



Law Society
of Scotland

Memorandum of Comments by the Constitutional Law Sub-committee

Comments on the House of Commons Committee of
Privileges Inquiry into select committee powers

June 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Constitutional Law sub-committee welcomes the opportunity to comment on the House of Commons Committee of Privileges Inquiry into select committee powers. The sub-committee has the following comments to put forward for consideration.

What is the primary role of select committees and what should be the practical limits of the application of their powers (as delegated to them by the House)?

Select Committees are found in both the House of Commons and the House of Lords. This submission confines itself to those in the House of Commons. They inquire into, consider and report on most aspects of UK Government activity including the work of government departments and aspects of government policy and social, economic, legal, administrative and constitutional matters affecting life in the UK. The results of these inquiries are publicly reported and frequently require a response from the government.

House of Commons Select Committees examine the work of Government departments including spending, policies and administration.

Departmental committees have a minimum of 11 members, who decide upon the line of inquiry and then gather written and oral evidence. The Law Society of Scotland has often given evidence to Select Committees (and Public Bill Committees) and the experience has been uniformly positive.

Findings are reported to the House of Commons, printed, and published on the Parliament website. Government has 60 days to respond to a Committee's report and recommendations.

Some Select Committees have a role that crosses Government departmental boundaries such as the Public Accounts or Environmental Audit Committees.

The majority of Select Committee Chairs are elected by MPs. On Select Committees generally see: <https://www.parliament.uk/about/how/committees/select/>.

Do you agree with our assessment of the three options, and our conclusion that a legislative solution is the best available option?

We agree with the committee's assessment of the three options and the conclusion that a legislative solution is the best available option. Legislation will silence any questions about effectiveness of the provisions. A new statute will not suffer from the application of desuetude.

Do you think the proposed draft Bill provides an appropriate solution to the issue of recalcitrant witnesses before committees?

We have the following observations on the proposed draft Parliamentary Committee (Witnesses) Bill:

A. Clause 1(1)

Clause 1 (1) provides that it is an offence for an individual to fail to comply with a summons from a Select Committee of the House of Commons.

Our Comment

The draft Bill is only concerned with the creation of the offence rather than the power to issue summonses. That power is detailed in Erskine May Paragraph 38.32:
(<https://erskinemay.parliament.uk/section/5914/papers-and-records/>).

However, if a statutory regime is desired, it would be important for the Select Committee to have the power to issue summonses and provide notice. Section 24(1) of the Scotland Act 1998 provides such a power to the Clerk of the Parliament:

- (1) *A requirement under section 23 shall be imposed by the Clerk giving the person in question notice in writing specifying—*
- (a) *the time and place at which the person is to attend and the particular subjects concerning which he is required to give evidence, or*
 - (b) *the documents, or types of documents, which he is to produce, the date by which he is to produce them and the particular subjects concerning which they are required.*

It is important that the recipient of the summons is aware of how to comply with it. Such a provision would ensure that there would be clear duties of specificity on the Committee issuing the summons and a clear understanding on the part of the recipient about how to comply with the summons.

Why is the offence confined to a natural person, when relevant documents may be held or owned by a legal person? A body corporate, for instance, should not be able to obstruct a Select Committee process.

The Scotland Act 1998 section 25(5) makes provision for the situation where a body corporate has committed an offence and it is proved that this has been done with the consent, connivance or neglect of a director, manager, secretary etc. of the body. In those circumstances, the natural person, as well as the

body corporate, is guilty of the offence and may be proceeded against. The Committee may reflect on how such a provision could enhance the draft Bill.

Clause (1) should make clear that the obligation to comply with the summons is to:

- i attend the meeting
- ii answer questions; and
- iii provide information or documents.

There may be human rights issues about requiring an answer to questions as there is a right not to self-incriminate *Funke v France (1993) 16 EHRR 297*. Actions by Parliament which are incompatible with convention rights are not unlawful because Parliament is not a public authority under section 6 of the Human Rights Act 1998. However, that does not mean that Parliament should not seek to comply with convention rights. See however our comments on legal professional privilege and confidentiality below.

The Scotland Act 1998 section 25 goes further in connection with the components of the offence.

Section 25 details that the offence is committed if the person summoned:

- (b) refuses or fails, when attending proceedings as required by the notice, to answer any question concerning the subjects specified in the notice,*
- (c) deliberately alters, suppresses, conceals or destroys any document which he is required to produce by the notice.*

A definition of documents should be included such as that applying to disclosure in civil courts in England: document” means any form of recorded information, not just writing on paper. It includes, for example, pictures, emails, mobile phone texts, social networking messages or video-clips:

<https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/general/disclosure-of-documents>

We would however support that there should be provision which protects legal professional privilege and the obligation of confidentiality, like the approach in the Scotland Act 1998 section 23 (9):

A person is not obliged under this section to answer any question or produce any document which he would be entitled to refuse to answer or produce in proceedings in a court in Scotland.

We note that in Erskine May Paragraph 38.32 there is reference to a solicitor being ordered to produce papers relating to a client and that paragraph 38.36 specifically excludes reliance on *privileged communication, as where a solicitor is called upon to disclose the secrets of a client; or on the ground that they are advised by counsel that they cannot do so without incurring the risk of self-incrimination*. The Committee could consider whether a new statutory provision might seek to revise these paragraphs to uphold human rights and the rule of law.

