be enforced by decision of the House. The Note considers arguments that have been made to increase select committees’ abilities to enforce these powers without recourse to the House. It reviews the arguments for requiring witnesses to give evidence on oath to select committees.

The Paper outlines the sanctions that can be imposed by the House on those who choose not to respond to requests from committees. It summarises the 1999 Joint Committee on Parliamentary Privilege’s review of these sanctions and its comments on contempt. The Joint Committee recommended that parliamentary privilege should be put on a statutory basis.

In April 2012, the Government published a Green Paper on parliamentary privilege, which included some draft clauses. A joint committee was appointed to review the Green Paper. It considered the difficulties that the two Houses face in exercising their penal powers. It considered approaches suggested by the Green Paper: doing nothing; legislating to confirm the powers of the two Houses or to specify particular contempts in statute; and reforming internal procedures to clarify powers and set out how they would be exercised. The Joint Committee preferred the third option and outlined how it believed the process should operate, stressing the importance of fairness, access to the rules and expectations of each House and a formal statement of “the kinds of behaviour likely to constitute contempt”.

The questions of the powers of select committees and the powers of the House of Commons to punish have not been clarified since the Joint Committee reported. Since then, informal select committee invitations to witnesses to give evidence have been declined. This has led to calls for the issue of select committee powers to be reconsidered and to make it a criminal offence to fail to appear or refuse to appear, without reasonable excuse, before a House of Commons Committee.

For authoritative procedural advice on select committee procedures, Members should contact the Clerk of Committees.

1. Introduction

Since at least the 19th century, the power “send for persons, papers and records” has routinely been given to select committees to enable them to obtain oral and written evidence.

The powers of select committees have not been tested often in modern times. Some recent committee inquiries have drawn attention to the powers of select committees; and to their ability to enforce these powers; and the House’s powers to enforce orders made by committees.

2. The powers of select committees

Select committees are regarded as extensions of the House, limited in their inquiries by the extent of the authority given them, but governed for the most part in their proceedings by the same rules as those which prevail in the House.¹

Erskine May notes that “Select committees possess no authority except that which they derive by delegation from the House”. May then notes that:

... Select committees are customarily given some or all of the following powers:

- to send for persons, papers and records;
- to appoint specialist advisers;
- to report from time to time;
- to meet on days when the House is adjourned;
- to meet away from Westminster;
- to appoint sub-committees;
- to exchange papers and/or meet concurrently with other select committees (including committees of the House of Lords).²

In undertaking their inquiries, select committees “rely very largely on written and oral evidence”.³ Consequently a key power that committees have is to be able to send for persons, papers and records.

As Erskine May describes:

...when a select committee has the power to send for persons, 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.⁴

In general a select committee with the power to send for persons, papers and records may summon any person within the United Kingdom jurisdiction as a witness.⁵ But there are significant exceptions: select committees (other than the Committee of Privileges and the Committee on Standards in relation to Members of the House of Commons) do not have the power to compel Members of either House, or officers of the House of Lords, to give oral or written evidence.⁶

¹ Erskine May, *Parliamentary Practice*, 24th edition, 2011, p808

² Erskine May, *Parliamentary Practice*, 24th edition, 2011, p799

³ Erskine May, *Parliamentary Practice*, 24th edition, 2011, p817

⁴ Erskine May, *Parliamentary Practice*, 24th edition, 2011, p820

⁵ Erskine May, *Parliamentary Practice*, 24th edition, 2011, p825

⁶ The House has given the Committee of Privileges the power to order the attendance of any Member to appear before the Committee. Standing Order No 148A(6) provides that:

The committee shall have power to order the attendance of any Member before the committee and to require that specific documents or records in the possession of a Member relating to its inquiries be laid before the committee or any sub-committee.

2.1 The power to summon witnesses

The process for formally summoning a witness is outlined by Erskine May:

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.⁷

It is the *House* which will ultimately decide how a case of disobedience should be dealt with.

When dealing with those who are not Ministers or civil servants, Committees generally issue an informal invitation to attend. If this is resisted without good reason, the Committee can remind a reluctant witness of its power to summon. As such reminders are informal, they are not recorded. Committees seldom have to resort to a formal order to an individual to attend.

In July 2011 the Culture, Media and Sport Committee invited Rupert Murdoch, Chair and CEO of News Corporation, James Murdoch, Chairman and Chief Executive of News Corporation (International), and Rebekah Brooks, former Chief Executive of News International, to appear before the Committee. In a press notice, the Committee stated that because both Rupert Murdoch and James Murdoch had declined the invitation to appear on a specified date the Committee had decided to summon them to appear on 19 July 2011:

Rebekah Brooks has accepted the invitation to appear before the committee next week. Rupert Murdoch has indicated he is unable to attend to give evidence, and James Murdoch has indicated he is unable to attend on the specified date but offered to appear at an alternative date, the earliest of which was August 10th.

[...]

The committee has made clear its view that all three should appear to account for the behaviour of News International and for previous statements made to the committee in Parliament, now acknowledged to be false.

Accordingly, the committee has decided to summon Rupert Murdoch and James Murdoch to appear before the Select Committee in Parliament at 2.30pm on Tuesday 19 July 2011.⁸

The Committee on Standards has a similar power:

The committee shall have power to order the attendance of any Member before the committee or any sub-committee and to require that specific documents or records in the possession of a Member relating to its inquiries, or to the inquiries of a sub-committee or of the Commissioner, be laid before the committee or any sub-committee.

[House of Commons, [Standing Orders of the House of Commons – Public Business 2016](#), February 2016, HC 2 2015-16, Standing Order No. 148A(6); No 149(9)]

⁷ Erskine May, *Parliamentary Practice*, 24th edition, 2011, p820

⁸ Culture Media and Sport Committee press notice, [Commons summons News International executives](#), 14 July 2011. Other committees have also ordered witnesses to attend:

Rupert Murdoch and James Murdoch appeared before the Committee on 19 July.

The Order made by the Culture, Media and Sport Committee is reproduced in Box 1.

Box 1: Order for the attendance of Rupert Murdoch and James Murdoch before the Culture, Media and Sport Committee

Culture, Media and Sport Committee

House of Commons 7 Millbank London SW1P 3JA

Tel 020 7219 5739 Email cmscom@parliament.uk Website www.parliament.uk/cmscom

THURSDAY 14 JULY 2011

Members present:

Mr John Whittingdale, in the Chair

Dr Thérèse Coffey
Damian Collins
Paul Farrelly

Alan Keen
Mr Adrian Sanders
Mr Tom Watson

1. Forthcoming hearing on phone-hacking

The Committee considered this matter.

Ordered, That Mr Rupert Murdoch and Mr James Murdoch attend the Committee on Tuesday 19 July 2011 at 14.30pm in the Wilson Room, Portcullis House.

[Adjourned till Tuesday 19 July at 14.00pm]

On 15 March 2016, the Business, Innovation and Skills (BIS) Committee ordered Mike Ashley, owner of Sports Direct, to attend the Committee on 7 June (see Box 2).⁹ The Committee had previously written to Mr Ashley to establish whether he would accept the Committee's invitation to give evidence to it at Westminster.¹⁰ In reply, Mr Ashley had restated an invitation to the Committee to visit Shirebrook – his company's

Welsh Affairs Committee – Edwina Hart, Welsh Assembly Government Health Minister, December 2009;

Public Accounts Committee – Professor Sir Ian Kennedy, IPSA, July 2011;

Public Accounts Committee – Dame Helen Ghosh, Rural Payments Agency, November 2011;

Home Affairs Committee – Sir Mike Walker, Intelligence Services Commissioner, February 2014;

Home Affairs Committee – Sir Paul Kennedy, Interception of Communications Commissioner, October 2014;

Northern Ireland Affairs Committee – Tony Blair, December 2014

Northern Ireland Affairs Committee – Mark Sweeney and Dr Simon Case, NIO, December 2014

⁹ Business, Innovation and Skills Committee, [Letter to Mr Mike Ashley](#), 15 March 2016

¹⁰ Business, Innovation and Skills Committee, [Letter to Mr Mike Ashley](#), 3 March 2016

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headquarters).¹¹ On 22 March 2016, in a point of order, Iain Wright, the Chair of the BIS Committee, said that “Yesterday [Mr Ashley] indicated to the press, although not to the Committee, that he has no current intention of attending the Committee”.¹² (See section 6.8 for questions from Members on how the House could ensure compliance with the Committee’s order.)

On 17 May 2016, it was reported that Mike Ashley had told the BIS Committee that he would appear before the Committee, as long as members of the Committee first visited his firm’s headquarters in Derbyshire.¹³

On 25 May 2016, the *Times* reported that the BIS Committee considered Mr Ashley’s response at its meeting on 24 May. The *Times* understood that the Committee would not go to Shirebrook as a condition of Mr Ashley appearing and that the Committee expected him to attend on 7 June:

It is understood that at the meeting yesterday MPs discussed the conditional nature of Mr Ashley’s offer. Most were unhappy that a precedent could be set, whereby an individual determined the basis on which to respond to an official summons to appear before an inquiry.

