Report

Select Committees and Coercive Powers – Clarity or Confusion?

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THE CONSTITUTION SOCIETY

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Introduction

Select committees carry out important work on behalf of the House of Commons and the House of Lords. They obtain much information consensually. But what is the position when documents are withheld, or when a witnesses refuses to attend or answer a question? What, if any, coercive powers are available to select committees and the Houses of Parliament to enforce their will?

In contrast to the confusion which reigned when the Murdochs initially refused to attend the House of Commons Culture, Media and Sport select committee's phone-hacking inquiry in 2011, this paper first attempts to bring some clarity to this question. The paper concludes that, in the face of resistance, there is no clear way in which Parliament's will could be enforced, or in which sanctions could be brought to bear on the non-compliant party.

Addressing this question necessitates a close analysis of select committee powers more generally, quite apart from issues of enforcement. This leads to the conclusion in this paper that there is a clear case for creating a more comprehensive and accessible framework of select committee powers generally.

Returning to the question of enforcement, the paper goes on to explore some of the issues which would need to be addressed in deciding whether, and if so how, coercive powers – such as the power to fine for disobeying a select committee – should be introduced. Central to this exploration is the prospect that people subject to coercive powers may seek to challenge them (including on grounds relating to the fairness of committees' procedures and processes) by asking the courts to rule on 'proceedings in Parliament' which are currently 'privileged' and immune

from challenge. If the courts were to rule on select committee proceedings, this may – albeit incrementally and over time – create a culture in which the courts may come to rule on other aspects of proceedings in Parliament. The issue of coercive powers for select committees thus potentially has wider significance for the separation of powers between the executive, legislature and judiciary.

This paper does not set out to recommend whether or not coercive powers should be introduced, or attempt to predict the outcome of any particular course of action. Rather, it tries to identify some potential consequences of different models, demonstrating that select committee powers should not be considered in isolation, but must be addressed in their wider constitutional context.

Notes on content and style

Throughout, the term 'Parliament' is used as shorthand to refer to one or both of the House of Commons or the House of Lords. Distinctions are made between the two Houses where appropriate.

There are varied ways in which Parliament might wish to enforce select committee powers. This paper does not set out to canvass them exhaustively, but rather focuses on the principles which are likely to be relevant generally to enforcement powers which go beyond shaming and criticism.[1] Detailed consideration of different types of enforcement is important, but beyond the scope of this paper.

It is also beyond the scope of this paper fully to explore the powers which Parliament can already exercise over its members, which may be considered coercive. For example, members of each House of Parliament can be suspended.

1 However, it is noted that such shaming and criticism may have considerable force, particularly as the subject will have no recourse against the committee, which is protected by parliamentary privilege.

Executive summary

Select committees and coercive powers – the core issue

Whether or not to legislate for select committees to have coercive powers raises significant issues of principle. These issues cannot be addressed as if they simply concerned the internal processes of Parliament. If legislation is introduced (whether by Standing Orders or by primary legislation) there may be greater involvement of the courts in the affairs of Parliament. The advantages and disadvantages of this will require careful evaluation.

Absence of clear coercive powers

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.

Source of select committee powers

The source of powers of select committees in the House of Commons and the House of Lords is potentially confusing. In the case of the House of Commons, there are many gaps, in terms of a coherent exposition of powers, which are capable of impeding the practical day-to-day work of select committees. A model needs to be developed that enables such select committees to

undertake their intended functions more effectively whilst not undermining the fact that powers are delegated to select committees by Parliament as a whole.

In relation to select committees of the House of Lords the task of ascertaining the relevant source of a committee's power is more difficult. This is because the source of power seems not (as in the case of Commons' committees) to be principally located in the Standing Orders but, rather, to consist of an amalgam of Standing Orders, *the Companion to the Standing Order and Guide to the Proceedings of the House of Lords*, and in the individual motions of the House of Lords creating the particular committee. There needs to be a more consistent framework for the articulation of the relevant powers of House of Lords select committees in addition to the considerations already mentioned in relation to select committees generally.

The source of power in relation to joint committees may be capable of being derived from first principles in that it would seem to be consistent with the structure of a joint Parliamentary committee that individual powers of that committee were only exercisable where jointly conferred by both Houses. However, the Standing Orders of each House fail to make this clear. This may not be practically significant provided that the other powers of select committees are rationalised under a more effective model.

Issues over compulsory and other powers in the conduct of select committee business

Do compulsory powers exist?

Select committees appear to possess no compulsory powers in practice. They cannot enforce their own processes. Any enforcement powers claimed by Parliament to fine or imprison have not been exercised for hundreds of years and it is doubtful whether they can properly be said to exist in current times.

Issues surrounding the creation of compulsory powers

The question of whether largely theoretical coercive powers (if they exist at all) should be retained or strengthened has been the subject of recommendations by different select committees.

There are constitutional implications whatever course Parliament decides to adopt. The creation of any power in Parliament to impose penalties or sanctions for contempt before a select committee may well fall foul of the European Convention on Human Rights. On the other hand, the creation of a court regime for the imposition of fines or other sanctions may raise issues under Article 9 of the Bill of Rights. In particular, defences to claims or criminal proceedings could lead to the court being required to adjudicate on proceedings in Parliament and thereby questioning or impeaching such proceedings contrary to the Bill of Rights.

Different types of witness/records

Not only do select committees of the House of

Commons and the House of Lords possess no obvious compulsory powers, or even non-compulsory powers that may, nonetheless, be made effective in practice by Parliamentary enforcement; there are also a number of real – even if imprecisely expressed – constraints on the limited types of order that such committees are entitled to make.

The rules relating to orders that may be made in respect of the attendance of witnesses or production of documents contain several exceptions that enable Members (including Ministers) and officers of the House to avoid even the making of an order against them.

These exceptions may have little consequence if, in fact, no compulsion can be exercised against any witness. There may be political and constitutional reasons why Parliament does not – or could not – choose to have true compulsory powers over aspects of the Executive. However, if a more effective framework is to be developed it will become important to ensure that it does not allow for myriad exceptions, especially where evidence of the highest importance may otherwise be withheld from select committees, unless such exceptions have been properly thought through and justified.

Administering oaths

There is undoubted power for a select committee to take evidence on oath. It has been commonly assumed that false evidence given on oath attracts criminal liability under the Perjury Act 1911. However, this assumption may be incorrect.

It would be possible to enact legislation removing the current ambiguities from the Perjury Act but this could create difficulties in terms of the current immunity of proceedings in Parliament from the jurisdiction of the courts.

It has also been assumed that false evidence given that is not on oath is contempt of Parliament. But there is no effective power in Parliament to punish for contempt.

Conflicts of interest

The problems posed by conflict of interest arising from membership on a select committee of a member of the executive or shadow cabinet are not addressed in Standing Orders or any other rules. Conflicts of interests of this kind should be addressed in a formal framework because they erode the independence required by select committees to perform their tasks of monitoring and scrutinising the work of Government departments. They also have the possible consequence that judges (adjudicating on enforcement proceedings in any new regime, for example) will become more ready to interfere in select committee proceedings where they perceive a conflict of interest to exist.

Impact of Parliamentary privilege on select committee proceedings

Although it is often described as absolute in nature, the scope and extent of Parliamentary privilege may be far from absolute even in terms of the effective protection of witnesses appearing before select committees. The position of third parties who may be affected by evidence given to a select committee

may be inappropriately damaged by application of considerations of Parliamentary privilege.

Moreover, statements made to witnesses appearing before select committees in informal guidance appear to be potentially misleading by stating that the witness will be fully protected by the doctrine of Parliamentary privilege. Erskine May incorrectly states that witnesses cannot refuse to answer questions even where they have every reason not to do so for their own protection. These statements assume that Parliamentary privilege will fully protect the witness from the consequences of answers that are given.

Parliamentary privilege has nothing to say about what questions a select committee should refrain from asking or what matters a select committee should put in the public domain, no matter how confidential answers to such questions might be or how damaging answers would be to pre-existing legal relationships.

There is a need to consider the entire question of Parliamentary privilege in the context of the practical operation of select committee procedure.

Other aspects of select committee proceedings

Conventions in select committee proceedings

Constitutional conventions do not apply to select committees and the case for developing clearer rules in respect of select committees is stronger than the case for developing such constitutional conventions in relation to select committees.

Lack of mechanism for addressing disputes over powers

Disputes over committee powers may arise on two levels, namely before the committee itself or in circumstances where a more authoritative ruling may be needed.

There would seem to be a need for procedures for addressing disputes over committee powers. Consideration should be given to a model such as that in New Zealand where Standing Orders of the House of Representatives anticipate, and provide for, problems likely to occur in practice. Where problems raise wider issues consideration should be given to conferring specific powers on the Speaker under Standing Order to give rulings.

The Future

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 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.

Select committees and coercive powers – the core issue

Select committees perform a number of valuable constitutional functions including, most notably, scrutinising the work of government. Since the modernisation of the select committee system in 1979 (and encompassing two further important reforms first in 2002 by the then Leader of the House of Commons, the late Robin Cook, and then – after the 2010 general election – through the implementation of many of the Wright Committee proposals) select committees have come to exercise a potentially significant influence on government policy.[2]

The proper discharge of that essential constitutional function should not be taken for granted. It depends, amongst other things, on select committees having sufficient resources at their disposal.

One of those resources is a set of clear and effective powers.[3] The primary focus of this Paper is the scope of enforcement powers of select committees and whether it is necessary or desirable to create and/or extend such powers. It has (for fundamental constitutional reasons which go far beyond the question of whether enforcement powers should be given or expanded) become increasingly important. It is recognised that much of the work of select committees can be done without reference to coercive powers resting, as it does, largely on consensus. However, a number of cases

2 See *Selective Influence: The Policy Impact of House of Commons Select Committees* published by the Constitution Unit (June 2011).

3 For further helpful detail on select committee powers see *Select Committees: evidence and witnesses* by Richard Kelly (House of Commons Library research Paper, 30th January 2012).

where witnesses have evinced reluctance to appear or to give evidence before select committees demonstrate that it is critical to understand not only what (if any) coercive powers select committees have over witnesses appearing before them but also the consequences in law of exercise of such powers if they exist or if they were to be created.

Creating or expanding coercive powers raises significant questions of principle. Is it necessary or desirable for Parliament or select committees to have enforcement powers at all?[4] If enforcement powers need to be created, how should this be done? In particular, should it be done in the form of statute or delegated legislation or should it be through an internal Parliamentary mechanism, most probably by Standing Orders?

This Paper suggests that the answers to these questions cannot simply be addressed as if they only concerned issues affecting the internal procedures of Parliament. In the modern state, political power can only be exercised through institutions one of which is the courts.[5] For a variety of reasons, what happens in Parliament can no longer necessarily be divorced, as perhaps it once could, from the scrutiny of the courts, from the operation of supra-national systems of law or, in consequence, from the legal rights and interests both of witnesses appearing

4 This is one of the issues in the Government's Green Paper (*Parliamentary Privilege*, April 2012). The Liaison Committee is also conducting an inquiry into select committees – *Select committee power and effectiveness* – and this is one of the issues that may be encompassed in that Committee's final Report. Little of the evidence submitted to the Liaison Committee addresses the subject-matter of this Paper, but it is touched on in the written evidence of Louise Ellman MP at attachment 08. At the time of finalising this Paper the Committee's Report has not been published.