Legal professional privilege is a key aspect of the rule of law and the interests of justice. It can be claimed by a client to avoid disclosure of documents. There are two main categories of documents to which privilege can attach:

- Confidential communications between a client and solicitor, where the client seeks, and the solicitor gives, legal advice (legal advice privilege).
- Confidential communications between a client and solicitor in contemplation of litigation (legal litigation privilege). This extends beyond communications solely between solicitors and clients to cover communications with third parties (e.g., experts and witnesses), but only applies where the overarching, dominant purpose of the communication is for use in actual, pending or reasonably contemplated litigation.

We note that Erskine May, Paragraph 38.33 states that “ *When a select committee has the power to send for persons, that power is unqualified,¹ except to the extent that it conflicts with the privileges of the Crown and of Members of the House of Lords, or with the rights of Members of the House of Commons*”.

The draft bill reflects this in that there is also no exemption in the bill for members of the judiciary.

This contrasts with the Scotland Act 1998 section 23 (7) which provides that:

The Parliament may not impose such a requirement on—

(a) a judge of any court, or

(b) a member of any tribunal in connection with the discharge by him of his functions as such.

The Committee could however reflect on the application of a similar approach to the offence provisions in terms of upholding the independence of the judiciary and the rule of law. There is also a limited exemption for prosecutors under section 23 (10) which should be considered for inclusion in the bill.

B. Clause 1(2)

Clause 1(2) provides the statutory penalties in the event of being found guilty of the Clause 1(1) offence.

Our Comment

Clause 1(2) requires that the Clause 1(1) offence should only be triable on indictment before a judge and jury. The penalties in the event of being found guilty of failure to comply with a summons are imprisonment for a period not exceeding 2 years, a fine (which may be unlimited) or both.

In contrast the Scotland Act takes a different approach.

Section 25 of the Act provides:

- (4) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a period not exceeding three months.*

There are a number of points distinguishing the two provisions. Firstly, the Scottish offence is prosecuted in a court of summary jurisdiction, that is before a judge (Sheriff) sitting alone rather than with a jury. Second the penalties are much lighter in Scotland, the fine is limited to £5000 and the custodial penalty to 3 months.

When compared with the provisions of the Scotland Act 1998 section 25 the penalties under the Bill seem to underline the seriousness with which the offence is considered by the Committee.

C. Clause 1(3)

Clause 1(3) provides that a written certificate by the Speaker that an individual has failed to comply with a summons is conclusive.

Our Comment

This provision has no analogy in the Scotland Act 1998, due to the different nature of UK Parliamentary Privilege. That having been said this is in effect a form of ouster clause. There may be doubts whether it would be effective to prevent a criminal court from investigating whether there has been a failure to comply with a summons.

D. Clause 1(4)

Our Comment

Clause 1(4) is also a form of ouster clause. We note that clause 1(4)(b) only prevents a court from considering aspects of the Committee's proceedings when determining the matters referred to in clause 1(5) and not when a court may be determining other matters, such as the scope of the Speaker's certificate.

What do you think the maximum sanction should be for an individual found guilty of an offence of failure to comply with a summons?

As per the provisions in the Scotland Act 1998.

Should the legislation be extended to encompass the enforcement of sanctions related to other contempts, or to make equivalent provision for House of Lords committees, or to deal with any other matters relating to parliamentary privilege?

We agree that the bill should be extended to encompass the enforcement of sanctions related to other complaints and to make equivalent provision for House of Lords committees.

How should the House set out its internal processes and commitment to fair treatment in a way that provides sufficient due process, whilst maintaining the flexibility and effectiveness of the current select committee system?

We take the view that the internal processes and commitment to fair treatment requires to be set out in Standing Orders of the House.

The draft Bill provides a power to summon non-Members to attend or to provide information or documents to a committee. Should equivalent powers be included to summon Members of the House, or for a committee of one House to summon Members of the other House?

We take the view that equivalent powers should be included in the Bill to summon members of the House of Commons. Empowering a committee of one House to summon members of the other House is a more problematic suggestion. Such a proposal would impact on the self-regulatory character of the House of Lords. To satisfy members of both Houses that the independence of each House from the other is respected a system could be created which would provide for a Joint Committee of both Houses to consider an application from a committee of either House to apply for direction that a member of either House should attend a committee of the other House.

Are there any other issues within the scope of the matter referred to us - "the exercise and enforcement of the powers of the House in relation to select committees and contempts" - that you think should be dealt with in our final recommendations to the House?

Taking evidence on oath.

Erskine May at Paragraph 38.37 states:

The Parliamentary Witnesses Oaths Act 1871 empowers the House of Commons and its committees to administer oaths to witnesses, and attaches to false evidence the penalties of perjury. By Standing Order No 132, oaths, and affirmations under the Oaths Act 1978, are administered to witnesses before a select committee, by the Chair or by the Clerk attending the committee.

By the Perjury Act 1911, s 1, where evidence is given upon oath, the giving of false evidence is punishable as perjury. The power of either House to punish for false evidence is not, however, superseded by this Act. Where evidence is not given upon oath, the giving of false evidence is punishable as a contempt (see para [15.5](#)).

It is not usual, however, for select committees to examine witnesses upon oath, except upon inquiries of a judicial or other special character.

The opportunity might be taken to consider whether any aspect of these provisions might be brought up to date.

By way of comparison in the Scottish Parliament the Presiding Officer can administer an oath under section 26 of the Scotland Act 1998 to any person who is giving evidence to the Parliament. It is an offence to refuse to take the oath.



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