It is thought that MPs will send Mr Ashley a letter this week thanking him for offering to appear on June 7 and making it clear that they expect to see him then. They have not ruled out visiting the Shirebrook complex later.¹⁴

Box 2: Order for the attendance of Mr Mike Ashley before the Business, Innovation and Skills Committee

Business, Innovation and Skills Committee

House of Commons London SW1A 0AAA

Tel 020 7219 5469 Email biscom@parliament.uk Website www.parliament.uk

15 March 2016

Extract from formal minutes of the Committee of 15 March 2016:

Ordered, That Mr Mike Ashley attend the Committee on Tuesday 7 June.

[signature]

Iain Wright MP

Chair of the Business, Innovation and Skills Committee

Source: Business, Innovation and Skills Committee, [Letter to Mr Mike Ashley](#), 15 March 2016; [Formal Minutes 2015-16](#), p29 Box text

¹¹ Business, Innovation and Skills Committee, [Letter from Mr Mike Ashley](#), 10 March 2016

¹² [HC Deb 22 March 2016 c1382](#)

¹³ BBC News, [Sports Direct boss Mike Ashley asks MPs to attend Derbyshire HQ](#), 17 May 2016; Simon Goodley, [“Mike Ashley will meet MPs on condition they visit Sports Direct”](#), *Guardian*, 17 May 2016

¹⁴ Deirdre Hipwell, [“We’ll see you at our place, not yours, MPs tell Ashley”](#), *Times*, 25 May 2016

Analysis

In a blog post shortly after the BIS committee ordered Mike Ashley to attend, Dr Hannah White, of the Institute for Government, considered the nature of select committee powers, highlighting their “soft power”:

In most cases such a summons will be sufficient to embarrass a potential witness into appearing. ...

After he refused an informal invitation, the chair of the BIS Committee wrote to Mr Ashley summoning him to attend a hearing on 7 June as part of its investigation into Sports Direct’s pay and working conditions. The BIS committee will now be hoping that their soft power – in the form of impact on the retailer’s share price – will persuade Mr Ashley to attend.¹⁵

2.2 The power to demand papers: private bodies

Erskine May states that:

There is no restriction on the power of committees to require the production of papers by private bodies or individuals provided that such papers are relevant to the committee’s work as defined by its order of reference. Select committees have formally ordered papers to be produced by the chairman of a nationalized industry and a private society. Solicitors have been ordered to produce papers relating to a client.¹⁶

2.3 The power to demand papers: Government papers and records

Erskine May states that:

A select committee has no power to send for any papers which, if required by the House itself, would be sought by Address. Consequently, a select committee is not capable of taking the formal step of ordering a Secretary of State to produce papers. Nor can a committee require an officer of a public department to produce any paper which, according to the rules and practice of the House, it is not usual for the House itself to order to be laid before it. Select committees have occasionally argued that the lack of opportunities for private Members to move motions in the House means that they cannot in practice seek to challenge in the House a department’s decision to withhold papers. Governments have opposed recommendations for a formal procedure to give them the opportunity, but have instead relied on the terms of the House’s Resolution on Ministerial Accountability of March 1997 and in particular its provision that ‘Ministers should be as open as possible with Parliament, refusing to provide information only when disclosure would not be in the public interest’. In addition the government has given an undertaking that ‘where there is evidence of widespread general concern in the House regarding an alleged Ministerial refusal to divulge information to a select committee’, time would be provided for a debate in the House.¹⁷

¹⁵ Hannah White, [In contempt? Witnesses before select committees](#), Institute for Government Blog, 18 April 2016

¹⁶ Erskine May, *Parliamentary Practice*, 24th edition, 2011, p819

¹⁷ Erskine May, *Parliamentary Practice*, 24th edition, 2011, pp818-819

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When the departmental select committee system was introduced in 1979, it was envisaged that committees would gain access to information largely using informal routes, with the threat of sanctions as a last resort.¹⁸ The Procedure Committee report on new departmental select committees recommended a mechanism to request and then, if refused, order and then, if refused, ultimately to allow select committees to “table a Motion for an Address or an Order for the Return of the papers required by the committee”.¹⁹ This recommendation was not adopted by the House. Informal requests for information have usually been met by government departments. For example, in the 2010-12 Session, National Security Council papers relating to the supply of aircraft carriers were provided to the Treasury Select Committee and the Committee of Public Accounts, with certain redactions.²⁰

¹⁸ Procedure Committee, *First Report*, HC 588-I 1978-79, chapter 7

¹⁹ Procedure Committee, *First Report*, HC 588-I 1978-79, para 7.25

²⁰ Committee on Public Accounts, *Providing the UK's Carrier Strike Capability*, 29 November 2011, HC 1427 2010-12, Ev22

3. Problems in questioning witnesses or obtaining evidence

Individual committees have identified difficulties in securing the appearance of individual witnesses and specific documents. They usually record these problems in the report of the relevant inquiry but from time-to-time, they make special reports to the House. The most frequent problems occur in relation to evidence from Government.

3.1 Witnesses

Ministers

Although select committees do not have power to summon ministers, Ministers rarely refuse to attend a select committee hearing. There have been occasional initial refusals, such as when the Health Minister, Edwina Currie, at first declined to give evidence to the Agriculture Committee's inquiry into salmonella in eggs.²¹

The Transport, Local Government and the Regions Committee reported that a Treasury minister refused to appear before the Transport Sub-Committee in 2002.²²

Civil Servants

The Cabinet Office's *Departmental Evidence and Response to Select Committees* (the "Osmotherly Rules") give general guidance to civil servants on giving evidence to select committees. The House has never formally agreed the Rules.²³ The Osmotherly Rules state that "Civil servants who give evidence to Select Committees do so on behalf of their Ministers and under their directions", in accordance with the principle that "it is Ministers who are accountable to Parliament for the policies and actions of their Departments".²⁴ The Rules accept that select committees may wish to take evidence from particular officials:

When a Select Committee indicates that it wishes to take evidence from any particular named official, including special advisers, the presumption is that Ministers will seek to agree such a request. However, the decision on who is best able to represent the Minister rests with the Minister concerned. It remains the right of a Minister to suggest an alternative civil servant, or additional civil servant(s), to the person named by the Committee if he or she feels that would be a better way to represent them. If there is no agreement about which official should most appropriately give

²¹ Agriculture Committee, *Salmonella in eggs*, February 1989, HC 108 1988-89

²² Transport, Local Government and the Regions Committee, *The Attendance of a Minister from HM Treasury before the Transport, Local Government and the Regions Committee*, 18 April 2002, HC 771 2001-02

²³ For further information see House of Commons Library Standard Note, [The Osmotherly Rules](#), SN/PC/2671

²⁴ Cabinet Office, [Giving Evidence to Select Committees: Guidance for Civil Servants](#), October 2014, paras 9-10

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evidence, the Minister can offer to appear personally before the Committee.²⁵

While Committees could in principle summon a named civil servant, any such summons would have to be enforced by the House, where the Government would normally have a majority.

In its July 2003 Report, *The Decision to go to War in Iraq*, the Foreign Affairs Committee criticized the Government for its reluctance to allow witnesses the Committee had invited to appear before it:

We are strongly of the view that we were entitled to a greater degree of co-operation from the Government on access to witnesses and to intelligence material. Our Chairman wrote to the Prime Minister (requesting his attendance and that of Alastair Campbell); the Cabinet Office Intelligence Co-ordinator; the Chairman of the Joint Intelligence Committee; the Chief of Defence Intelligence; the Head of the Secret Intelligence Service; and the Director of GCHQ. None of them replied. It was the Foreign Secretary who informed us that they would not appear. The Chairman wrote a further letter to Alastair Campbell and after an initial refusal he agreed to appear. We asked for direct access to Joint Intelligence Committee (JIC) assessments and to relevant FCO papers. That was refused, although some extracts were read to us in private session. We are confident that our inquiry would have been enhanced if our requests had been met. We agree with Alastair Campbell that "it would have been very odd to have done this inquiry" without questioning him, and we regret that other witnesses, some of whom we suspect felt the same way as Mr Campbell, were prevented from appearing. Yet it is fair to state that within the Government's self-imposed constraints the Foreign Secretary sought to be forthcoming, spending more than five hours before the Committee, and reading to us in private session limited extracts from a JIC assessment dated 9 September 2002.²⁶

In March 2004, following the publication of Lord Hutton's Report and a report by the Intelligence and Security Committee – *Iraqi Weapons of Mass Destruction – Intelligence and Assessments* – the Foreign Affairs Committee returned to the question of ensuring that invited witnesses appeared before committees in a Special Report. After contrasting the witnesses who appeared before and the papers made available to Lord Hutton and the Intelligence and Security Committee with its inquiry, the Foreign Affairs Committee raised a number of questions relating to the power to send for persons, papers and records for the House to consider:

13. The House has given this Committee, in common with other Committees, power under its Standing Orders to send for persons, papers and records. The experience of the Foreign Affairs Committee in the course of its Inquiry into *The Decision to go to War in Iraq* suggests that these powers are, in practice, unenforceable in relation to the Executive. We commented in our Report of that Inquiry in the following terms:

²⁵ Cabinet Office, [Giving Evidence to Select Committees: Guidance for Civil Servants](#), October 2014, para 12

²⁶ Foreign Affairs Committee, *The Decision to go to War in Iraq*, 7 July 2003, HC 813 2002-03, para 6

We also note that select committees have always enjoyed the power to send for "persons, papers and records" to assist them in their work. While committees cannot summon members of either House (Commons or Lords) to appear before them, officials have a duty to attend when requested. By tradition, select committees have observed what are colloquially known as the 'Osmotherly Rules', which provide guidance to civil servants appearing before committees. These state that when a Minister and a select committee disagree about the attendance of a particular, named official, the Minister should give evidence personally. However, in 1990, the then Permanent Secretary to the Cabinet and Head of the Home Civil Service, Sir Robin Butler, confirmed that when a specific civil servant was summoned by a committee they had a "duty" to attend.