5 For an illuminating account of the relationship between law and politics see *Sword and Scales* by Martin Loughlin (Hart Publishing, 2000).

before select committees or, in some instances, the legal rights and interests of third parties who are affected by the publication of evidence given to select committees.[6] If and to the extent that legal issues arise with respect to select committee proceedings in the context of enforcement powers which may be created it is likely that courts will be required to adjudicate on them. This may lead to Parliamentary privilege being narrowed by court rulings.

The creation of enforcement powers of select committees by legislation may, thus, itself help to shape the future of the scope of Parliamentary privilege if that doctrine comes to be tested before the senior judges. A brief explanation is necessary.

Parliamentary privilege is largely governed by Article 9 of the Bill of Rights 1689, which protects freedom of speech and debates or proceedings in Parliament from being impeached or questioned in the courts.[7] The ambit of Parliamentary privilege has been questioned in the courts and, in general terms, the courts have held that they, rather than Parliament, have the ultimate authority to determine its parameters. Together with supra-national systems of law, most notably the incorporation into domestic law of the requirements of the European Convention on Human Rights, the boundary between that which is protected under Article 9 and that which is not has become less clear.

6 Or, indeed, the need to balance the rights of witnesses and third parties, and wider public interests.

7 The common law, including the concept of the 'exclusive cognisance' of Parliament, is also particularly relevant. See *R v Chaytor* [2010] 3 WLR 1707. In this paper, reference to Article 9 should be taken to include reference to parliamentary privilege at common law and exclusive cognisance where necessary. It may for some purposes be necessary to consider differences between those three constructs, but that is beyond the scope of this particular paper.

This means, therefore, that Parliament may now be more vulnerable to court process than previously.

A potential solution both to this lack of clarity and also to Parliament's increasing vulnerability to court process may be to seek to prescribe the boundaries of Parliamentary privilege itself by primary legislation. But there are dangers in so doing even in the ostensibly limited area of legislating for compulsory select committee powers.

Acts of Parliament are subject to judicial interpretation and there are risks that in legislating in pocket areas such as that of the powers of select committees in order to insulate desired parameters of Parliamentary privilege (in whatever form), the opposite result might be achieved and that the courts might, in interpreting particular statutory provisions, actually cut down what had been assumed to be (and had been intended to remain) 'proceedings in Parliament' immune from interference by the courts.[8]

In the interests of a more effective committee system, Parliament may well choose to legislate for these committees to have coercive powers. Before doing so, however, it should evaluate the risks as well as the benefits.

Summary

Whether or not to legislate for select committees to have coercive powers raises significant issues of principle.

8 The arena of select committee powers is by no means the only area in which Parliamentary privilege may come to be narrowed by the courts. Another obvious potential candidate is that of the courts deciding to intervene to control abuses of Parliamentary privilege where an injunction has been frustrated by detail being disclosed under cover of Parliamentary privilege. The circumstances of disclosure of the Trafigura injunction and other instances of disclosure are outlined in the Report of the Joint Committee on Privacy and Injunctions, *Privacy and Injunctions* (27th March 2012).

These issues cannot be addressed as if they simply concerned the internal processes of Parliament. If legislation is introduced (whether by Standing Orders or by primary legislation) there may be greater involvement of the courts in the affairs of Parliament. The advantages and disadvantages of this will require careful evaluation.

Absence of clear coercive powers

This Paper argues, as developed below in the section, 'Do compulsory powers exist?', that select committees cannot be said to have any clear coercive powers, or therefore, compulsory authority at all. If that is correct, then there is a strong case for saying that the assertion or threat of exercise of such powers by a select committee undermines its legitimacy. So, too, a select committee's legitimacy would be undermined by it expressing uncertainty about whether it possessed coercive powers.

However, it does not follow from the absence of clear powers of enforcement that coercive power should necessarily be introduced. While it may be the case that the introduction of coercive powers would be desirable, there could, as foreshadowed above, be wider consequences flowing from this that could be highly undesirable from a constitutional perspective. It is suggested here that Parliament needs carefully to evaluate its relationship with the courts before making decisions. Such evaluation requires consideration not merely of whether coercive powers are a good thing in principle but also of whether, and if so how, the courts defer to Parliament in other areas and whether the courts are likely to interfere, and with what constitutional consequences, if coercive powers are introduced.

Summary

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.

Source of select committee powers

Select committees of the House of Commons *'possess no authority except that which they derive by delegation from the House.'*[9] They derive their powers largely[10] from Standing Orders made by Parliament. This is consistent with their status as entities scrutinising government policy and actions on behalf of Parliament itself.[11]

Standing Orders are simply one source[12] of rules made by Parliament for the conduct of Parliamentary business. An important aspect of Parliamentary business is the scrutiny exercised over the executive by Parliament through its select committees. In order to understand the intended scope of a particular select committee it is, therefore, first necessary to look at the Standing Order under which that committee was established. It should not be assumed that the terminology of Standing Orders in relation to a select committee will, necessarily, provide a satisfactory account of its powers. This is because the Standing Orders are usually phrased in the most general way and without consideration of events that may, and often do, arise in practice. Further, in neither the Standing Orders relating to select committees generally nor in the specific Standing Orders relating to a particular select committee is there any provision that ostensibly enables any select committee of either House to act outside the express powers conferred

9 Erskine May *Parliamentary Practice* (Lexis-Nexis 24th ed, 2011) at p. 799.

10 There is at least one other clear source of power, namely that conferred by a resolution of the House.

11 This would seem to be as true of select committees that are not departmental committees such as the Committee for Political and Constitutional Reform.

12 Another source being resolutions.

in the Standing Orders themselves.

Thus, in the 2011 Standing Orders of the House of Commons, Standing Orders 121-138 refer, almost exclusively,[13] to specific powers conferred on select committees generally. These Orders address matters such as quorum (Standing Order 124), admission of the public (Standing Order 125) and the administration of oaths (Standing Order 132). Those Standing Orders governing individual select committees[14] (Standing Orders 139-152J and Temporary Standing Orders relating to the Political and Constitutional Reform Committee and to the Liaison Committee) replicate the pattern, albeit on an individual- committee basis, of conferring specific powers on the Committees to which these Orders relate.[15]

It is clear that the Standing Orders of the House of Commons are intended to provide a comprehensive code for the exercise of select committee powers supplemented by resolutions of the House; the 'code' is comprehensive in the sense that committees have only the specific powers which are given to them, but not, as developed below, in the sense that it covers all eventualities. They are written on the basis that, for example, the power to send for persons, papers and records has to be granted rather than being an inherent power. This is demonstrated by (in the case of this example) Standing Order 135 which provides, materially, *'all select committees having power to send for persons, papers and records...'*. The power is then granted

13 There are a few exceptions. For example, Standing Order 122(D) deals specifically with the election of the Backbench Business Committee.

14 Select committees related to government departments are grouped together in Standing Order 152.

15 Sometimes the specific powers add further powers; sometimes they vary the general powers.

only in respect of specific (albeit most) select committees. The position is, therefore, that select committees of the House of Commons do not have any powers – however desirable they might be – outside the express powers conferred whether under the Standing Orders or by a specific resolution of the House. This is in stark contrast to the position both at common law and as expressly provided under some statutory regimes. At common law the law permits statutory bodies to undertake tasks that are reasonably incidental to the achievement of their statutory purposes.[16]

However, as demonstrated, in the case of Standing Orders even the most basic powers appear to be available only when expressly catered for. Moreover, there would be potential constitutional implications if the position were otherwise. To permit select committees to assert the existence of a 'reasonably incidental' power might, in the absence of any independent adjudicative mechanism, run the risk of select committees usurping the role of Parliament in determining the scope of the power delegated. This is, perhaps, why the Standing Orders appear to be designed so as to provide no scope for the select committees to determine the extent of their own powers.

This creates a practical difficulty. The day-to-day business of select committees could be impeded by the absence of powers which go beyond those expressly set out in the Standing Orders. It is all too easy to envisage situations in which a select committee might need an additional power to buttress the powers that it has. For example, a power to send for persons is not by any means the same as a power to enforce against a person who refuses to attend.

16 *Ashbury Railway Carriage and Iron Co Ltd v. Riche* (1875) L.R. 7 HL 653

Delineating the powers of select committees thus raises wider constitutional tensions as to the appropriate relationship between Parliament and its committees. As the body which confers power, on its behalf, to select committees it may be that Parliament should simply step in where there is a 'gap' between that which Parliament has conferred and the ability for the select committee to exercise its functions effectively. On the other hand, it seems impracticable for Parliament to have to intervene in each and situation in which a select committee needs additional power to perform its functions.

Currently, there is no obvious mechanism in Parliament for resolving these tensions. Whether such mechanisms can, or should, be created by resort to the construct of 'implied powers' such as might apply in a purely legal context, or whether (amongst other possible models) a different construct such as much more comprehensive Standing Orders providing for specific Parliamentary procedures should be available is an important question.

There is, however, a further, and more fundamental, problem with Standing Orders in whatever form they are structured. It is this. The process by which Standing Orders are made and amended is one that, in practice, allows for their amendment at the fiat of the executive. The fact that Standing Orders are made in the name of Parliament and that select committees act on behalf of Parliament tend to disguise the extreme vulnerability of powers that are conferred by Standing Orders on select committees.

The vulnerability, more generally, of the Standing Order system of rules to charges of executive control was articulated by the Chair of the Political and Constitutional Reform Committee Graham Allen MP. He said this:

> *'The advantage of a statute is that the Government must go through what they think is a very long public process of producing a Bill, whereas Standing Orders can be amended by a Government majority in the House, pretty much on a couple of days' notice. These things could therefore be changed despite the view of many parliamentarians, whereas if it is a statute, at least it's out there and we can see what they are up to ... Standing Orders are regularly suspended by Government, probably on a daily basis. The 10 o'clock rule is just nodded through as a suspension, so what's in the Standing Orders, unlike the statute, can be altered very rapidly at the whim of someone like the Chief Whip.'*[17]

In the present context, on the assumption that a statutory regime to regulate its own Parliamentary select committees was inappropriate, it is for consideration whether the process of drawing up Standing Orders should, at least in the context of select committees, contain safeguards against executive-driven amendment or suspension.[18]

The above analysis may require some modification in relation to select committees of the House of Lords and joint Parliamentary select committees where the position in relation to powers seems more opaque than in the case of select committees of the House of Commons.

There are Standing Orders which relate to select

17 QQ 21, 24 in the oral evidence of Dr. Malcolm Jack to the Political and Constitutional Reform Committee on 7th September 2010

18 Note, though, *'The House of Commons Backbench Business Committee'*, David Howarth, Public Law, July 2011 p. 490 which argues that the limitations on the business of the Backbench Business Committee ('BBC') do not exclude at least the initiation for debate by the BBC of proposals before the House to amend many Standing Orders.

committees of the House of Lords.[19] However, these Standing Orders appear to be supplemented by *the Companion to the Standing Orders and Guide to the Proceedings of the House of Lords (2010) ('the Companion')*. The status of this document is unclear. No equivalent document exists for the House of Commons. On its face it states that it is issued with the authority of the Procedure Committee. This is a reference to the House of Lords Procedure Committee ('the Procedure Committee') which is itself a select committee.

The arrangements for select committee powers in the House of Lords appear to suffer from significant ambiguities.

For example, the Standing Orders (2010) relating to House of Lords' select committees do contain references to specific powers. However, these Standing Orders do not appear to contain a comprehensive code as in the case of the House of Commons.

The Companion has a number of additional specific references to powers which could as easily have appeared in the Standing Orders but, for some reason, have not. Further, neither the Standing Orders nor *the Companion* appear to exhaust the powers intended to be conferred on House of Lords select committees. In its 1st Report of Session 2008/09 the Procedure Committee recommended that the power to send for persons, papers and records be conferred upon all committees of the House of Lords. The Procedure Committee recommended (paragraph 17) that this power be included in motions to appoint or reappoint

19 The position with respect to select committees of the House of Lords may be less important than in relation to select committees of the House of Commons because the latter are more directly concerned with scrutiny over the Executive.

committees at the next available opportunity. The current version of *the Companion* states that committees are given this power. However, the mechanism by which whether (and if so how) this power is conferred remains unclear. In a briefing document *Committee Work* (2011) the House of Lords states that *'[t]he power "to send for persons and papers" (i.e. gather evidence) is taken for granted.*'

As far as joint Parliamentary select committees are concerned it is difficult to state the position in respect of their source of powers accurately. Erskine May (2011, 24th edition) ('Erskine May') states (at pp.911-912) as follows:

> *'A joint committee has only such authority, and can exercise only those powers, which have been given it by both Houses. A purpose which had been given or a power which had been delegated to it by one House only would be ineffective until the other House conferred the same. A power may, however, be explicitly conferred only on the committee of one House where it is already by practice possessed by the committee of the other House.*'

The Companion deals with the matter rather differently and perhaps ambiguously (see paragraph 11.43):

> *'... Any power to be exercised by a joint committee must be granted by both Houses. The procedure in a joint committee is that of select committees of the House of Lords (with the exception of the Joint Committee on Tax Law Rewrite Bills, which follows Commons procedure).*'

The Standing Orders of the House of Commons deal with joint Parliamentary select committees in Standing Orders 140, 151, 152B, 152C and 152I. None of these provisions suggest that for a specific power to be exercisable by a joint committee it must be conferred by both Houses.

Similarly, the Standing Orders for the House of Lords do not address this question either. Whilst it may be logical to suppose that a power exercisable by a joint Parliamentary select committee must be conferred by both Houses if it is to be triggered, the drafting of the respective Standing Orders is less than clear and in order to determine whether or not particular powers are exercisable it is unclear how the source of such a jointly conferred power could be ascertained.

Summary

The source of powers of select committees in the House of Commons and the House of Lords is potentially confusing. In the case of the House of Commons, there are many gaps in terms of a coherent exposition of powers which are capable of impeding the practical day-to-day work of select committees. A model needs to be developed that enables such select committees to undertake their intended functions more effectively whilst not undermining the fact that powers are delegated to select committees by Parliament as a whole.

In relation to select committees of the House of Lords the task of ascertaining the relevant source of a committee's power is more difficult. This is because the source of power seems not (as in the case of Commons' committees) to be principally located in the Standing Orders but, rather, to consist of an amalgam of Standing Orders, *the Companion to the Standing Order and Guide to the Proceedings of the House of Lords*, and in the individual motions of the House of Lords creating the particular committee. There needs to be a more consistent framework for the articulation of the relevant powers of House of Lords select committees in addition

to the considerations already mentioned in relation to select committees generally.

The source of power in relation to joint committees may be capable of being derived from first principles in that it would seem to be consistent with the structure of a joint Parliamentary committee that individual powers of that committee were only exercisable where jointly conferred by both Houses. However, the Standing Orders of each House fail to make this clear. This may not be practically significant provided that the other powers of select committees are rationalised under a more effective model.

Issues over compulsory and other powers in the conduct of select committee business

Introduction

As mentioned earlier, there are a number of areas in which select committees may need to act beyond the powers which are expressly given to them. There is a lack of clarity as to how select committee powers fit more generally into other Parliamentary processes and into domestic and international legal regimes. This is a problem that arises in respect of select committee powers widely and there is a strong case for making the rules clearer by a more comprehensive set of Standing Orders. However, the issue arises with particular force with respect to compulsory powers because lack of clarity will itself tend to render the exercise of a purported coercive power subject to the jurisdiction of the courts.

It is now proposed to address some significant issues over 'compulsory' and linked powers that may easily be anticipated to arise in the day-to-day activities of select committees and that must – if such powers are to be introduced – be resolved by a new legislative framework (whether by way of Act of Parliament or Standing Orders) that confronts these issues directly.

Do compulsory powers exist?

For a power to be compulsory, it is necessary to be able to enforce it. Under the existing Standing Orders there is only one power that could, even on a first reading, be supposed to be compulsory in nature; that is the power to send for persons, papers and records which is now conferred on almost all select committees of the House of Commons and, it would appear, the House of Lords.[20]

Properly analysed, however, no select committee has any direct power to enforce any of its existing powers. In relation to the power to send for persons, papers and records there are two possible stages for exercise of the power.[21] The first entails a mere request or 'invitation' as, for example, to a potential witness to attend a committee hearing. The second stage, if the request is not complied with may be to issue an 'order'[22] or 'summons.'[23]

Neither of these stages reflects the existence of any compulsory power in the select committee to secure the witnesses' attendance. Even in respect of the second stage, the question will, inevitably, arise 'what happens if the

20 This section must be read with the section on different types of witness / records, because the powers exercisable here are modified in respect of different types of witness in any event.

21 See, further, Erskine May at pp. 820 and 896.

22 *Disciplinary and Penal Powers of the House* Fact Sheet G6 General Series of the House of Commons Information Office (September 2010) at p. 6.

23 See statement by the House of Commons Culture Media and Sport Committee dated 14th July 2011.

witness simply refuses to attend?'[24]

The constitutional position, as reflected in the Standing Orders, seems to be that the select committee (provided that it possesses the relevant power) may make a special report to the House of Commons or House of Lords (as appropriate).[25]

Unfortunately, this does not resolve the difficulties from a practical perspective. First, there is a threshold difficulty over the proper interpretation of the phrase *'send for persons'* etc[26] in the Standing Orders. The Standing Orders of the House of Commons use this phrase in most of the select committee provisions. However, the Standards and

24 It was reported that when Irene Rosenfeld (chief executive of Kraft) refused to come from the USA to attend a Business Select Committee hearing about the takeover of Cadbury, committee members discussed issuing her with a subpoena: see the Guardian, 13th March 2011. However, the more fundamental question was whether there was any power to issue a subpoena even had she been in the UK. Contrary to the view taken in this Paper the *Parliamentary Privilege* Green Paper (April 2012) appears to assume that the power send for persons, papers and records is a compulsory power. However, it acknowledges that there may be an issue in theory. See paragraphs 251 e*t seq.*

25 See: Standing Order 133 (House of Commons, 2011) and Standing Order 68 (House of Lords, 2010). Neither of these Standing Orders, however, refers specifically to the power to report a failure to comply with an order of the Committee. Nonetheless, Standing Order 133 (House of Commons) does refer to the power to make a special report. Moreover, paragraph 11.18 of the *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* refers expressly to a practice of a House of Lords select committee reporting a refusal to attend in response to a formal summons to the House as a *prima facie* contempt. The *Parliamentary Privilege* Green Paper (April 2012) at paragraph 259 suggests that *'Currently, if the House of Commons wished to punish a non-member for committing a contempt, the issue would first be considered by the Standards and Privileges committee, which would come to a conclusion and recommend a punishment. This would then be sent to the House for endorsement'.*

26 The same analysis attaches to the power to send for papers and records.

Privileges Committee[27] is vested not only with this power (Standing Order 149(5)) but also with what appears to be the additional power to *'order the attendance of any Member'*. Unless this is simply loose drafting and confers no additional power on the Standards and Privileges Committee,[28] it would appear that the phrase *'send for persons'* could not extend to ordering such persons to attend. If that is right, it follows that the special report process would not be capable of being implemented since the 'sending for' could only ever be an invitation.

Secondly, even if this difficulty were to be surmounted, the question of whether a witness's refusal to attend a committee hearing amounts to contempt and, if so, what action should be taken is a matter for the relevant House as a whole.[29] But it is very doubtful whether, in modern times, Parliament could, or would, consider it appropriate to seek to impose a fine or imprisonment for contempt.[30] Indeed,

27 There is now provision for separate select committees on standards and on privileges.

28 Which seems unlikely in the light of the committee's role.

29 The House may decide that there was a 'reasonable excuse' for failing to do as asked and, therefore, no contempt. See the *Parliamentary Privilege* Green Paper (April 2012) at paragraph 160.

30 The last fine was imposed in 1666. The last (unsuccessful) claim to fine was in 1762. The last imprisonment for contempt of a non-member was in 1880. See *Disciplinary and Penal Powers of the House* Fact Sheet G6 General Series of the House of Commons Information Office (September 2010) at p. 8. Thus, the existence at law of any such powers (see, eg, Lord Denman in *Stockdale v. Hansard* (1839) 9 Ad & Ell 96; 112 ER 1112) would appear to be academic in modern times. The Standards and Privileges Committee in its 14th Report of Session 2010-2011 *Privilege: Hacking of Members' Mobile Phones* queried whether these penal powers still existed (see paragraph 59). Parliament may have other lesser penalties available to it but these would, in the absence of enforcement powers, probably be toothless. Future references in this paper to compulsory or coercive powers should be read in this context.

if it sought to do so there would be potentially serious constitutional implications in terms of the separation of powers between judiciary and legislature. There would also be serious legal questions as to whether or not such action contravened the European Convention on Human Rights. These and related questions are considered below.

If the House did decide to take the matter further, the most likely course, in the event of non-compliance with a select committee order for attendance followed by a special report to the relevant House would be for the House itself to serve a warrant on the defaulting witness.[31] But this still leaves unanswered the next logical question 'what happens if the witness disobeys the warrant?' It has been suggested that if the witness, on being served with the warrant, refuses to attend then he or she may be taken into custody by the Serjeant at Arms.[32] However, such a course runs the serious risk of being in breach of fundamental rights.[33]

The above-mentioned uncertainties are exemplified in the recent appearance of Rupert Murdoch and James Murdoch before the House of Commons Culture, Media and Sport Select Committee. When the Murdochs did not accept the Committee's invitation to attend and give evidence, the Committee ordered or summonsed them to

31 *Disciplinary and Penal Powers of the House* Fact Sheet G6 General Series of the House of Commons Information Office (September 2010) at p.6.

32 *Disciplinary and Penal Powers of the House* Fact Sheet G6 General Series of the House of Commons Information Office (September 2010) at p.8.

33 The Human Rights Act 1998, s6(3) excludes from the definition of '*public authority*', '*either House of Parliament or a person exercising functions in connection with proceedings in Parliament*'. This means that if either House acts in a way which is incompatible with a Convention right, it does not act unlawfully under the HRA. However, the Convention may have potential relevance in any legal challenge brought in relation to select committee proceedings. Moreover, there are many ancient common law rights pre-dating the HRA that would be potentially relevant.

attend.[34] The Murdochs then agreed to attend but, before this happened, there was significant uncertainty and speculation as to what powers could be exercised against them if they continued to fail to comply.[35]

It is notable that no compulsory powers have been sought to be used by either the House of Commons or the House of Lords in modern times. There have been relatively recent recommendations that the penal powers, such as they are, of Parliament should be sparingly exercised.[36] Properly analysed, it would seem that select committees do not possess any compulsory powers or certainly any compulsory powers that are capable of being exercised.