We conclude that continued refusal by Ministers to allow this committee access to intelligence papers and personnel, on this inquiry and more generally, is hampering it in the work which Parliament has asked it to carry out.

We recommend that the Government accept the principle that it should be prepared to accede to requests from the Foreign Affairs Committee for access to intelligence, when the Committee can demonstrate that it is of key importance to a specific inquiry it is conducting and unless there are genuine concerns for national security. We further recommend that, in cases where access is refused, full reasons should be given.

14. The Government has not accepted our recommendations. We therefore invite the House to consider, and to reach a view on, the following questions:

What procedures should apply when a relevant Minister refuses to appear before a Committee of this House?

What procedures should apply when a Minister refuses to allow a named civil servant or other official within his area of responsibility to appear before a Committee of this House?

What procedures should apply when a Minister refuses to supply papers or records to a Committee of this House?²⁷

In its Annual Report for 2004 it referred to the Special Report and noted:

58. The Government, which controls the time of the House, has yet to provide it with an opportunity to consider these vital questions. Our colleagues on the Liaison Committee, however, have raised them with the Prime Minister and with the Leader of the House, Peter Hain. Mr Hain has submitted proposals for amendment of the Government's internal rules governing the provision of evidence to select committees, none of which answers our questions. It is deeply disappointing that, as the Freedom of Information Act comes into force, the Government appears set on avoiding an opportunity to enhance Parliamentary scrutiny of its affairs.²⁸

²⁷ Foreign Affairs Committee, *Implications for the Work of the House and its Committees of the Government's Lack of Co-operation with the Foreign Affairs Committee's Inquiry into The Decision to go to War in Iraq*, 18 March 2004, HC 440 2003-04, paras 13-14

²⁸ Foreign Affairs Committee, *The work of the Committee in 2004*, 31 Jan 2005, HC 112, 2004-05

Special advisers

There have also been problems in seeking the appearance of Government special advisers as witnesses. The Public Administration Select Committee (PASC) invited Jonathan Powell, Special Adviser to the Prime Minister, to give evidence in 2000 but Sir Richard Wilson, Cabinet Secretary and Head of the Home Civil Service, appeared before the Committee.²⁹ The Transport, Local Government and the Regions Committee experienced similar problems in relation to Lord Birt, Tony's Blair's unpaid special adviser, in relation to an inquiry into transport policy.³⁰

²⁹ Public Administration Select Committee, *Making Government Work – Minutes of Evidence for Wednesday 1 November 2000*, 19 December 2000, HC 238-vi 1999-2000, Q397

³⁰ Transport, Local Government and the Regions Committee, *The Attendance of Lord Birt at the Transport, Local Government and the Regions Committee*, 4 March 2002, HC 655 2001-02 As a Member of the House of Lords, Lord Birt could not have been summoned by the Committee

4. Protection for witnesses

Witnesses before Committees enjoy parliamentary privilege, and it is a contempt of Parliament for others to penalise a witness for the evidence they give. In 2003-04 the Committee on Standards and Privileges found that such a contempt had occurred when a witness to a Committee had been asked to resign from the board of an NDPB.³¹ The Government unreservedly apologised, and issued new guidance making clear to NDPBs that:

... subject only to a Committee's power to decide to require the attendance of a witness, the decision on whether to give evidence is solely for the individual concerned. There must be no pressure placed on individuals to deter them, or action taken against them as a consequence of giving evidence to a Select Committee. Any such actions might be regarded as a contempt of the House with potentially serious consequences for those involved.³²

The House of Commons *Guide for witnesses giving written or oral evidence to House of Commons select committees* notes that “Witnesses to select committees enjoy **absolute privilege** in respect of the evidence they give, whether written or oral, **provided that it is formally accepted as such by the Committee**” (emphasis in original). The guidance also stresses the duties of witnesses who give evidence to select committees:

The protection which absolute privilege gives to those preparing written evidence and to witnesses must not be abused. In particular, witnesses should answer questions put to them by a committee **carefully, fully and honestly**. Deliberately attempting to mislead a committee is a contempt of the House, which the House has the power to punish.³³

³¹ Committee on Standards and Privileges, *Privilege: Protection of a Witness*, 1 April 2004, HC 447 2003-04,

³² Committee on Standards and Privileges, *Privilege: Protection of a Witness (Government Response)*, 16 September 2004, HC 1055 2003-04, Appendix, paragraph 6

³³ House of Commons, [Guide for witnesses giving written or oral evidence to House of Commons select committees](#), June 2011, p11. Guidance has also been published for Members who serve on select committees: House of Commons, [Guide for select committee members](#), March 2011

5. Evidence on oath

Under the provisions of the *Parliamentary Witnesses Oaths Act 1871*, as amended, both the House and its committees can administer an oath:

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.

Any oath under this Act may be administered by the Speaker of the House of Commons, or by such person or persons as may from time to time be appointed for that purpose either by him or by any Standing Order or other Order of the said House.³⁴

And Standing Order No 132 provides 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.³⁵

The *House of Commons (Witnesses) Bill 1871*, which became the Act, quickly passed through all its Commons Stages, without amendment. It was founded on the report of a select committee into an earlier bill of the same title.³⁶ The Select Committee Report on the earlier Bill is briefly reviewed in Box 3.

As Erskine May states, “it is not usual ... for select committees to examine witnesses upon oath, except upon inquiries of a judicial or other special nature”.³⁷ While Committees dealing with opposed private bills take evidence on oath, other committees rarely do so. In many cases those giving evidence to a Committee will do so as part of an exploration of opinions, rather than as an investigation of facts. Although it is infrequent, Committees (other than private bill committees) have taken evidence on oath on several occasions. The most recent example at the time of writing was on 7 November 2011, when the Public Accounts Committee administered the oath to Anthony Inglese CB, General Counsel and Solicitor, HMRC.³⁸

Giving false evidence to a Committee, whether or not an oath had been administered, would be a contempt of the House. The *Perjury Act 1911* provides for those making false statement to be tried in the courts:

(1) If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury, and shall, on conviction thereof on indictment, be liable to penal servitude for a term not exceeding seven years, or to imprisonment for a term not

³⁴ *Parliamentary Witnesses Oaths Act 1871* (chapter 83), section 1, as amended

³⁵ House of Commons, [Standing Orders of the House of Commons – Public Business 2011](#), December 2010, HC 700, Standing Order No 132

³⁶ HC Deb 23 February 1871 c759

³⁷ Erskine May, *Parliamentary Practice*, 24th edition, 2011, p824

³⁸ Oral Evidence Taken Before The Public Accounts Committee, *HM Revenue and Customs Accounts 2010-11*, HC 1531-ii, Q305; BBC News, [HMRC lawyer forced to swear oath](#), 7 November 2011; see also Erskine May, *Parliamentary Practice*, 24th edition, 2011, p 824, fn 158

exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine.

(2) The expression “judicial proceeding” includes a proceeding before any court, tribunal, or person having by law power to hear, receive, and examine evidence on oath.³⁹

Box 3: Select Committee report on witnesses taking the oath

On 22 June 1869, the *Witnesses (House of Commons) Bill* received a second reading and was committed to a select committee.

The Committee reviewed the practice of taking evidence at the Bar of the House and in the House of Lords. It noted that “except in the case of Private Bills, it is only when the truth of facts is to be ascertained that an Order is now made by the House of Lords, authorising witnesses to be sworn. Your Committee are of the opinion that this distinction points to the nature of the rule that might, with most advantage, be followed, in taking evidence by the Commons House of Parliament”.⁴⁰

The Committee discussed evidence from the Speaker, the previous Speaker and Sir Thomas Erskine May, the Clerk Assistant. The Committee noted that there remained “a variety of questions of the greatest moment on which the House of Commons may be called upon to pronounce judgment; the consequences of which may involve property, character, privilege and personal liberty. ... In all these ... it seems natural that evidence should be taken in the most solemn manner”.⁴¹

The Committee concluded that:

... provision should be made by Act of Parliament for conferring on the House of Commons the power of examining witnesses on oath, and that the said power be further extended to select Committees whenever the House in its judgment shall deem fit.⁴²

The Committee did not amend the Bill before it, but noted that it would “substantially carry into effect these recommendations”.⁴³ox text

If proceedings for perjury before a Committee were brought, it would be for the courts to deal with the relationship between Article 9 of the Bill of Rights and the *Perjury Act 1911*. In a paper on “Powers of Select Committees” for the Liaison Committee, the Clerk of the House discussed problems that prosecuting for perjury, before a parliamentary committee, could cause.⁴⁴

The 1997-99 Joint Committee on Parliamentary Privilege favoured clarification in the context of legislation on privilege:

316. Statutes already exist to deal with two serious classes of offences. The primary responsibility for the protection of its witnesses rests with Parliament, and at the beginning of every session the House of Commons resolves to proceed ‘with the utmost severity’ towards any person who obstructs or tampers with a witness. However, this warning is supported by statute. The Witnesses (Public Inquiries) Protection Act 1892 includes penalties for those who are proved, before the courts, to have threatened or punished any person on account of evidence given

³⁹ *Perjury Act 1911* (chapter 6), section 1

⁴⁰ Select Committee on Witnesses (House of Commons), *Report*, July 1869, HC 305, 1868-69, para 2

⁴¹ *Ibid*, para 7fs

⁴² *Ibid*, para 11

⁴³ *Ibid*, para 12

⁴⁴ Liaison Committee, [Select committee effectiveness, resources and powers – Volume II](#), 8 November 2012, Written Evidence submitted by the Clerk of the House, Ev w77-Ev w85, paras 28-35. See also, Alexander Horne, [‘Evidence under oath, perjury and parliamentary privilege’](#), U.K. Constitutional Law Blog, 29 January 2015

by that person before a committee of either House, unless that evidence was given in bad faith. It also includes provision for damages when the witness has been defamed or materially disadvantaged.

317. Perjury before a House or a committee is dealt with in statute, as well as being a contempt. The Lords have always had the power to take evidence on oath and to treat false evidence as being liable to the penalties of perjury. That right was given to the Commons, on a permanent basis, in 1871 by the Parliamentary Witnesses Oaths Act, superseded by the Perjury Act of 1911.

318. These are two instances where parliamentary privilege was not intended to stand in the way of evidence relating to proceedings being given in court. In the light of the prominence given in this century to article 9, it would be advisable to reaffirm these two statutory exceptions to that article in any future statute on privilege. We are not aware of any prosecutions under either statute. Presumably, these statutes would be considered only when a grave offence was specifically drawn to the attention of the House and the prosecuting authorities by the appropriate committee.⁴⁵

⁴⁵ Joint Committee on Parliamentary Privilege, *Report*, 9 April 1999, HC 214-I 1998-99, paras 316-318

6. Enforcing the powers of select committees: reviews, proposals and questions

In 1978, the Procedure Committee recommended the establishment of departmental select committees to scrutinise the expenditure, administration and policy of government departments. The Committee had considered the powers that the committees should have but the final decision on their establishment and the powers that would be available to them was taken by the House after the 1979 general election.

In the 1979 debate on establishing departmental select committees, Norman St John Stevas, the then Leader of the House of Commons, discussed the powers that the proposed committees would have. He noted that the Procedure Committee had recommended that select committees should have the power to order the attendance of Ministers, and to order the production of papers and records by Ministers. If a committee's request was refused, it should also have been empowered to force a debate.⁴⁶ In response to these recommendations, Norman St John Stevas said:

I have two comments to make. First, the power to order any Member of the House to attend before a Select Committee, be he a Minister or not, is a power that constitutionally strictly belongs to the House and not to a Committee. Secondly, the Procedure Committee itself concedes that formal powers on these matters have had to be exercised only on rare occasions.⁴⁷

Consequently, on their establishment, departmental select committees were given, *inter alia*, the power "to send for persons, papers and records",⁴⁸ the standard powers given to select committees to enable them to obtain oral and written evidence.

Since their introduction in 1979, departmental select committees have been subject to a number of reviews by the Liaison Committee, the Procedure Committee and the Modernisation Committee. Questions about the powers available to select committees and discussions about the enforcement of those powers have been raised from time to time.

6.1 Procedure Committee – summoning ministers (1990)

In the 1989-90 Session, the Commons Procedure Committee held an inquiry into the operation of the departmental select committees. In his written evidence to the Committee, the then Clerk of the House examined the case for stronger powers for select committees to summon ministers. He wrote that:

⁴⁶ Procedure Committee, *First Report*, HC 588-I 1978-79, paras 7.21-7.22

⁴⁷ HC Deb 25 June 1979 vol 969 c44

⁴⁸ Commons Journal (1978-79) 78

...it is sometimes suggested that the power of committees should be increased to enable them to order the attendance of Ministers to answer all relevant questions.

Such arguments are, in my view, unrealistic unless the House were to give select committees the power to punish recalcitrant witnesses directly, which would have to include the ultimate power, only possessed by the House, of committal in the case of contempt of an order. It is highly unlikely that the House would ever delegate such powers, and that being so committees would have to resort to the House if a Minister refused an order to attend as a witness and to answer certain questions. The House would still be likely to support the Minister in his refusal. The additional powers would thus amount to very little.

In practice, in the great majority of cases, Ministers have given select committees evidence when requested. The influence of parliamentary and public opinion has backed up such voluntary co-operation. In my view, these informal influences are sufficient. Additional formal powers are unnecessary and would not work.⁴⁹

The Committee agreed, noting “given that the only area in which those powers are presently circumscribed is the ability to summon Ministers (and other Members) and since the only body which can enforce compliance with an order to attend the House, where the Government has a majority, it is hard to see what meaningful change could be made”.⁵⁰

6.2 Liaison Committee – persons, papers and records (1997)

In its review of *The Work of Select Committees* at the end of the 1992 Parliament, the Liaison Committee considered the question of committees’ powers to summon persons, papers and records. The Liaison Committee noted that undertakings to provide information to committees had generally been met but that there had been requests to introduce the procedure recommended in 1978 to allow select committees to move for an Address or an Order for a Return of Papers. It also reported that there were general concerns that the lack of specific powers to enforce requests left committees at a disadvantage in obtaining the fullest cooperation from Government:

8. When the Departmental Select Committee system was established in 1979, it was acknowledged that the Committee’s general powers to send for persons, papers and records did not extend to ordering the attendance of Ministers nor to the production of specific Government papers. In rejecting a recommendation of the Procedure Committee, that committees should be able to take the failure to provide papers automatically to the floor of the House, the then Leader of the House committed the Government to making available to committees as much information as possible and to giving the House an early opportunity to debate a matter on the floor of the House if the Government refused to provide information and that refusal was

⁴⁹ Select Committee on Procedure, *The Working of the Select Committee System: Memoranda*, HC 19-i 1989-90, p lxiv

⁵⁰ Select Committee on Procedure, *The Working of the Select Committee System*, HC 19 1989-90, para 162

of serious concern to the House as a whole. These undertakings have been amplified in the intervening period.

9. The Public Service and Trade and Industry Committees in their recent Reports have made a number of specific recommendations about the powers of committees in this respect. In particular they called

- for committees to be given the power to order the attendance of Members of the House as witnesses in the same way as other witnesses can be summoned;
- for there to be “a presumption that Ministers accept requests by committees that individual named civil servants give evidence to them”; and,
- in relation to papers, for the House to agree to a 1978 recommendation by the Procedure Committee for a procedure which would “restore to select committees in certain specified circumstances the right, which formerly belonged to any backbenchers, to move for an Address or an Order for a Return of Papers”.

10. The reports from individual Chairmen indicate that, with few exceptions, there have not been any real difficulties in the current Parliament. Nonetheless there remains concern that the lack of specific powers leaves committees at a disadvantage in obtaining the fullest cooperation from Government.⁵¹

In the same review, the Liaison Committee reported that it was in the area of the provision of documents that most difficulties had arisen. There were a number of causes of problems – committees not being aware that documents existed; specific papers not being made available to committees; and no mechanism to require the Government to provide a particular document – and the Committee identified a number of solutions:

14. It is in the area of provision of documents that most difficulties have arisen. There is a basic problem facing committees in so far as they are not always aware of the information and documents available in Departments which are germane to their inquiries. Some committees have complained of the difficulties in discerning the existence of documents. **We conclude, as the Procedure Committee did in its 1990 Report, that it should be the duty of Departments to ensure that select committees are furnished with any important information which appears to be relevant to their inquiries without waiting to be asked for it specifically.**

15. In most but not all cases where specific problems have arisen it has been because papers were, or were alleged to be, sensitive, either politically, militarily or commercially. Frequently it has been possible to reach a reasonable compromise but this was always the case. There are established arrangements under which committees may receive classified evidence – and indeed publish that evidence subject to agreement on sidelining (that is, excising the particularly sensitive passages from the published evidence). On occasions it has been helpful for committees to see particularly sensitive material under the “crown jewels” procedure⁵² although

⁵¹ Liaison Committee, *The Work of Select Committees*, 18 February 1997, HC 323-I 1996-97, paras 8-10

⁵² The Liaison committee provided the following footnote to describe the procedure:

some committees have misgivings about the restrictions thereby placed on their freedom to comment upon the evidence. There is evidence that Government is using outside experts more frequently to consider specialist subjects such as “efficiency”. Such advice has been claimed as “advice to ministers” and thus denied to select committees. We believe this is unacceptable.