Summary

Select committees appear to possess no compulsory powers in practice. They cannot enforce their own processes. Any enforcement powers claimed by Parliament to fine or imprison have not been exercised for hundreds of years and it is doubtful whether they can properly be said to exist in modern times.

34 The form of Order is reproduced in Box 1 of *Select Committees: evidence and witnesses* House of Commons Research Paper, Richard Kelly, 30th January 2012.

35 *"Could Rupert Murdoch face jail for refusal to meet MPs? Rupert and James Murdoch's non-acceptance of committee summons leaves legal experts divided over untried sanctions"*, Guardian, 14th July 2011

36 See *Disciplinary and Penal Powers of the House* Fact Sheet G6 General Series of the House of Commons Information Office (September 2010) at p. 7.

Issues surrounding the creation of compulsory powers

Most recently, in its Fourteenth Report of Session 2010-2011 *Privilege: Hacking of Members' Mobile Phones* the House of Commons Standards and Privileges Committee recommended that the House should lose its powers of imprisonment but should be given a statutory power to fine offenders. It also considered that the power to reprimand an offender in person at the bar of the House should continue to be available.[37]

It is not within the scope of this Paper to detail each of the recommendations made by different committees of Parliament over the years. It should, however, be noted that an earlier Joint Parliamentary Select Committee – the Joint Committee on Parliamentary Privilege – had in its First Report of Session 1998-1999 recommended the retention of penal sanctions by Parliament as well as summary powers to search and detain in exceptional circumstances.[38] In addition, the Joint Committee (like the Standards and Privileges Committee) recommended the inclusion of a statutory power to fine. The Joint Committee (unlike the Standards and Privileges Committee which was only addressing contempt by non-members) recommended that some instances of contempt relating to members of the House could be dealt with by the imposition of a fine by the House of Commons and the House of Lords rather than by the courts.

Not only, therefore, did each of these eminent committees make sometimes materially different recommendations; neither committee appears to have recognised or to have addressed satisfactorily the obstacles that creating

37 See paragraph 60.

38 See paragraphs 312 and 314 of this Joint Committee Report.

a statutory power to fine would be likely to create.[39] If there were a statutory power to fine there is a serious issue as to whether, under the European Convention on Human Rights, an independent court or tribunal would be required to hear and determine whether a fine should be imposed and, if so, how much. This is because Article 6 of the European Convention on Human Rights requires an independent and impartial court or tribunal to determine criminal charges and civil rights and obligations. It may be possible to construct a regime for imposing a sanction on an administrative basis which does not engage Article 6. However, there is, at the very least, likely to be scope for argument as to whether Article 6 is engaged.[40] The question of whether or not Parliament itself could, systemically, constitute an independent court or tribunal has never been determined by the European Court of Human Rights in Strasbourg.[41] The closest that the Strasbourg Court has come to considering the issue is in its ruling in *Demicoli v. Malta* (1992) 14 EHRR 47.

There, the Maltese House of Representatives was, on the facts, held not to constitute an independent court or tribunal for the purposes of contempt proceedings brought by it against a journalist. However, the Strasbourg Court

39 Legislative options for coercive powers have been raised again in the *Parliamentary Privileges* Green Paper (April 2012) at paragraphs 256 *et seq* which touch on some of the difficulties.

40 See for example the discussion in the judgment of the European Court of Human Rights in *Demicoli v Malta* (1992) 14 EHRR 47 at paragraphs 30-35. See, further, Human Rights Joint Committee Nineteenth Report Legislative Scrutiny: Parliamentary Standards Bill (prepared 30th June 2009).

41 The assessment of this question would, amongst things, involve consideration of Parliamentary processes designed to address partiality and/or bias such as, perhaps, deploying or adapting the current role of the Parliamentary Commissioner for Standards.

was not required to address whether or not the House of Representatives was, by its very nature, lacking in the independence and impartiality necessary to comply with Article 6. On the specific facts the partiality of two specific members was sufficient for the Court to rule that Article 6 had been violated.

There seems no reason in principle, why Article 6 would not be engaged by any proceedings brought by Parliament and decided by Parliament in consequence of which fines may be imposed. Nor is there any obvious reason of principle why, in this respect, members of the House should be treated differently from non-members.

There is a real risk that such proceedings would fall foul of Article 6 because of the argument that Parliament does not constitute an independent and impartial court or tribunal. However, there are potentially significant constitutional implications involved in setting up a regime for an independent court to impose fines or other sanctions for disobeying Parliament.

In brief, it seems likely that in the consideration of any criminal charges or civil claims brought before a court arising from alleged contempt before a select committee, the court might have to adjudicate on matters that Article 9 of the Bill of Rights would preclude. For example, the validity of the summons or order by which a witness had been ordered to attend might be questioned. So, too, the issue of whether the select committee in question had exceeded its powers might be raised as a possible defence. The courts and Parliament alike would probably not wish such questions to arise and have to be determined in court proceedings because it disturbs the separation of powers.

The risk of court proceedings concerning select committee powers is exemplified by the arrangements in the

United States. The rules of the US House of Representatives (One Hundred Twelfth Congress, January 5 2011) contain express provision for the compelling of witnesses to attend.

Rule XI (Procedures of Committees and Unfinished Business) provides, materially, as follows:

> *'(m)(1) For the purpose of carrying out any of its functions and duties under this rule and rule X (including any matters referred to it under clause 2 of rule XII), a committee or sub- committee is authorized...*
>
> *(B) to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.'*

There is also separate provision in these rules for enforcement of compliance with a subpoena *'as authorised or directed by the House'*. However, it should not be assumed that a legislative solution of this kind could necessarily be replicated as a model in the UK without any difficulties arising. In the US there have been extensive court challenges to committee enforcement powers which the courts have addressed by reference to their specific constitutional provisions and procedural rules.[42]

Moreover, the UK Parliament is potentially subject to supra-national systems of law, namely those that prevail in the EU and, to a lesser extent, under the ECHR. These aspects are likely to prevent the creation of clear and workable coercive powers for Parliament that are immune from the courts.

In addition, the highest UK Court has made it clear

42 See, for example, *Wilkinson v. United States* 365 U.S. 399 (1961).

that the boundary between the courts and Parliament is ultimately a matter of law and one to be determined by judges applying the common law rather than by Parliament. In *R v. Chaytor and Others* [2010] 3 W.L.R. 1707 the Supreme Court observed as follows:

> *'15. It is now accepted in Parliament that the courts are not bound by any views expressed by parliamentary committees, by the Speaker or by the House of Commons itself as to the scope of parliamentary privilege...*
>
> *16. Although the extent of parliamentary privilege is ultimately a matter for the court, it is one on which the court will pay careful regard to any views expressed in Parliament by either House or by bodies or individuals in a position to speak on the matter with authority...'*

Thus, an attempt to create coercive powers of committees could be treated by the courts as an area in which judges were required to adjudicate. This could bring the courts into conflict with Parliament.

In theory at least, Parliamentary sovereignty could trump all these factors. If Parliament were to legislate in clear and express terms to set out the scope of Parliamentary privilege, including the immunity of Parliament from the courts, current constitutional doctrine might be thought to prevent the courts from adjudicating in respect of select

committee proceedings.[43]

In substance, however, it is unlikely that Parliament possesses this freedom of action. For example, immunity from EU law supremacy could only be achieved by withdrawal from the European Union.

Further, Parliamentary sovereignty itself has sometimes been thought to be a judicial construct.[44] In *Jackson v. Attorney General* [2005] UKHL 56 different views were expressed on the constitutional status of Parliamentary sovereignty. Lord Steyn went so far as to suggest that:

> *'The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts,*

43 In the absence of clear and express language the courts would – employing the common law principle of legality – be likely to interpret a particular statute as not abrogating fundamental or constitutional entitlements such as the right to a fair procedure. Of the many cases on the principle of legality see *R v. Secretary of State for the Home Department, ex p. Simms* [2000] 2 A.C. 115 at 131E. Equally, of course, Parliament could legislate in clear terms to *limit* the scope of Parliamentary privilege. For a good example see the draft clause set out in the *Parliamentary Privilege* Green Paper (April 2012) at p. 37. Moreover, Parliament could legislate so as to permit *waiver* of Parliamentary privilege and, indeed, has: see Defamation Act 1996 s. 13. See further *Parliamentary Privilege* Green Paper (April 2012) paragraphs 183-192.

44 See, also, written evidence of Professor Adam Tomkins to the European Scrutiny Committee, November 2010, referring to the *'common law radicals'* and *'common law radicalism'*.

> *the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal.'*[45]

So, in deciding whether or not to legislate so as to introduce compulsory powers, Parliament would need to give very careful thought to whether or not it was, having regard to the possible involvement of the courts, desirable to do so and if so how to do it. In particular questions would arise as to whether or not legislation should take the form of primary legislation or be undertaken by way of standing order. Possible legislative models are considered below. Different models may have a bearing on the likelihood of the courts intervening.

Summary

The question of whether largely theoretical coercive powers (if they exist at all) should be retained or strengthened has been the subject of recommendations by different select committees.

There are constitutional implications whatever course Parliament decides to adopt. The creation of any power in Parliament to impose penalties or sanctions for contempt before a select committee may well fall foul of the European Convention on Human Rights. On the other hand, the creation of a court regime for the imposition of fines or other sanctions may raise issues under Article

45 Lord Hope made comments to similar effect. However, Lord Bingham disagreed with both Lord Steyn and Lord Hope.

9 of the Bill of Rights. In particular, defences to claims or criminal proceedings could lead to the court being required to adjudicate on proceedings in Parliament and thereby questioning or impeaching such proceedings contrary to the Bill of Rights.

Different types of witness/records[46]

The difficult issues surrounding compulsory powers are linked to the question of how different types of witness/ records may be treated by select committees before which they appear.

Save for limited exceptions, the existing Standing Orders of neither House touch on the question of whether there are certain categories of witness who could not, in any event, be compelled to attend or to provide other information.

An exception is Standing Order 149 of the House of Commons which implies that only the Standards and Privileges Committee has the power to order a Member of the House of Commons to attend or lay before it specific documents or records. To slightly different effect[47] is paragraph 11.19 of the *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*. This provides that *'[M]embers or staff of the House of Commons and persons outside United Kingdom jurisdiction (such as foreign ambassadors), may give evidence by invitation, but cannot be compelled to do so.'* Paragraph 11.19 also makes provision for the calling of officers of the House of Commons before select committees of the House of Lords and clarifies that leave of the House of Commons is, in any event, required before such officer may be called. The position may, *mutatis mutandis*, be similar in the House of Commons (see Erskine May at p.821).

46 For further detail of the practical problems involved see *Select Committees: evidence and witnesses,* Richard Kelly, House of Commons Research Paper, 30th January 2012.

47 Curiously, perhaps, there is no clear provision exempting Peers from being ordered to appear before a House of Lords Select Committee. However, Erskine May, *op cit.* at p.821 assumes, without providing direct authority, that this is the position.

There are also parallel provisions in the Standing Orders for each House permitting a Member of each House to attend as a witness before a committee of the other House if requested and if he thinks fit (see Standing Order 138 of the House of Commons Standing Orders and 25 of the House of Lords Standing Orders). These provisions do not operate to achieve any measure of compulsion, a fact which gave rise to concern when the Prime Minister's adviser, a member of the House of Lords, could not be compelled because of the *'long standing convention'* that Members of the House of Lords cannot be compelled to appear before committees of the House of Commons.[48]

Civil servants and officials are treated differently again. There is no reference in the Standing Orders of either House to whether or not civil servants and officials should be treated any differently from other witnesses before select committees. Nor does the *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* make any such reference.[49] A set of internal guidelines known as the Osmotherly Rules have no Parliamentary status, not having been approved by Parliament. What seems clear, however, is that if they do appear before select committees, civil servants and officials appear on behalf of the relevant Minister and that, in practice, the Minister makes a decision as to the most appropriate civil servant or official to appear and possibly appearing himself if there is no agreement between the committee and the

48 Fourth Report for Session 2001-2002 of the House of Commons Transport Local Government and the Regions Select Committee at paragraph 4

49 Though if civil servants do appear, the relevant Minister on whose behalf they are appearing should require them to be as helpful as possible in providing accurate and truthful information (see *the Companion* at paragraph 4.65).

department as to which official should most appropriately give evidence. The Rules state, however, that the committee nevertheless retains a power to order[50] a particular civil servant or official to appear even if the Minister disagrees.[51]

The position in respect of sending for *'papers and records'* (i.e. documents) would appear, once more, to be governed (albeit somewhat elliptically) in the House of Commons by Standing Order 149. Standing Order 149(6) refers to a power being granted to the Standards and Privileges Committee to require that specific documents or records in the possession of a Member relating to its inquiries be laid before it. There appears to be no equivalent provision in the Standing Orders of the House of Lords or in the *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*. The implication of this seems to be that it is only the Standards and Privileges Committee of the House of Commons that has the exceptional power to require production of documents and records from Members of the House of Commons (including Ministers). Other situations in which greater powers of demand may be thought to be required so as to seek to obtain documents of importance are not covered by any Standing Order or comparable authority. It appears that the Government has sought to rely on unenforceable statements of commitment or intent in order to bridge the gap that remains in the powers of select committees to obtain the information that they may require.[52]

50 The assertion that the committee has a 'power to order' is doubtful, as explained generally in this Paper.

51 See paragraph 47 of the Osmotherly Rules (2005 version)

52 See Erskine May at pp.818-819

Summary

Not only do select committees of the House of Commons and the House of Lords possess no obvious compulsory powers, or even non-compulsory powers that may, nonetheless, be made effective in practice by Parliamentary enforcement; there are also a number of real – even if imprecisely expressed – constraints on the limited powers of order that such committees are entitled to make.

The rules relating to orders that may be made in respect of the attendance of witnesses or production of documents contain several exceptions that enable Members (including Ministers) and officers of the House to avoid even the making of an order against them.

These exceptions may have little consequence if, in fact, no compulsion can be exercised against any witness. There may be political and constitutional reasons why Parliament does not – or could not – choose to have true compulsory powers over aspects of the Executive. However, if a more effective framework is to be developed it will become important to ensure that it does not allow for myriad exceptions, especially where evidence of the highest importance may otherwise be withheld from select committees unless such exceptions have been properly thought through and justified.

Administering oaths [53]

Compulsory powers are also linked to the power to administer oaths.

It is clear that a select committee of the House of Commons has power to administer an oath to witnesses appearing before it. This appears implicitly from Standing Order No 132 and also from the Parliamentary Witnesses Oaths Act 1871 s. 1.[54]

The assumption has regularly been made that a witness giving deliberately false evidence on oath before a select committee may be prosecuted for perjury. However, this assumption may well be incorrect and, in any event, if correct raises a number of potentially acute legal difficulties.

That the assumption has been made is unsurprising. The 1871 Act (and its predecessor the Parliamentary Witnesses Act 1858) made persons wilfully giving false evidence under oath to a committee liable to the penalties of perjury. These specific provisions were repealed by the Perjury Act 1911. But this was a consolidating Act intending to simplify the law relating to perjury. On one view, therefore, that offence might be thought to have survived in the 1911 Act.

However, there is a serious issue as to whether the giving of false evidence before a select committee would fall under either s. 1 (perjury) or s. 2 (false statements on oath made otherwise than in a judicial proceeding) of the 1911 Act. Neither provision specifically refers to proceedings before

53 See, for further detail, *Select Committee: evidence and witnesses,* Richard Kelly, House of Commons Research Paper, 30th January 2012

54 Select committees of the House of Lords may also administer an oath to witnesses under the Parliamentary Witnesses Act 1858. Erskine May states, incorrectly, that the 1871 Act itself attaches to false evidence the penalties of perjury (see p. 824).

a select committee.[55]

Moreover, each section contains its own 'gateway'. Section 1(1) applies only to a 'judicial proceeding'. Section 1(2) states that *'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'*.

A select committee has the power to administer an oath to a witness before it. But this is not necessarily the same as having, *'by law'* power to hear, receive and examine evidence. The source of a select committee's power to hear evidence may be thought to derive not from statute (the law of the land) but, rather, from Standing Orders, and it would be unwise necessarily to equate Standing Orders with law. While the 'law' and custom of Parliament are commonly considered to be sources of constitutional law, Parliament's internal procedures are not what are conventionally regarded as laws. There may, however, be scope for debate on this point.

Moreover, if the legislature were to adopt terminology that treated the internal procedures of Parliament as laws it could lead, over time, to the courts incrementally assuming a power to adjudicate on the legality of Standing Orders. In truth, the jurisdiction of a select committee to hear evidence is an emanation of the exclusive cognisance (through, amongst other things, the making of Standing Orders) that Parliament exercises over its internal proceedings.

As far as s. 2 of the 1911 Act is concerned (*'otherwise than in a judicial proceeding'*), the 'gateway' here is that a witness is *'required or authorised by law to make any statement on oath'*. A similar difficulty arises in that there is no obvious

55 Contrary, perhaps, to the impression created by Erskine May (see p.240).

source of law requiring a witness to give evidence before a select committee (as there would be, for example, in a court setting where judges have powers and duties to decide what questions may or may not be asked of witnesses). True it is that nothing prevents a witness from giving evidence but that is not necessarily the same as being authorised by law. Further, there may be laws that could be argued to prevent a witness from giving particular evidence as, for example, laws imposing a duty of confidentiality as to what may or may not be disclosed.

There is, therefore, an issue as to whether the Perjury Act applies at all to proceedings before select committees. It may be thought that the straightforward solution is simply to pass new legislation removing these difficulties of interpretation.[56] A possible opportunity for this could be to include a legislative formula in the draft Parliamentary Privilege Bill.

However, a legislative 'solution' of this kind might raise its own difficulties. Even if new legislation used the clearest terminology to criminalise the giving of false evidence to select committees, a court determining a criminal prosecution would have to inquire into matters taking place in the context of proceedings in Parliament. However, the intrusion of court process into the arena of proceedings in Parliament raises issues under Article 9 of the Bill of Rights.[57]

Nor is this problem necessarily satisfactorily resolved by

56 The difficulties of interpretation mentioned here may not have been anticipated in the First Report of Session 1998-1999 of the Joint Committee on Parliamentary Privilege (see paragraphs 316-318).

57 The *Parliamentary Privilege* Green Paper (April 2012) at paragraph 96 proceeds on the basis that the Perjury Act 1911 has this effect already. This is because it considers the Perjury Act as *'implying the effective amendment of the protection of privilege.'*

Parliament purporting to give itself stronger penal powers. Here there is, perhaps, as in the other aspects of select committee compulsory powers considered in this Paper, a tension between the competing interests of Parliament. On the one hand, Parliament has an interest in making the powers of select committees stronger in terms of their enforceability. On the other hand, however, Parliament has an interest in protecting the divide between proceedings in Parliament, immune from court process, and what happens outside Parliament.

This section has been concerned with the issues around perjury where evidence is given on oath. However, it is often supposed that even where evidence is not given on oath (as is usually the case) Parliament has the power to punish for contempt in the event of false evidence being given. As has been explained, however, there are many issues around the power of Parliament satisfactorily to address contempt in the modern age by way of penal sanction.

Summary

There is undoubted power for a select committee to take evidence on oath. It has been commonly assumed that false evidence given on oath attracts criminal liability under the Perjury Act 1911. However, this assumption may be incorrect.

It would be possible to enact legislation removing the current ambiguities from the Perjury Act but this could create difficulties in terms of the current immunity of proceedings in Parliament from the jurisdiction of the courts.

It has also been assumed that false evidence given that is not on oath is contempt of Parliament. But there is no effective power in Parliament to punish for contempt.

Conflicts of interest

The issue of conflicts of interest on a select committee may not appear obviously to be linked to compulsory powers. However, there is an important indirect relationship because, to the extent that select committee proceedings may become subject to court scrutiny if compulsory powers are introduced, one of the clearest indicators of an unfair procedure is where a court or tribunal lacks impartiality. As mentioned earlier, the presence of a conflict of interest adds to the risk of the courts interfering in decisions of select committees (see the decision of the European Court of Human Rights in *Demicoli v. Malta* (1992) 14 EHRR 47 referred to above).

Further, a key function of the select committee system is that it operates to monitor and to scrutinise the work of government departments. In order to be effective, such monitoring and scrutiny must be independent. That independence would be compromised if a member of the executive were to participate in the very bodies set up to scrutinise the executive.

It follows from these considerations that, as a matter of principle, members of the executive ought not, ordinarily, become members of select committees or to remain on select committees in the event that they become part of the executive. If members of the executive take part in the business of select committees there is a real risk of conflicts of interest emerging and of the fairness and effective operation of the select committees' work being eroded.

The problem goes further and, indeed, cannot ever wholly be resolved in a fused powers system such as that embedded in the House of Commons (i.e. one in which the executive is largely taken from members of Parliament).

However, the problem of conflicts of interest in select committees is not restricted to the situation in which members of the executive were allowed to sit on such committees but would extend, logically, to members of the shadow cabinet. This is because the constitutional task of the shadow cabinet, in contrast to that of select committees, is amongst other things to oppose substantive policy. This is quite different from the more objective task of ensuring that the executive undertakes its functions effectively.

Of course, members of select committees will usually be members of a specific political party. Their own policy instincts will not always be easy to separate from the independent scrutiny that select committees must give to their task. It may be said that even here the risks of conflicts of interest may emerge; or putting it another way, that the fact that select committees are made up of individuals who will necessarily, as MPs, have political points to make and interests to pursue, may give rise to a general issue as to whether select committees could ever have the requisite impartiality. This risk is, however, considerably mitigated by the fact that the composition of select committees is now no longer controlled by the party whips and is also carefully balanced to ensure that the party balance in the House of Commons is replicated in its select committees.[58]

58 See House of Commons *Brief Guide on Select Committees* (August 2011). The problems of conflict of interest are far less relevant to the work of select committees of the House of Lords because the task of such committees is not one that requires shadowing government departments as in the case of the House of Commons. Moreover, there is no true executive in the House of Lords even if, occasionally, members of the House of Lords may become part of the executive. In the House of Lords the composition of select committees is not necessarily determined by reference to reflecting membership of political parties in the House of Lords. Moreover, there is no general system of election.

Currently, there seems to be no framework for grappling with the problems posed by conflict of interest. In particular, there are no rules such as might be expected in Standing Orders that operate to prevent members of the executive or shadow cabinet – even Government ministers – from being appointed to select committees. Nor are there any rules for preventing members of select committees who subsequently become members of the executive or members of the shadow cabinet from remaining on the committee or committees to which they were originally appointed.