16. Since 1979, the Government has given a series of undertakings that time would be provided for debate in the fairly rare cases where there is disagreement about the provision of information or papers. It is clear that these undertakings are not entirely satisfactory in the rare cases where a committee needs access to a specific document but the Department concerned will not release it. There have been a significant number of cases where committees have been refused specific documents but the Government has not provided time for the subject to be debated. The onus should be shifted onto the Government to defend in the House its refusal to disclose information to a select committee. A committee should be able to table and have debated a motion for the return of a specific document. A debate for an hour or so would enable the committee and the Government to set out their points of view and the House could decide the matter on a division. This procedure would be analogous to the one hour debate provided for in Standing Orders if nominations to select committees are opposed on the floor of the House. In practice we believe the existence of such a fall-back procedure would encourage a compromise to be reached before the matter had to be taken to the floor of the House. **We recommend that Standing Orders be amended to provide that if the Chairman of a departmental select committee tables a motion on behalf of the committee that a specific document be laid before the committee the motion should be debated on the floor of the House within ten sitting days and brought to a conclusion after one hour.**⁵³

6.3 Liaison Committee – calling individuals, access to papers (2003)

At its meeting on 16 October 2003, the Liaison Committee decided to review the working of select committees in the light of the Hutton Inquiry into the circumstances surrounding the death of Dr David Kelly. A note by the Liaison Committee’s Clerks identified the following issues for consideration in relation to calling ministers and named civil servants:

What is the most effective method of avoiding refusals – firm negotiation case by case or a general Government undertaking? If the latter, what elements should it contain? What form should it take?⁵⁴

The “crown jewels” procedure was named after the arrangement made for the Foreign Affairs Committee in Session 1984-85 to consult intelligence material known as the “Crown Jewels” on the Department’s premises, without taking away copies or making any notes.

⁵³ Liaison Committee, *The Work of Select Committees*, February 1997, HC 323-I 1996-97, paras 14-16

⁵⁴ Liaison Committee, [Scrutiny of Government: Select Committees after Hutton – Note by the Clerks](#), 8 January 2004, para 13. This Note gives other examples of requests for evidence from select committees not being fulfilled

It identified the following issues in relation to “Access to Papers” for select committees:

20. In brief

- select committees tend to get **information** but not **documents**:

- the Government makes use of the exemption in the Code and in particular Group 2 on “Internal Discussion and Advice” –

“Information whose disclosure would harm the frankness and candour of internal discussion including: proceedings of Cabinet and Cabinet committees; internal opinion, advice, recommendation, consultation and deliberation; projections and assumptions relating to internal policy analysis, analysis of alternative policy options and information relating to rejected policy options; confidential communications between departments, public bodies and regulatory bodies”

Much of the material made available to Hutton would be covered by the Code and so would not currently be provided to select committees

- **select committees could be more active in requesting documents rather than information; but**

- **eventually the question of principle will have to be faced as to whether select committees should enjoy substantially enhanced access to official documentation.**⁵⁵

6.4 Liaison Committee inquiry – select committee powers and effectiveness (November 2012)

Since the attendance of the Murdochs, in July 2011, the Speaker has identified the need for “some quite extensive exploration” of three questions relating to the authority of select committees. In a speech marking the anniversary of the *Parliament Act 1911*, he suggested that:

There are three areas which seem to me at least to merit some quite extensive exploration.

The first is the ability of select committees to compel the attendance of witnesses whom they regard as essential to their inquiries. Reluctant attendance of a witness is perhaps not unusual. Outright refusal is rarer, but of course it is precisely in these cases that the interests of Parliament and the public must be served.

We have some venerable and indeed picturesque procedures for securing the attendance of witnesses, but I think the time has come to consider whether we need something more in accord with modern constitutional and legislative circumstances.

The same goes for the ability to call witnesses to account should they give false evidence, or otherwise mislead a select committee.⁵⁶

⁵⁵ Liaison Committee, [Scrutiny of Government: Select Committees after Hutton – Note by the Clerks](#), 8 January 2004

⁵⁶ Speaker Bercow, [Parliamentary Reform Today – Lessons from 1911](#), Speech at the Livery hall, Guildhall, London, 3 November 2011

On 9 December 2011, the Liaison Committee announced that it would undertake an inquiry into select committee powers and effectiveness.⁵⁷

The Clerk of the House prepared a paper “Powers of Select Committees” for the Liaison Committee. In his paper, he considered whether there was a problem, noting recent events that had prompted questions about select committee powers. He also reviewed the question of sanctions, highlighting the difficulties associated with admonishing, fining and imprisoning those found to be in contempt of the House. He then considered “Should something be done and, if so, what?” He suggested that the alternative options of “do nothing, proceed by Standing Order or Resolutions or legislate” should be tested in terms of “efficacy, proportionality and hazard”.⁵⁸

The Committee’s report, *Select committee effectiveness, resources and powers*, was published on 8 November 2012.⁵⁹ It devoted a short chapter to select committee powers.

It highlighted that “long-standing uncertainties about the extent and enforceability of select committees’ powers were brought to the fore by a series of unusual inquiries”. It mentioned a number of issues: refusal to attend; summoning witnesses; taking evidence on oath; the publication of the Green Paper on parliamentary privilege; and the Clerk’s paper on select committee powers.⁶⁰

The Liaison Committee expected a joint committee to be established to consider the Green Paper. It still commented that “We expect to be represented on that joint committee, and do not wish to prejudge its conclusions, but it may be helpful if we give an indication here of our thinking. **We are persuaded that the disadvantages of enshrining parliamentary privilege in statute would outweigh the benefits**”.⁶¹

The Committee also considered whether action was necessary:

134. There are two points of view on whether it is now necessary to take some action: either

- a) doing nothing is no longer an option: it is only a question of time before our powers are challenged; or
- b) recent problems have not been severe and either possible solution would bring more disadvantages than advantages.

On balance, **we conclude 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**

⁵⁷ Liaison Committee, [Liaison Committee inquires into select committee powers and effectiveness](#), 9 December 2011

⁵⁸ Liaison Committee, [Select committee effectiveness, resources and powers – Volume II](#), 8 November 2012, Written Evidence submitted by the Clerk of the House, Ev w77-Ev w85

⁵⁹ Liaison Committee, [Select committee effectiveness, resources and powers](#), 8 November 2012, HC 697 2012-13

⁶⁰ Liaison Committee, [Select committee effectiveness, resources and powers](#), 8 November 2012, HC 697 2012-13, paras 129-132

⁶¹ Liaison Committee, [Select committee effectiveness, resources and powers](#), 8 November 2012, HC 697 2012-13, para 133

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. Evidence of such determination is altogether lacking at present. We look forward to the Joint Committee's conclusions.⁶²

On 24 January 2013, the Liaison Committee published responses to its report from the Speaker on behalf of the House of Commons Commission, from House authorities – the Clerk of the House replied on behalf of the Management Board and the Clerk Assistant responded to the Committee's recommendation on staffing issues – and from the Leader of the House of Commons. It described the responses from the House as "positive", while "the response from the Government is mixed".⁶³

The Liaison Committee's report and the responses to it are scheduled to be debated on 31 January 2013.

6.5 Green Paper on Parliamentary Privilege (April 2012)

The Government's commitment to publish a draft bill on parliamentary privilege was met by its Green Paper on *Parliamentary Privilege*, which included some draft clauses, published in April 2012.⁶⁴

The chapter on select committee powers did not include any draft legislation. The Government noted that it was "not aware of any case where an individual has failed to comply with a formal summons from a select committee or with an order to produce a document or record. Therefore, the evidence suggests that in practice there may not be an issue to address".⁶⁵

Despite this, the Government reviewed two broad approaches, discussed by the 1999 Joint Committee on Parliamentary Privilege:

A: Legislate to give the two Houses enforceable powers by codifying their existing powers, possibly including giving the House of Commons a clear power to fine non-Members; or

B: Create criminal offences of committing contempts of Parliament; this would allow Parliament's powers to be enforced through the courts.

And asked:

Q24: Should the House of Commons be given a statutory power to fine non-members? If so, what steps should be taken to ensure this power was only used in line with the principles of natural justice?

⁶² Liaison Committee, [Select committee effectiveness, resources and powers](#), 8 November 2012, HC 697 2012-13, para 134

⁶³ Liaison Committee, [Select committee effectiveness, resources and powers: responses to the Committee's Second Report of Session 2012–13](#), 24 January 20-13, HC 911 2012-13, paras 1-3

⁶⁴ HM Government, *Parliamentary Privilege*, April 2012, Cm 8318

⁶⁵ HM Government, *Parliamentary Privilege*, April 2012, Cm 8318, para 254

[...]

Q25: Should a statutory definition of contempt of Parliament be introduced that would be enforceable by the courts? If so, should it be defined by reference to general principles or to specific acts?

[...]