The absence of any framework is exemplified by the reported disagreement between John Whittingdale MP, the chair of the Commons Culture Media and Sport Select Committee, and Tom Watson MP about the effect of Tom Watson's appointment as Deputy Chair of the Labour Party. John Whittingdale is reported to have said that, as a member of the shadow cabinet, Tom Watson should stand down from the select committee as a matter of parliamentary convention but that there was no power to enforce this. Tom Watson is reported to have responded that he would not stand down because he did not hold a front bench policy brief.[59]

It is by no means clear how strong the convention claimed by John Whittingdale is or, indeed, whether any such convention has any clear and practical effect. The House of Commons *Brief Guide on Select Committees* (August 2011) simply states as follows:

> *'Ministers, Opposition front-bench spokesmen and party whips do not normally serve on most select committees.'*

59 *'Tom Watson should quit Culture Select Committee, says John Whittingdale' The Guardian*, 7th October 2011.

A framework with clear rules as to appointment on select committees and cessation of membership in the event of appointment to the executive or shadow cabinet would not only address the very real problems posed by conflicts of interest but would also serve to immunise those seeking to rely on vague, existing practices from charges of political manoeuvring.

The conflicts of interest posed by membership of the executive are by no means the sole source of conflicts of interest arising from membership of a select committee. However, financial conflicts of interest (in practice the sole remaining likely conflict of interest) are catered for in the House of Commons Code of Conduct (June 2009, updated May 2010 at paragraph 83).

Summary

The problems posed by conflict of interest arising from membership on a select committee of a member of the executive or shadow cabinet are not addressed in Standing Orders or any other rules. Conflicts of interests of this kind should be addressed in a formal framework because they erode the independence required by select committees to perform their tasks of monitoring and scrutinising the work of Government departments. They also have the possible consequence that judges (adjudicating on enforcement proceedings in any new regime, for example) will become more ready to interfere in select committee proceedings where they perceive a conflict of interest to exist.

Impact of Parliamentary privilege on select committee proceedings

As may be seen from the difficulties referred to above, little consideration seems to have been given to the impact of Parliamentary privilege on the practical day-to-day work of select committees. The starting point is that it is well established that what is said and done in select committees ranks as *'proceedings in Parliament.'*[60] It follows from this that, in principle at least, Article 9 of the Bill of Rights 1689 applies. This provides, materially as follows:

> *'That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.'*

This might suggest that witnesses in select committee proceedings enjoy immunity stemming from absolute Parliamentary privilege in terms of the evidence that they give. This understanding is, indeed, consistent with a House of Commons resolution in 1818 that *'all witnesses examined before this House, or any committee thereof, are entitled to the protection of this House in respect of anything that may be said by them in their evidence.'*[61]

However, as a matter of legal analysis these statements

60 Paragraph 252 of the First Report of Session 1998-1999 of the Joint Committee on Parliamentary Privilege

61 See Erskine May at p. 841 citing (at fn 274) various references in Parliamentary documents.

may be misleading.[62] There are three qualifications that need to be made in relation to the notion of absolute Parliamentary privilege in select committee proceedings.

First, the scope and extent of Parliamentary privilege is not ultimately a matter for Parliament at all but is, rather, a question of law for the courts. This was most recently authoritatively stated by the Supreme Court in *R v. Chaytor and Others* [2010] 3 W.L.R. 1707. This means that not every aspect of Parliamentary privilege can, necessarily, be classified as absolute in nature. As the Supreme Court observed:

> *'15. It is now accepted in Parliament that the courts are not bound by any views expressed by parliamentary committees, by the Speaker or by the House of Commons itself as to the scope of parliamentary privilege...*
>
> *16. Although the extent of parliamentary privilege is ultimately a matter for the court, it is one on which the court will pay careful regard to any views expressed in Parliament by either House or by bodies or individuals in a position to speak on the matter with authority...'*

Secondly, it is by no means obvious that the domestic courts would refuse to permit evidence to be given in court in certain types of case. The most obvious example is that of a criminal trial. The effect of excluding statements made

62 Equally misleading for the reasons set out in this Section may be the suggestion in the *Parliamentary Privilege* Green paper (April 2012) at paragraph 17 that the conduct of witnesses before select committees falls under the concept of 'exclusive cognisance' and is, therefore, immune from questioning in the courts. To the same effect is the assertion in the Green Paper that *'non members who participate in proceedings are also protected from legal action being taken on the basis of what they say'* (see paragraph 47). See, also, Green Paper at paragraphs 157 and 159.

before a select committee that might be needed to advance a particular defence (as for example seeking to challenge the statement of a witness in a trial who had also given evidence to different effect before a select committee), on the basis that such statements were automatically protected by Parliamentary privilege under Article 9 of the Bill of Rights, would be to contravene elementary ideas of what is necessary for a fair trial.

Similarly, statements made before a select committee might well be needed by a claimant in civil proceedings to advance a common law or statutory right. For example, there was debate as to whether or not Brodie Clark could rely on statements made before a select committee by Theresa May MP in any claim for unfair or wrongful dismissal.[63] In *Weir v Secretary of State for Transport* [2005] EWHC 2192 (Ch), a claim for misfeasance in public office, counsel for the claimant conceded that the privileges of Parliament were such that he could not question the Secretary of State for Transport with a view to showing that the minister deliberately told an untruth in a Parliamentary select committee. Lindsay J stated that the concession was correct (paragraph 240) and apologised to Parliament for not having stopped cross-examination on this point (paragraph 242). However, other claimants may not make such concessions and the point may arise for determination in another case.

Thirdly, the framework by which the European Court of Human Rights approaches the issue of whether Convention rights are breached is, essentially, one of fair balance. Thus, Parliamentary privilege was considered in *A v. United Kingdom* (2003) 36 EHRR 51. In that case, it

63 See Head of Legal Blog, www.headoflegal.com, Carl Gardner, 10th November 2011.

was claimed that such privilege breached Article 6 of the European Convention because A was therefore unable to bring a claim for defamation against an MP in the English courts.

The Strasbourg Court rejected that particular argument but made it clear that the question involved one of fair balance. Whilst it may well be fair, having regard to the interests of free speech in Parliament, to deny defamation claims on the basis of what is said in Parliament, the same principle is unlikely to apply in the case of criminal trials and other types of claim where the statement before a select committee may be needed as essential evidence.

Thus, the House of Commons *Guide for witnesses giving written or oral evidence to a House of Commons select committee* (June 2011) may be less than accurate in stating, as it does, that *'... select committee witnesses are immune from civil or criminal proceedings founded upon [select committee] evidence; nor can their evidence be relied upon in civil or criminal proceedings against any other person.'*[64]

Of even more concern are certain statements made in Erskine May as to the questions that a witness before a select committee must answer.[65] According to Erskine May,[66] a witness before a select committee is bound to answer all questions put to him or her and may not seek to excuse answering on (for example) the following grounds, namely that:

64 See p. 11 of the Guide.

65 Concerns over the questions that a select may put to witnesses have surfaced in relation to the Culture, Media and Sport select committee in relation to Rupert Murdoch and James Murdoch, and the Public Accounts Committee in its questions of Dave Hartnett.

66 At p. 823

(i) There would be a risk of self-incrimination.[67]
(i) The witness would thereby be exposed to a civil action.
(i) There would be a breach of legal professional privilege.

These statements are seriously misleading. They appear to rely on a number of flawed premises. First, the statements assume a power in the select committee to require questions to be answered. However, there is nothing in the relevant Standing Orders of either House that confers the power on select committees to require questions to be answered. Nor does the House of Lords Companion to the Standing Orders and Guide to the Proceedings of the House of Lords refer to the existence of such a power. It may be debatable whether a witness's refusal to answer a question posed by a select committee would of itself be a contempt of Parliament.

Select committees are expressly enabled to ask questions (see House of Commons Standing Order 131; House of Lords Standing Order 66). However, this is quite different from being able to require those questions to be answered.

The second assumption made by Erskine May in the above-mentioned statements is that even if there were a power in the select committee to require questions to be answered, the select committee would through Parliament as a whole be in a position to enforce a failure in the witness to comply. However, as has been seen, there is a strong case to say this assumption is incorrect. While Parliament may be able to admonish or censure a witness for failure

67 But the *Parliamentary Privilege* Green Paper (April 2012) appears to assume that there is no current risk of self-incrimination before a select committee: see paragraphs 159-160.

to comply, there is no power clearly exercisable in current times to bring a witness before Parliament or to impose any kind of penalty.

Finally, Erskine May may have assumed that Parliamentary privilege would operate to remove the ordinary consequences of a witnesses' answers, such as the possibility that such answers may be used in legal proceedings. Once again (and as suggested above) an assumption of this kind is likely, at least in some contexts, to be incorrect.

There are other situations in which Parliamentary privilege may intrude in practice that are not addressed by Erskine May and which may also lead to difficulty. For example, a witness appearing before a select committee may be required under statute to observe relations of confidentiality with third parties sometimes under pain of criminal penalty. This was, indeed, what was claimed by Mr Hartnett when answering questions put to him by the Public Accounts Committee in 2011.[68] In such circumstances, it seems highly doubtful that the select committee is empowered to seek to require the giving of answers by a witness. When considering the argument advanced by Mr Hartnett, and the potential for other such arguments, it is notable that select committees do not have the expertise of judges to decide what questions may be put to witnesses, or what questions witnesses are required to answer. This is particularly problematic in the light of the fact that witnesses before select committees are generally not represented by counsel.[69]

68 Sixty first Report of Session 2010-2012 of the Public Accounts Committee *HM Revenue & Customs 2010-11 Accounts; Tax Disputes* see paragraph 5

69 On the position of counsel at select committee proceedings, see Erskine May, p824.

It would also seem that there should be limits on what answers a select committee may legitimately seek to elicit. A witness may decide to answer questions once they are put to him. But that does not mean that a select committee should be permitted to ask the questions in the first place.

At present there seem to be few limits to what a select committee may, at least, ask in the discharge of its functions.[70] However, it is all too easy to envisage a situation in which the eliciting of answers could, in practice, have practical consequences. One example might be the eliciting of answers that might be highly prejudicial to a criminal investigation. Another example, as just referred to, is the eliciting of answers that might bypass the confidentiality required by law between the person appearing before the committee and third parties.

These hypothetical examples pose very real practical problems. Here, it is not a question of whether Parliamentary privilege protects the witness but, rather, whether the eliciting of particular answers threatens to damage wider legal relationships, and to harm the public interest in various respects, such as upholding justice and the integrity of the tax system.[71] There is no judge, beyond the select committee itself, as to whether such wider legal relationships may, or will, be damaged, no criteria currently

70 One example of constraints placed on questions is that matters which are *sub judice* may not be the subject of question in select committee proceedings (see 2001 House of Commons Resolution referred to in Erskine May at p. 441).

71 The wider public interest is, arguably, damaged where different inquiries or investigations address the same overlapping subject-matter but using entirely different methods. A recent example of how third party interests may be adversely affected is afforded by the various investigations into media phone hacking being undertaken during the same period by: (i) the Culture Media and Sport Select Committee, (ii) the police investigation and (iii) the Leveson Inquiry.

laid down in guidance as to how any balancing exercise might be conducted and no obvious recourse (because of Article 9 of the Bill of Rights) against a select committee that decides (even had it decided to hear confidential matters in private session) to include such confidential matters in its Report to Parliament.[72]

Summary

Although it is often described as absolute in nature, the scope and extent of Parliamentary privilege may be far from absolute even in terms of the effective protection of witnesses appearing before select committees. The position of third parties who may be affected by evidence given to a select committee may be inappropriately damaged by application of considerations of Parliamentary privilege.