Q26: Do you think a criminal offence should be introduced of failing to comply with an order of a select committee? If so, how should the issues identified in this paper be addressed?⁶⁶

The Government argued that before codifying their powers – to reprimand, fine or imprison – the two Houses would need to review their procedures for punishing non-Members to ensure that safeguards were in place so that individuals received a fair hearing. The Government noted that the Joint Committee had concluded that it was unlikely that Parliament would be able to provide the kind of safeguards associated with modern due process.⁶⁷

If the second option of criminalising contempts was pursued it would ensure that “punishment was imposed only after a fair and transparent process”. However, Parliament would no longer be responsible for enforcing its privileges; and it would require Parliament to allow its proceedings to be questioned in the courts.⁶⁸ This approach also prompted questions about defining contempts and initiating a prosecution.

6.6 Joint Committee on Parliamentary Privilege (2012-13)

A joint committee was established to report on the Green Paper. The Joint Committee’s report was published in July 2013.⁶⁹

The Joint Committee considered the Green Paper’s questions on whether there was a need to address select committees’ powers to summon witnesses, and require the production of documents and records in a chapter entitled “Penal powers of the Houses”.⁷⁰

Although committees have powers to call for evidence and to summon witnesses, they do not have the power to punish: the Joint Committee restated that “the power to punish contempts remains a matter for each House as a whole”.

The Committee identified two impediments to either House “imposing its will on a contemnor”:

- “institutional reluctance to take action which may seem oppressive”. In 1978, the two House of Commons resolved that “its penal jurisdiction should be exercised ‘(a) as sparingly as possible and (b) only when the House is satisfied that to exercise it

⁶⁶ HM Government, [Parliamentary Privilege](#), Cm 8318, April 2012, chapter 7

⁶⁷ HM Government, *Parliamentary Privilege*, April 2012, Cm 8318, paras 257-263

⁶⁸ HM Government, *Parliamentary Privilege*, April 2012, Cm 8318, paras 264-267

⁶⁹ Joint Committee on Parliamentary Privilege, [Parliamentary Privilege](#), 3 July 2013, HC 100 2013-14

⁷⁰ Joint Committee on Parliamentary Privilege, [Parliamentary Privilege](#), 3 July 2013, HC 100 2013-14, paras 48-100

is essential in order to provide reasonable protection for the House, its Members or its officers, from such improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with the performance of their respective functions’⁷¹; and

- “fear of successful legal challenge”. While domestic courts were unable to consider proceedings in Parliament, the European Court of Human Rights has asserted its jurisdiction – Article 6 of the European Convention on Human Rights provides for the right to a fair trial “by an independent and impartial tribunal”.

The Committee considered the three options “for addressing the perceived inability of the two Houses to exercise their penal powers” that had previously been suggested to the Liaison Committee:

- Doing nothing
- Legislation
- Internal measures, such as amending Standing Orders or agreeing resolutions.

The Committee opined that “All three options carry significant risk”.⁷²

“Doing nothing” was rejected by the Joint Committee. It acknowledged that in most inquiries, in which committees explored issues from a number of points of view, there was “little trouble in securing evidence”. However, the Committee noted that there were occasions when witnesses did not wish to supply material or appear when committees considered it necessary. The Committee recommended that “We consider that it is in the public interest to ensure that committees have the powers they need to function effectively”. It then said:

While committees have been able to function effectively up until now, the growing, and increasingly public, doubt over each House’s penal powers means there is a real risk that potential witnesses will be tempted to test those powers. The two Houses must be prepared for that eventuality. It will be too late to consider these matters when a crisis arrives.⁷³

The Joint Committee rejected the two approaches for legislating to confirm Parliament’s penal powers (criminalising specific contempts⁷⁴ and giving statutory authority to exercise penal powers). Its preferred option was that both Houses should set out what their powers were and how they would exercise. It outlined how it believed the process should operate, stressing the importance of fairness, access to the rules

⁷¹ Joint Committee on Parliamentary Privilege, [Parliamentary Privilege](#), 3 July 2013, HC 100 2013-14, para 50, citing “Third Report from the House of Commons Committee of Privileges, Session 1976–77, *Recommendations of the Select Committee on Parliamentary Privilege*, HC 417; and Resolution of the House, 6 February 1978, CJ (234) 170”

⁷² Joint Committee on Parliamentary Privilege, [Parliamentary Privilege](#), 3 July 2013, HC 100 2013-14, para 57

⁷³ Joint Committee on Parliamentary Privilege, [Parliamentary Privilege](#), 3 July 2013, HC 100 2013-14, para 61

⁷⁴ Such as, failure or refusal, without reasonable excuse, to appear before a select committee, to answer committees question or to produce documents

and expectations of each House and a formal statement of “the kinds of behaviour likely to constitute contempt”. It recommended:

We recommend that the two Houses should build on our work to set out clearly the 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.⁷⁵

6.7 Government response to the Joint Committee on Parliamentary Privilege (December 2013)

In its response to the Joint Committee, the Government agreed that neither approach to giving legislative effect to the House’s penal powers that had been considered by the Committee was right. The Government supported the recommendation that the Houses should build on the Committee’s proposal to set out their penal powers and how they would be exercised:

The Government recognises the difficulties associated with criminalising contempt or legislating to confirm Parliament’s penal powers, and agrees that neither is the right approach.

The Government notes with interest the approach recommended by the Committee to reassert Parliament’s penal rights through the establishment of a “fair process” in Resolutions and Standing Orders of the House of Commons, as set out in Annexes 2 and 3 of the Report. We support the Committee’s recommendation that the two Houses should build on this to set out clearly how the powers would and should be exercised. The Government agrees that transparency in procedure will be critical to ensuring that any application of penal powers conforms with modern standards of natural justice.⁷⁶

6.8 Response to the Business, Innovation and Skills Committee’s decision to summon a witness (March-May 2016)

As noted above (section 2.1), on 15 March 2016, the BIS Committee summoned Mike Ashley to appear before the Committee on 7 June.

Following the Committee’s decision, Iain Wright, its Chair, asked the Speaker, on a point of order in the Chamber on 22 March 2016 to confirm that the BIS committee had “acted in accordance with the procedures of this House”. He then asked:

Can you advise me what steps can now be taken to ensure that Mr Ashley complies with the very reasonable request, and then the formal order, of the BIS Committee?

⁷⁵ Joint Committee on Parliamentary Privilege, [Parliamentary Privilege](#), 3 July 2013, HC 100 2013-14, para 100

⁷⁶ Leader of the House of Commons, [Government Response to the Joint Committee on Parliamentary Privilege](#), Cm 8771, December 2013

In response, the Speaker said that “it appears to me that so far the proper procedures have been followed”. He then outlined what might happen if the BIS Committee wished to take the matter further:

As long as the Committee is acting within its terms of reference, the House expects witnesses to obey the Committee’s order to attend. If, after due consideration, the hon. Gentleman’s Committee wishes to take the matter further, the next step would be to make a special report to the House, setting out the facts. The hon. Gentleman may then wish to apply to me to consider the issue as a matter of privilege, and to ask me to give it priority in the House. Under procedures agreed to by the House in 1978 and set out on page 273 of “Erskine May”, this application should be made to me in writing, rather than as a point of order. I would then be happy to advise him on the options open to him.⁷⁷

On 5 May 2016, at Business Questions, Chris Bryant, the Shadow Leader of the House of Commons, drew attention to the 2013 Joint Committee’s conclusion that the question of the powers of the House to deal with contempts had to be addressed. He noted that it had not and suggested that it be made “a criminal offence to fail to appear or refuse to appear without reasonable excuse before a Committee of this House”:

Our constituents want us to hold the powerful to account, and we should not be shy of doing so. Some people think our powers are unclear, and witnesses are beginning to call our bluff, so we have to do something. In 2013, the Joint Committee on Parliamentary Privilege recommended changes to Standing Orders to make it absolutely clear that Parliament can arrest, punish and fine offenders, saying that

“if the problems we have identified...are not resolved...today’s Parliament should stand ready to legislate”.

The Committee said that doing nothing was not an option, but that is exactly what the Government have done—absolutely nothing. So surely it is time for us to make it a criminal offence to fail to appear or refuse to appear without reasonable excuse before a Committee of this House.

In response, Chris Grayling, the Leader of the House, agreed, saying:

It is essential for the workings of this House that if people are summoned to appear before a Select Committee, they do so. I am very happy that in the new Session we hold cross-party discussions on how we ensure that happens.⁷⁸

6.9 Academic commentary

Parliament’s powers

The question of enforcing the powers of select committees has come up in some of these reviews. The question tends to arise only when select committees are prevented from taking or receiving evidence from an individual.