Moreover, statements made to witnesses appearing before select committees in informal guidance appear to be potentially misleading by stating that the witness will be fully protected by the doctrine of Parliamentary privilege. Erskine May incorrectly states that witnesses cannot refuse to answer questions even where they have every reason not to do so for their own protection. These statements assume that Parliamentary privilege will fully protect the witness from the consequences of answers that are given.

72 Nor, indeed, is there any recourse if a select committee makes findings outside the remit of a particular inquiry. This problem is exemplified by the finding of the House of Commons Culture Media and Sport Select Committee in its Report on *News International Phone-hacking* (Eleventh Report of Session 2010-12) at paragraph 229 that *'Rupert Murdoch is not a fit person to exercise the stewardship of a major international company'*. See The Guardian, *Rupert Murdoch deemed 'not a fit person' to run international company* (1st May 2012) reporting Louis Mensch MP's concerns that the committee had strayed outside its remit. Louise Mensch was herself a member of the committee.

Parliamentary privilege has nothing to say about what questions a select committee should refrain from asking or what matters a select committee should put in the public domain, no matter how confidential answers to such questions might be or how damaging answers would be to pre-existing legal relationships.

There is a need to consider the entire question of Parliamentary privilege in the context of the practical operation of select committee procedure.

Other aspects of select committee proceedings

There are many issues relating to select committee procedure which might, no doubt, benefit from clarification in a comprehensive set of rules in Standing Orders, or in some other convenient form such as a handbook or protocol. This section considers two in particular (conventions and approach to disputes) because they may be thought to have a tangential connection with the subject of coercive powers.

The rationale for this kind of clarification is largely procedural and presentational. However, the area of enforcement is a key area where Parliament has to face the question of whether substantive change is required or not. There is, of course, an important link between the substantive changes that would need to accompany the introduction of coercive powers and improvements in, and clarification of, committee procedure. But, when it comes to addressing possible models at the end of this Paper it will be seen that we seek to differentiate between improvements for their own sake without any coercive powers (Model 1) and models that encompass both improvements in procedure and the establishment of coercive powers (Models 2 and 3).

Conventions in select committee proceedings

It is relevant to distinguish between constitutional conventions such as the Salisbury Convention or the Sewel Convention and use of the word 'convention' more generally as a form of accepted practice.[73]

A constitutional convention is a set of agreed or generally accepted political standards or practices which are, in practice, treated as binding.

Use of the word 'convention' to refer to certain practices of select committees has not been used to describe a constitutional convention but has sometimes been deployed to describe restraints that are placed on questions put in select committee to particular types of witness or even, as noted above, to describe a type of behaviour that is normally expect to occur in select committee.

The difficulty of using the notion of a 'convention' to describe what happens in select committees is that it is in danger of being misunderstood. Moreover, to use the word 'convention' as a description of aspects of select committee procedure has a further ambiguity which is that sometimes a practice adopted or recognised by a select committee amounts to no more than recognition of a constitutional restraint or convention applying to the organs of state.

Thus, for example, select committees sometimes refer to a 'convention' whereby civil servants are not asked questions about substantive policy but only about implementation of policy. But this 'convention' is, in truth, no more than

73 The Salisbury Convention prevents the House of Lords from vetoing the second or third Parliamentary reading of any government legislation promised in its election manifesto. The Sewel Convention is a convention that the Westminster Parliament will only legislate on matters reserved to the Westminster Parliament and will not legislate on matters devolved to the Scottish Parliament without first seeking the consent of the Scottish Parliament.

a non-binding practice respecting the constitutional relationship that subsists between Ministers and the civil service. Similarly, select committees respect rules and conventions that prevent judges from commenting on certain matters.[74] Again, this is a convention affecting an organ of state, the judiciary, and represents a practice by select committees rather than a specific constitutional convention applying to select committees.

In the context of select committees, whose powers and practices may be subject to change, there is a strong case for ensuring clarity and certainty by more specific rules rather than through reliance on informal and often uncertain past practice or development of any system of constitutional conventions (which currently do not exist) in relation to select committees.

Summary

Constitutional conventions do not apply to select committees and the case for developing clearer rules in respect of select committees is stronger than the case for developing such constitutional conventions in relation to select committees.

74 From the judiciary website 'Judges and Parliament' www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/jud-acc-ind/judges-and-parliament

Lack of mechanism for addressing disputes over powers

It is inevitable that however clearly expressed they may be, any system of power-creating rules will give rise to disputes over their application.

At present, there is no evidence of any consideration having been given to the way in which such disputes are to be addressed. This may be because the existence of select committee powers has been thought to be of peripheral importance when compared with supposedly more pragmatic responses such as the recall of witnesses or the background threat of publicity as a coercive factor. Another possible reason has been the assumption that select committees do have wider powers and ultimate sanctions. This assumption is likely to be mistaken for the reasons already analysed.

However, the absence of a mechanism for addressing disputes about select committee powers may cause a number of practical problems. It may cause an impasse. A select committee without a route to approaching the issue may be encouraged to remain passive and do nothing.

But if a committee does nothing there is a more profound consequence. It is that the committee has, by its very passivity, been prevented in practice from carrying out the inquiry necessary to fulfil its Parliamentary functions.

The task of establishing an effective approach to disputes may need to be considered at two levels.

The first level is that of proceedings before the select committee itself. Circumstances may arise where, for instance, a witness refuses to answer a question put to him. There is presently no system of rules or framework to say how the committee should approach this type of problem. In contrast, the Standing Orders of the House

of Representatives of New Zealand (amended October 5 2011) contain a set of rules that anticipate such problems. Examples are afforded by rules 223 and 224:

> *'223 Objections to answer*
>
> *Where a witness objects on any ground to answering a relevant question put to the witness, the witness will be invited to state the ground upon which objection to answering the question is taken*
>
> *224 Committee consideration of objections*
>
> *(1) Where a witness objects to answering a question on any ground, the select committee, unless it decides immediately that the question should not be pressed, will then consider in private whether it will insist upon an answer to the question, having regard to the importance to the proceedings of the information sought by the question.*
>
> *(2) If the committee decides that it requires an answer to the question, the witness will be informed of that decision, and is required to answer the question.*
>
> *(3) The committee may decide that the public interest would best be served by hearing the answer in private or secret.*
>
> *(4) Where a witness declines to answer a question to which the committee has required an answer, the committee may report this fact to the House*'

The second level is that which may require disputes to be addressed outside the committee itself. This may arise, for example, because a dispute raises a wider question of principle which the committee needs to have resolved. One situation in which this might occur could be where

different select committees had interpreted their powers in different ways. In such circumstances, there might be thought to be a need for an over-arching ruling. Such over-arching ruling could, perhaps, be given by a suitable committee such as the Liaison Committee or it could, perhaps more appropriately, be given by the Speaker. The Speaker's constitutional role as the highest authority of the House of Commons[75] would appear to render him eminently qualified for this.

At present the Speaker of the House of Commons is empowered to give rulings on points of order. He also gives private advice to Members which rulings have, since 1981, appeared in the Official Report immediately before written answers where they are considered to be of general interest or to serve as precedents for the future.[76] However, it would appear that the opinion of the Speaker cannot – as a matter of usage – be sought in the House about any natter arising or likely to arise in a committee.[77]

This is in contrast to the position in other jurisdictions. In New Zealand the Speaker's rulings are published online and grouped according to subject matter including various topics on select committee proceedings. In the UK it would seem a straightforward matter to confer on the Speaker a specific power under Standing Orders to give procedural rulings on questions relating to committee powers. This would be to do no more than to extend other specific powers given to the Speaker under Standing Order.[78]

75 *'Office & Role of Speaker'* on the www.parliament.uk website.

76 See Erskine May at p. 62.

77 Erskine May at p. 62 and note the references therein in fn. 72.

78 See Erskine May at pp. 62-63.

Summary

Disputes over committee powers may arise on two levels, namely before the committee itself or in circumstances where a more authoritative ruling may be needed.

There would seem to be a need for procedures for addressing disputes over committee powers. Consideration should be given to a model such as that in New Zealand where Standing Orders of the House of Representatives anticipate, and provide for, problems likely to occur in practice. Where problems raise wider issues consideration should be given to conferring specific powers on the Speaker under Standing Order to give rulings.

The Future

The above analysis suggests that the subject of select committee powers is one that should be confronted in some way by Parliament. To say that is merely to recognise that the present situation reflects a degree of confusion that is, in any event, less than desirable. Select committees perform an important constitutional function. For much of the time, they will be able to perform those functions under the current arrangements. But, as has been demonstrated, there are areas of vagueness and gaps in the powers conferred on select committees. Sometimes the gaps relate to whether or not a particular power exists; at other times there is ambiguity as to how a situation that has arisen should be regulated; there are also areas that are not covered by the rules at all.

Simply in terms of how Parliament chooses, by virtue of its exclusive cognisance, to regulate its internal affairs, the current position is unsatisfactory. A case could be made for improving the present system in three linked ways: first, by clarifying existing rules where necessary (as for example the scope of the power to call for persons, papers and records); secondly by creating rules which filled existing gaps (as, for example, conflict of interest); thirdly, by making the rules accessible by setting them in one place within a coherent framework.

The process of establishing what the present rules were for the purpose of this Paper was not altogether easy. It was often necessary to trawl through not merely a succession of Standing Orders, but also to consider Parliamentary resolutions and passages in Erskine May to see whether or not a particular power or committee constraint was said to exist. The situation bears unfavourable comparison with

the approach taken in the Standing Orders of the House of Representatives of New Zealand (referred to earlier) which, for example, set out methodically what should happen when different problems arise in the course of committee proceedings such as a witness objecting to committee questions. There are also specific provisions relating to the conduct of proceedings by the committee chairman including the power to prevent irrelevant questions from being asked.

To improve select committees in these kinds of ways seems unobjectionable and, indeed, as the New Zealand experience suggests, quite feasible.[79] There are, it may be thought, sound constitutional reasons for ensuring that committees and those appearing before them know more clearly where they stand. If select committees are to perform their work expeditiously and efficiently, they need to be provided with a better framework within which to operate.

What may be described as organisational deficiency becomes something that is qualitatively different when it comes to consideration of committee enforcement powers. It is at this point that many of the issues discussed earlier in this Paper converge. If committees are given enforcement powers, procedural issues such as fairness and compliance with legal standards are likely to enter into the picture. Where (without clear enforcement powers) Parliament could, no doubt, look with a measure of tolerance at its sometimes less than logical processes, great care needs to be taken when it comes to the nature of proceedings before

79 This Paper has not considered the rules in other jurisdictions in depth, or their practical working. However, the New Zealand Standing Orders demonstrate a different approach to that taken in the Westminster Parliament which would appear to have significant merit.

committees that may result in sanction if new powers are to be conferred. This is because in substance the power to enforce by the imposition of sanctions imports, to say the least, the requirements of natural justice and, if it constituted 'determination of a criminal charge' within the meaning of the ECHR, a number of specific Convention safeguards.

If enforcement powers are for the first time to be created, committees (or Parliament) may have power to fine or even to imprison individuals appearing before them. Such individuals may, as we have seen, wish to challenge in the courts the procedures involved as being unfair or in breach of entitlements under the ECHR or as a matter of EU law. Numerous examples may be given but one obvious possibility is that an individual may assert that the committee was biased and therefore lacked legal power to impose a particular sanction.

It follows that if Parliament wishes to create new enforcement powers it needs, also, to inject legally compliant procedures into committee hearings. To that extent, it would be necessary to 'judicialise' committee proceedings in a way that a court would find satisfactory. In other words, it may be necessary to make provision for matters such as legal representation.

Thus, Parliament appears to have a choice. Either it refrains from introducing enforcement powers with the attendant quite radical changes to its procedures that this would be likely to entail, or it introduces enforcement powers. If it decides to introduce enforcement powers, it will then be necessary to address the best method of legislating (primary legislation or Standing Order).

Quite complex problems of evaluation may need to be considered by Parliament when deciding how to address

the question of enforcement powers. At its most basic level, the threshold issue is whether or not Parliament wishes to take the real risk of greater involvement by the courts in 'proceedings in Parliament'. This is a greater risk if enforcement powers were to be created because it would be likely to involve the courts in scrutinising procedures in committee hearings in order to ensure their legality. To the extent that the courts feel obliged to intrude on proceedings in Parliament in this way, the courts will in effect be delimiting the scope of Parliamentary privilege.

Before outlining the evaluations that will be required, it is perhaps helpful to remind ourselves of the constitutional significance of Parliamentary privilege. We are rightly accustomed to our courts acting benignly. But in terms of the need for a constitutional separation of powers between the judiciary, the executive and Parliament this cannot be assumed. There is as much need for the curbing of judicial power as there is for curbing the power of any other arm of the State. Thus, Parliament is entitled to constitutional protection from the judges in the form of Parliamentary privilege, just as much as judges are entitled, in the name of judicial independence, to protection from an over-zealous executive or Parliament.

It is, therefore, entirely legitimate for Parliament, in considering how to address the question of select committee power, to pay close attention to the impact of its actions in this context on the likely intrusion of the courts into proceedings in Parliament if particular action is taken.

The tables below set out three possible models with the possible advantages and disadvantages of each of the selected models. These models are not entirely separate because Model 1 would be necessary if committee enforcement powers were created by either Model 2 or Model 3.

Model 1 – Improve present committee procedures but without legislating for coervice powers

Advantages	Disadvantages
Good constitutional practice	Does not solve the problem of lack of enforcement powers
Increased efficiency	Removes flexibility
Increased legitimacy	Creates constraints which did not previously exist
A necessary condition for conferring enforcement powers whether now or in the future	Makes it easier to point to a lack of a committee power that is not expressly conferred

Model 2 – Legislate for coercive powers by standing order

Advantages	Disadvantages
Strengthens the ability of committees to inquire into things that might otherwise be hidden (this is common to any method of conferring coercive powers)	The courts may intervene if committee procedures are not sufficiently judicialised so as to conform with human rights legislation (this is common to any method of conferring coercive powers)
The courts would not necessarily become involved unless a challenge was to be brought in separate court proceedings. Standing Orders have never previously been interpreted by the courts and the courts may therefore shy away from interfering with processes set up by Standing Order	If and when the courts start to adjudicate on Standing Orders in the context of coercive powers they may find it easier to interfere more generally with proceedings in Parliament because they will already have crossed a line which had previously existed.

Model 3 – Legislate for coercive powers by Act of Parliament

Advantages	Disadvantages
Strengthens the ability of committees to inquire into things that might otherwise be hidden (this is common to any method of conferring coercive powers)	The courts may intervene if committee procedures are not sufficiently judicialised so as to conform with human rights legislation (this is common to any method of conferring coercive powers)
Greater chance of keeping the courts' intervention to defined limits because the courts would still only be interpreting statutes: they would not necessarily have crossed the line of interpreting Standing Orders (although they may do if they are required to consider committee procedures, eg to adjudicate upon a defence).	Maximises the prospect of the courts intervening in proceedings in Parliament because the courts are used to interpreting and applying statutes whereas they are not used to interpreting and applying Standing Orders: the use of a statute to create the regime for such proceedings may have the effect of giving courts the 'green light' to adjudicate fully upon such proceedings, including consideration of what has happened in Parliament.

In evaluating these models, Parliament will need to consider whether it wishes to do anything at all other than improving its current procedures (Model 1). Otherwise, there is a case to be made for leaving things much as they are in terms of the committee process. Shaming recalcitrant witnesses with the threat of publicity or recall are, no doubt, powerful weapons currently available to

committees which can be used to great effect without the need for greater sanction. But there is, of course, a strong counter-argument that – without more powerful select committees – Parliament will not be effective enough.[80]

But less effectiveness may need to be balanced against the risk of greater court involvement over what happens in Parliament. If compulsory powers are chosen, then the respective merits and demerits of Models 2 and 3 will have to be addressed. The starting point must be that enforcement powers (whether created by Standing Orders or by Act of Parliament) bring with them a risk of court involvement. This is because there is a material risk that in creating a sanctions regime enforceable by select committees and/or by Parliament, the courts will intervene in order, amongst other things, to ensure compliance with the fundamental legal entitlement to a fair procedure. It is distinctly possible that the courts would uphold the requirement for fair procedures even at the expense of intruding on 'proceedings in Parliament'.

Model 2 would not inevitably involve the courts because the creation of enforcement powers by Standing Order would only result in the courts becoming involved if a separate legal challenge were brought to the Parliamentary process. Further, the courts would have to show themselves prepared to entertain such challenge. Provided, therefore, that Parliament had instituted sufficiently fair procedures before its select committees there might be greater scope for arguing that the courts should not interfere at all. The difficulty is, however, that of the courts did become involved this would create the precedent of a court interpreting and adjudicating upon a process created by

80 For a strong endorsement of the need for select committee effectiveness, see Margaret Hodge MP's speech to Policy Exchange on March 15 2012.

internal Parliamentary legislation. Such a precedent would appear to make it easier in the future for the courts to intrude further into proceedings in Parliament outside the scope of select committee proceedings.

Model 3 proposes legislation by way of an Act of Parliament. But this is still a choice to be made, which would need to be spelled out in the legislation, as to whether the coercive powers introduced are enforced by courts or select committees/Parliament.

Parliament could enact a statute similar to the Perjury Act 1911 creating a criminal offence for giving false evidence to a committee or failing to attend when ordered. That type of legislation would, inevitably, involve the courts because the courts would be responsible for enforcing the legislation.

A different aspect of Model 3, albeit one also involving primary legislation, would be for Parliament to enact a statute in which committees or Parliament were given specific enforcement powers. Here, the courts would not inevitably become involved because there would need to be a separate court challenge which the courts were willing to entertain. However, the risk of the courts becoming involved would probably be higher than in the case of similar legislation effected by Standing Order because the courts are used to interpreting and giving effect to statutes.

If the courts did become involved there would seem to be less risk than in the case of Model 2 of a precedent being created for greater court involvement in proceedings in Parliament generally since the courts are well used to interpreting and applying statutes and they would not necessarily have crossed the line of interpreting Standing Orders (although they may do if they are required to consider committee procedures, eg to adjudicate upon a defence).

There may be a way of structuring select committee powers so as to avoid the difficulties of Models 2 and 3 of the courts becoming more involved with Parliamentary processes and, indeed, also resolving some of the current issues over committee procedures that would not necessarily be addressed under Model 1.

This would be to enact primary legislation creating a new extra-Parliamentary authority that could have appeal or review powers conferred upon it in respect of committee procedures.[81] A recent example of such procedures connected with Parliament is that of the compliance officer for the Independent Parliamentary Standards Authority ('IPSA') under the Parliamentary Standards Act 2009 who is appointed by IPSA but is independent of it. The compliance officer reviews determinations by IPSA and, in turn, may be appealed to the First Tier Tribunal and thereafter to the Upper Tribunal (a superior court of record) and a further appeal to the Court of Appeal on a point of law.

In similar fashion, a body such as a 'Commissioner for Select Committee Procedures' might be given power to hear appeals from select committee decisions. The Commissioner may himself thereafter be subject to further

81 There may also be scope for the establishment of an independent officer to undertake an *ad hoc* fact finding inquiry where there is seen to be a particular need for independent oversight and/or for greater expertise in the questioning of individuals with the specific purpose of eliciting information.

appeal or judicial review in the courts.[82]

A possible advantage of such a structure would be that it would remove the possibility of direct adjudication by the courts on the fairness or legality of proceedings before select committees. However, it may be questioned whether the supposed benefit is more apparent than real. The IPSA compliance officer model provides for appeals to the courts which then inevitably brings the courts into proximity with Parliamentary affairs. Nonetheless, if the underlying risks are perceived to be those of an incremental 'culture' leading the courts into collision with Parliament this culture is at least arguably avoided by a process in which the courts remain in the position of scrutinising the decisions of a public body created by statute.

More generally, in considering whether to introduce coercive powers there are two further points. First, trying to assess the likelihood of greater court involvement may be an impossible task. Secondly, complicated dynamics far removed from the arena of select committees may ultimately dictate whether or not the courts are able to position themselves so as to interfere further in proceedings in Parliament. Legal challenges such as that to the plans for the HS2 rail network (which appear to question the whole hybrid bill procedure as being contrary to EU law) or challenges to legislation[83] or for non-compliance

82 However, without primary legislation the courts would not necessarily scrutinise a body set up by Parliament understanding order such as the Parliamentary Commissioner for Standards (see: *R v. Parliamentary Commissioner for Standards, ex p. Al Fayed* [1998] 1 WLR 669). It should not be assumed that this case would inevitably be decided in the same way today as it preceded the entry into force of the Human Rights Act 1998 and the cases addressing (with increasing focus since the HRA) fundamental constitutional rights at common law.

83 The provisions of the Sovereignty Bill are perhaps a case in point.

with legislation,[84] closely connected to proceedings in Parliament may lead to greater involvement of the courts in what happens in Parliament whatever legislative options are thought appropriate in respect of committee powers.[85]

In coming to a decision as to how to grapple with the current issues over committee powers, Parliament faces more than a simple question of whether it wishes select committees to be able to enforce their powers. There is an underlying and more subtle question facing Parliament which is how it wishes to balance its own competing interests. On the one hand greater enforcement may lead to greater scrutiny of its proceedings by the courts; on the other hand, creating no new enforcement powers may leave Parliament less effective through its select committees than it would like to be. Ultimately, the most appropriate model will be that which reaches the most acceptable balance between these two interests.

That is a question for Parliament to answer.

Summary

Parliament will need to consider the issue of compulsory powers for select committees in the light of competing

84 As, for example, alleged non-compliance with the requirements of the Fixed Term Parliaments Act: see, at the Bill stage, the evidence of Dr. Malcolm Jack the then Clerk of the House of Commons to the Political and Constitutional Reform Committee (September 7 2010). See, especially, Dr. Jack's answer to Q7.

85 It may be that some concerns over Parliamentary procedures may be capable of being addressed by appropriate Parliamentary and/or government action which may operate to remove the scope for court challenge. Thus, for example, where concerns were expressed over the hybrid bill procedure in the context of the Crossrail Bill and its compatibility with EU requirements of consultation, the Department of Transport simply extended the time allowed for consultation.

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 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.