⁷⁷ [HC Deb 22 March 2016 cc1382-1383](#)

⁷⁸ [HC Deb 5 May 2016 cc310-311; c312](#)

The limitations of what Parliament can do in such circumstances were considered by McKay⁷⁹ and Johnson, in their 2010 book *Parliament and Congress*:

...while a recalcitrant non-official witness is nowadays something of a rarity, when a problem does arise there is no really satisfactory way of successfully deploying the committee's authority. When a journalist declined to disclose the source of certain information given to a committee, on the grounds that 'free journalism' would be impossible if he did so, the Committee had little real choice in their response other than to invite the House to consider the matter. A House of Lords committee which recently encountered a reluctant witness felt it had no recourse other than to refer the matter to the Lords Procedure of the House Committee. In a modern plural society, the traditional weapon of committal for contempt in such cases is not practical. It is more than likely that, failing a witness's refusal to testify in full at a critical point in a high-profile inquiry, matters will be left to the ingenuity of committees in securing most of the information they need without provoking crises which may not have satisfactory endings. There are usually ways round the problem.⁸⁰

Select committees and coercive powers

In June 2012, the Constitution Society published a pamphlet, *Select Committees and Coercive Powers – Clarity or Confusion?*, by Richard Gordon QC and Amy Street. The pamphlet argued that:

At present select committees possess no clear coercive powers at all. The present situation poses a threat to the legitimacy of select committees. However, it does not necessarily follow from this that coercive powers should be introduced. There is a need to consider whether and if so how giving increased powers to select committees would affect Parliament's relationship with the courts more generally.⁸¹

The pamphlet explored the issue in relation to select committee powers without considering the relationship between select committees and the House – the source of authority for select committees; and without considering the role that the House would play in enforcing (or otherwise) decisions of select committees.

Although in their conclusions, Richard Gordon and Amy Street called on Parliament to consider the issue:

Parliament will need to consider the issue of compulsory powers for select committees in the light of competing considerations, namely greater committee effectiveness versus the risk of court intervention in what have traditionally been regarded as 'proceedings in Parliament'.

There are three possible models. First, Parliament may decide to do nothing (other than to improve its existing procedures). Secondly, it may decide to legislate to confer coercive powers and sanctions on select committees and Parliament by means of Standing Order. Thirdly, it may decide to legislate by primary legislation. Here, it may decide to legislate so as to create criminal

⁷⁹ The former Clerk of the House, Sir William McKay

⁸⁰ WR McKay and Charles W Johnson, *Parliament and Congress*, 2010, p368

⁸¹ Richard Gordon and Amy Street, [Select Committees and Coercive Powers – Clarity or Confusion?](#), 2012, Executive Summary

offences enforceable by the courts or it may decide to legislate by simply conferring coercive powers and sanctions on select committees and Parliament.

There are advantages and disadvantages of any of these courses of action. Parliament should consider its decision-making options against the possibility that irrespective of what it decides to do in relation to coercive powers, the courts may inevitably come to have a greater degree of involvement in Parliamentary processes.⁸²

⁸² Richard Gordon and Amy Street, [Select Committees and Coercive Powers – Clarity or Confusion?](#), 2012, Executive Summary

7. Contempt

The Joint Committee on Parliamentary Privilege, which reported in April 1999, considered what was meant by contempt of either House. After providing an overview, the Joint Committee listed a number of examples of activities that could be considered contempts:

264. Contempts comprise any conduct (including words) which improperly interferes, or is intended or likely improperly to interfere, with the performance by either House of its functions, or the performance by a member or officer of the House of his duties as a member or officer. The scope of contempt is broad, because the actions which may obstruct a House or one of its committees in the performance of their functions are diverse in character. Each House has the exclusive right to judge whether conduct amounts to improper interference and hence contempt. The categories of conduct constituting contempt are not closed. The following is a list of some types of contempt:

- interrupting or disturbing the proceedings of, or engaging in other misconduct in the presence of, the House or a committee
- assaulting, threatening, obstructing or intimidating a member or officer of the House in the discharge of the member's or officer's duty
- deliberately attempting to mislead the House or a committee (by way of statement, evidence, or petition)
- deliberately publishing a false or misleading report of the proceedings of a House or a committee
- removing, without authority, papers belonging to the House
- falsifying or altering any papers belonging to the House or formally submitted to a committee of the House
- deliberately altering, suppressing, concealing or destroying a paper required to be produced for the House or a committee
- without reasonable excuse, failing to attend before the House or a committee after being summoned to do so
- without reasonable excuse, refusing to answer a question or provide information or produce papers formally required by the House or a committee
- without reasonable excuse, disobeying a lawful order of the House or a committee
- interfering with or obstructing a person who is carrying out a lawful order of the House or a committee
- bribing or attempting to bribe a member to influence the member's conduct in respect of proceedings of the House or a committee
- intimidating, preventing or hindering a witness from giving evidence or giving evidence in full to the House or a committee
- bribing or attempting to bribe a witness

- assaulting, threatening or disadvantaging a member, or a former member, on account of the member's conduct in Parliament
- divulging or publishing the content of any report or evidence of a select committee before it has been reported to the House.

Additionally, in the case of members:

- accepting a bribe intended to influence a member's conduct in respect of proceedings of the House or a committee
- acting in breach of any orders of the House
- failing to fulfil any requirement of the House, as declared in a code of conduct or otherwise, relating to the possession, declaration, or registration of financial interests or participation in debate or other proceedings.

The Joint Committee also reviewed the penalties that could be applied to anyone found guilty of a contempt. First the Joint Committee reviewed “the present position” (in 1999):

Penalties: the present position

271. Historically the power to adjudge a contempt is linked to the power to commit to prison. In the eighteenth and early nineteenth centuries committal to the custody of the Serjeant-at-Arms, or to prison, was a regular punishment. The House of Commons has power to imprison until the end of the current parliamentary session, however long or short that may be. The House of Lords has power to imprison indefinitely.

272. Alternative punishments are formal admonishment or reprimand. The Commons used to have power to fine. This power was last used in 1666. It was called into question by the courts in the eighteenth century, and should be regarded as lapsed. The House of Lords still retains the power to fine, but it is open to doubt whether, in practice, the means exist to enforce payment. Contempts by members may also be punished in the Commons by suspension (and loss of pay) for a period up to the end of the Parliament, and by expulsion. The House of Lords does not have power to suspend a member permanently. A writ of summons, which entitles a peer to ‘a seat, place and voice’ in Parliament, cannot be withheld from a peer. A peer can be disqualified temporarily either by statute or at common law, for reasons such as bankruptcy or being under age. Whether a peer can otherwise be suspended within the life of a single Parliament is not clear.

273. The 1967 committee concluded that the present penal powers were inadequate to fulfil their necessary role in the protection of Parliament. They recommended that the House of Commons should be empowered to impose a fine, and to commit to prison for a period unaffected by the end of a session but subject to a maximum prescribed by law. The 1977 committee considered that, if there were power to fine, the power to imprison should cease.⁸³

The Joint Committee then considered the application of the rules on contempt to Members, first and then non-Members. The Committee reviewed the jurisdiction of the two Houses in relation to Members; the penalties the Houses are able to impose; procedural fairness; and the

⁸³ *Ibid*, paras 271-273

role of the whole House in deciding any penalty. On the subject of procedural fairness, the Joint Committee drew attention to evidence it had received about the possible application of the European Convention on Human Rights to Parliament, and then commented that:

Although proceedings in Parliament are excluded from the Human Rights Act 1998 and from the jurisdiction of United Kingdom courts, they may nevertheless be within the jurisdiction of the European Court of Human Rights. The existence of this jurisdiction is a salutary reminder that, if the procedures adopted by Parliament when exercising its disciplinary powers are not fair, the proceedings may be challenged by those prejudiced. It is in the interests of Parliament as well as justice that Parliament should adopt at least the minimum requirements of fairness.⁸⁴

⁸⁴ *Ibid*, para 284

8. Sanctions

According to Erskine May:

Acts or omissions which obstruct or impede the work of a committee or any of its members or officers, or which tend, directly or indirectly, to produce such results, may be treated as a contempt of the House and investigated and punished, as appropriate.⁸⁵

May also states that:

In the past witnesses who have refused to be sworn or take upon themselves some corresponding obligation to speak the truth, who have refused to answer questions, who refused to produce or destroyed documents in their possession, who have prevaricated, given false evidence, wilfully suppressed the truth, or persistently misled a committee have been considered guilty of contempt.⁸⁶

The power to punish contempt may be exercised only by the House, but has not been so in recent years. In 1978 the House approved recommendations of the Committee of Privileges that it should exercise its penal jurisdiction as sparingly as possible, and only when it was satisfied that to exercise it was

... essential in order to provide reasonable protection for the House, its Members or its officers from improper obstruction or attempt at or threat of obstruction causing, or likely to cause, substantial interference with the performance of their respective functions.⁸⁷

The House has not punished a non-Member since that time.

The sanctions of reprimand or admonition are described by Erskine May as follows:

In the Commons, the offender, if he is in attendance, is brought to the Bar of the House forthwith by the Serjeant at Arms, and is there reprimanded by the Speaker in the name and by the authority of the House. The offender is then discharged. If, however, he is not in attendance, he may be ordered either to be taken into the custody of the Serjeant and brought to the Bar the following or some later day, there to be reprimanded and discharged, or to attend the House on a future day to be reprimanded.⁸⁸

The House of Commons has not imposed a fine since 1666, and the 1999 Joint Committee on Parliamentary Privilege considered that the power should be "regarded as lapsed".⁸⁹ The power to commit offenders to prison, or into the custody of the Serjeant-at-Arms, has not been used since Charles Bradlaugh was committed by order of the House in 1880. *Griffith and Ryle on Parliament* provides details of three

⁸⁵ Erskine May, *Parliamentary Practice*, 24th edition, 2011, pp837-838

⁸⁶ *Ibid*, pp252-253

⁸⁷ *Ibid*, p273

⁸⁸ *Ibid*, pp196-97; punishment by the House is discussed in Erskine May (24th edition) at pages 191-7

⁸⁹ Joint Committee on Parliamentary Privilege, *Report*, 9 April 1999, HC 214-I 1998-99, para 272

post-war occasions where Members and a non-Member were formally reprimanded at the bar of the House:

Since 1945, two Members (Mr Walkeden in 1947 and Tam Dalyell in 1968) and one journalist have been formally reprimanded. John Junor (Editor of the *Sunday Express*) was summoned to the bar of the House in 1957 to explain his actions regarding an article in his newspaper; however, after he made an apology to the House, the House decided to take no further action. Again, these are penalties which may be felt less effective or appropriate today.⁹⁰

In a blog post, soon after the Public Accounts Committee required Anthony Inglese to give his evidence on oath, Mark D'Arcy, the BBC Parliamentary correspondent, considered what sanctions were available to the House against someone who lied to a committee and how an offender could be punished:

It's pretty rare to make witnesses to Commons select committees swear to tell the truth, but on Monday a civil servant was required to do so by the Public Accounts Committee. Anthony Inglese, one of the most senior lawyers in the civil service was made to swear an oath on an actual Bible, and warned he must tell the truth, the whole truth and nothing but the truth, as the PAC probed the tax deals made between HMRC and big companies including Vodaphone and Goldman Sachs.

Later this week James Murdoch appears before the Culture, Media and Sport Committee - with some MPs concerned about evidence heard in the course of their earlier inquiry into phone hacking. What happens if they decide that is indeed the case?

It is a contempt of Parliament to lie in evidence to a committee - and perjury if the oath has been sworn - and anybody caught telling porkies could be subject to criminal penalty. But it's not clear what. The parliamentary bible, Erskine May, makes it clear that witnesses who "give false evidence, prevaricate, present forged or falsified documents... or attempt in any way to deceive a committee... may be reported to the House and dealt with as determined". But the precedents for such action are ancient indeed - the latest example cited is 1946-7 and another dates back to 1897. And it's really not clear how the Commons would deal with the situation were a liar to be unmasked.

[...]

The fact is, the last time such offences were dealt with, the range of punishments available probably involved hot irons, or possibly transportation to the colonies. MPs will be setting new precedents however they react, if at some future point they do conclude that they have been lied to.⁹¹

⁹⁰ Blackburn and Kennon, *Griffith and Ryle on Parliament*, Second Edition, 2003, para 3-020

⁹¹ Mark D'Arcy, "[How can select committees avoid being misled?](#)", *BBC News – Politics*, 9 November 2011; other blogs have also raised questions about how select committees' powers are enforced, for example, Carl Gardner, "[The select committee, the Murdochs and Brooks](#)", *Head of Legal*, 19 July 2011

8.1 Should contempt be a statutory offence?

The 1999 view

The Joint Committee on Parliamentary Privilege which reported in 1999 looked into matters of contempt. They concluded that contempt by non-Members should still attract a punishment, and that there should be a power to fine non-Members, but the power to imprison should be abolished. They stated:

301. The first question to be considered is whether contempt of Parliament by non-members should still attract any punishment at all. We believe it should. Take, as an example, the investigatory work of committees. Powers must exist to ensure that committee investigations can proceed, that witnesses will attend and that papers will be produced. Apart from public officials and ministers, many interest groups and representative bodies, and many companies and private individuals, also appear regularly before select committees of both Houses. They almost always appear voluntarily. However, occasionally witnesses are unwilling to appear, or information necessary to an inquiry is not willingly provided. In two recent Commons cases orders had to be issued for the production of papers to a select committee. In this regard it is pertinent to note that, although legislation for the three recently devolved parliamentary bodies treats privilege differently from Westminster, in each case failure to attend proceedings or answer questions or produce documents is a criminal offence.

302. If the work of Parliament is to proceed without improper interference, there must ultimately be some sanction available against those who offend: those who interrupt the proceedings or destroy evidence, or seek to intimidate members or witnesses; those who disobey orders of the House or a committee to attend and answer questions or produce documents. Sometimes the conduct is a criminal offence. Then the criminal law should take its course. In the case of non-members that will normally suffice. But unless a residual power to punish exists, the obligation not to obstruct will be little more than a pious aspiration. The absence of a sanction will be cynically exploited by some persons from time to time.

303. For the same reason we are in no doubt that, to be effective as a last resort, the punishments themselves must be meaningful. The prospect of being summoned to the bar of the House and reprimanded may be a sufficient sanction in many cases. For other non-members, perhaps with commercial interests involved, something tougher may be appropriate for a grave contempt. Accordingly the Joint Committee considers there should be power to fine non-members. Imprisonment, not used for over a century, should be abolished as a form of punishment.

The Joint Committee recommended that:

Contempt of Parliament should be codified in statute. Contempts comprise any conduct which improperly interferes with the performance by either House of its functions, or the performance by a member or officer of the House of his duties.

Parliament's power to imprison persons, whether members or not, who are in contempt of Parliament should be abolished, save that Parliament should retain power to detain temporarily persons misconducting themselves within either House or elsewhere within the precincts of Parliament.

For practical reasons Parliament's penal powers over non-members should, in general, be transferred to the High Court. Parliament should retain a residual jurisdiction, including power to admonish a non-member who accepts he acted in contempt of Parliament. Proceedings should be initiated on behalf of either House by the Attorney General, at the request of the Speaker, advised by the standards and privileges committee or of the Leader of the House of Lords acting on the advice of the committee for privileges. The court should have power to impose a fine of unlimited amount.

Wilful failure to attend committee proceedings or answer questions or produce documents should be made criminal offences, applicable to members and non-members, punishable in the courts by a fine of unlimited amount or up to three months' imprisonment.

Parliament should retain its existing disciplinary powers over members, except that the power to imprison should be replaced with a power to fine.[359]

In the interests of fairness, some of the disciplinary procedures of the Commons committee of standards and privileges need to be revised, as would those of the Lords committee for privileges if the need arose for that committee to consider contempts. The minimum requirements of fairness should be those set out above.

Each House should retain power to itself to make the decision on contempt matters, save that the House should not have power to increase the penalty above that recommended by the relevant committee. Members of the relevant committee should be eligible to participate in any debate in the House but should not vote.

The power of the House of Lords to suspend its members should be clarified and confirmed.

Each House should resolve that unauthorised disclosure of embargoed copies of reports presented to the House but not yet published, and the unauthorised use of committee material, may be treated as a contempt.

Section 1 of the Parliamentary Privilege Act 1770 should be amended so as to include, but without prejudice to article 9 of the Bills of Rights, court proceedings brought against members of Parliament in respect of statements made or acts done in the course of proceedings in Parliament.⁹²

The 2013 view

No legislation to put parliamentary privilege onto a statutory basis has been introduced but at the beginning of the 2010 Parliament, the Government stated that a draft Parliamentary Privilege Bill would be published in the first Session of the Parliament.⁹³

In the event, the Green Paper, *Parliamentary Privilege*, was published in April 2012. It discussed two options for enforcing sanctions against those who committed contempts of Parliament:

A. Legislate to give the two Houses enforceable powers by codifying their existing powers, possibly including giving the House of Commons a clear power to fine non-members; or

⁹² Joint Committee on Parliamentary Privilege, *Report*, 30 March 1999, HL Paper 43-I and HC 214-I, 1998-99, para 324

⁹³ HC Deb 26 May 2010 cc4WS-5WS

B. Create criminal offences of committing contempts of Parliament; this would allow Parliament's powers to be enforced through the courts.

As noted above (in section 6.6) the Joint Committee that was appointed to consider the Green Paper rejected proposals to define contempt in statute.

Statutory provisions in Scotland and Wales

There is no concept of "parliamentary privilege" in relation to the Scottish Parliament or the National Assembly of Wales or their members. However, both the *Scotland Act 1998* and the *Government of Wales Act 2006* include provisions to make it a statutory requirement to comply with requests for information or attendance at committee meetings. Failure to comply is an offence and is punishable by a fine.⁹⁴ The provisions only apply to people who can provide information that relates the functions of the respective administrations etc. The *Scotland Act 1998* states that:

...the Parliament may impose such a requirement on a person outside Scotland only in connection with the discharge by him of

–

functions of the Scottish Administration, or

functions of a Scottish public authority or cross-border public authority, or Border river functions...⁹⁵

The *Government of Wales Act 2006* likewise states that the Assembly "may not impose a requirement" to attend proceedings or produce documents "on a person who is not involved in the exercise of functions or the carrying on of activities, in relation to Wales".⁹⁶

⁹⁴ *Scotland Act 1998* (chapter 46), sections 23-26; *Government of Wales Act 2006* (chapter 32), sections 37-39

⁹⁵ *Scotland Act 1998*, s23(2)

⁹⁶ *Government of Wales Act 2006*, s37(2)

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