



House of Commons
Procedure Committee

The House's power to call for papers: procedure and practice

Ninth Report of Session 2017–19

*Report, together with formal minutes relating
to the report*

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Procedure Committee

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Summary

One of the powers of the House of Commons is a power to “call for papers”: that is, to require Ministers to produce documents and information to assist the House in discharging its functions. The right of the House to demand papers on this basis has never been challenged. In theory the power is capable of being exercised without limitation, but the House has, through practice, established certain limits: the power is not used to obtain papers which are not in the Government’s possession or which are of a personal nature. Although limited at present by the House’s established practice, the power could in the future be limited by a resolution of the House, by statutory provision or by judicial intervention.

The Law Officers’ convention is a Government convention which provides that the existence and the content of advice to Government from the Law Officers of the Crown must not be disclosed outside Government without the authorisation of the Attorney General. The convention is cited in *Erskine May*, which acknowledges that such advice is not usually provided to the House: requests for the production of such advice are frequently refused. There is nevertheless no known precedent for the House having used its formal powers to obtain such information and the Government having successfully resisted the use of the power, either by defeating a motion trying to exercise the power or by having a resolution rescinded.

Historically, Members who were not Ministers would often move motions for papers in order to force the Government to disclose information. The Government would resist, or attempt to amend, the motions it disagreed with, since it recognised that such motions, if passed, would have to be complied with. From the second half of the nineteenth century, Ministers began to provide more information to Parliament in Act and Command Papers, and the use of the “motion for return” as a means for Members to secure information from the Government fell into disuse.

Ministers themselves make frequent use of the power in order to arrange for the publication of reports of sensitive inquiries and other material which they wish to protect from legal challenge. The Government’s use of motions for return has been the subject of a recent judgment in the High Court, and may be examined again on appeal.

The procedure has been revived in the present Session: to date ten motions for return have been moved on Opposition days. The House has agreed to five such motions, and in four of the five cases the Government has complied with the requirements of the House without further challenge.

On 13 November 2018 the House passed a resolution requiring the production of the legal advice to the Government on the Withdrawal Agreement between the UK and the EU then under negotiation. The Government did not engage directly with the resolution of the House, and instead provided a paper on the “overall legal effect” of the agreement in its final form. Press reports indicated that a legal opinion on the draft agreement had been provided to Cabinet but had not been disclosed to the House. The issue was raised as a matter of privilege on 4 December 2018: the House found Ministers to be in

contempt and ordered the immediate production of the legal advice referred to in the 13 November resolution. On 5 December the Attorney General consented to the release of his legal advice, and no further complaint of non-compliance has been made.

The Committee has considered a number of issues arising from the House's recent practice in considering motions for return, and has made this report in order to clarify the House's practice.

The Government has contended that Ministers are under a legal duty, driven by the public interest, to keep certain information confidential. Ministers are expected to observe certain conventions within Government on the confidentiality of such information, and in some cases the obligations on Ministers are governed by statute. The Government has suggested that the House ought to recognise the Law Officers' convention and other Government conventions governing the disclosure of information, and undertake not to request information which Ministers consider they are under an obligation to keep confidential.

Although the Committee recognises the importance to Government of the Law Officers' convention, and other conventions on the disclosure of information, it does not recommend that the House should place any further prior restraint on the exercise of its power to call for papers. Motions seeking the production of papers may be defeated by the use of a Government majority: they may also be amended, for example to allow extracts of papers to be released without compromising confidential information.

The Committee is not convinced that there is any case for the House to amend its current practice in relation to the power to call for papers. The recent difficulties experienced by the Government in complying with the House's demands stem from political disagreements over the use of Opposition days. The Committee considers that the procedural mechanisms available to the Government are sufficient to enable Ministers to resist demands for the disclosure of information which would pose a genuine risk to the national interest.

The Committee recommends one substantive change in practice: where a motion for return requires the disclosure of papers to a committee of the House, the motion ought not to be debated unless and until the chair of the committee concerned has indicated that the committee is content to receive the information.

1 The House's power to call for papers

1. This report follows a short inquiry to examine the recent practice of the House in exercising its power to call for papers from the Government. The inquiry was occasioned by two decisions of the House. The first, on 13 November 2018, was to agree to a motion requiring the Government to provide to Parliament details of the legal advice provided to Ministers on a specified matter, including legal advice from the Attorney General.¹ The second, on 4 December 2018, was to agree to a motion, moved as a matter of privilege, to find Ministers in contempt of the House for not providing to Parliament a copy of the Attorney General's legal advice to the Prime Minister on that matter in response to the earlier resolution of the House.²

2. The House rejected a Government amendment to the privilege motion taken on 4 December. Had that amendment been agreed to, the question of whether the Government's response to the resolution passed on 13 November 2018 fulfilled the resolution's terms would have been referred to the Committee of Privileges for consideration. That Committee would also have been asked to consider "the constitutional and historic context and the proper use, ambit and scope of the motion for return procedure."³ Since the Committee of Privileges may only examine matters referred to it by the House, the Chair of the Committee, Kate Green MP, declined a separate request from the Leader of the House to examine the issues raised in the Government amendment.⁴

3. The Procedure Committee decided to open an inquiry into the issues of procedure and practice raised by the invocation of the House's powers to call for papers.⁵ We noted not only the concerns raised by the Leader of the House in her letter to the Committee of Privileges but also those raised by the Public Administration and Constitutional Affairs Committee in a recent report.⁶

4. We took oral evidence from the Leader of the House, Rt Hon Andrea Leadsom MP, and the Attorney General, Rt Hon Geoffrey Cox QC MP; from the then Clerk of the House of Commons, Sir David Natzler KCB, and the Clerk of the Journals, Mark Hutton; from the Shadow Solicitor General, Nick Thomas-Symonds MP and the SNP Justice spokesperson, Joanna Cherry QC MP; and from a former Attorney General, Rt Hon the Lord Morris of Aberavon KG QC.⁷

1 Votes and Proceedings of the House of Commons, 13 November 2018

2 *Ibid.*, 4 December 2018

3 *Ibid.*, 4 December 2018

4 The letter from the Leader of the House to the Chair of the Committee of Privileges, dated 4 December 2018, is available here: <https://www.parliament.uk/documents/commons-committees/Privileges-Committee/Leader-committee-20181204.pdf>. The response, dated 6 December 2018, is available here: <https://www.parliament.uk/documents/commons-committees/Privileges-Committee/Leader-committee-20181204.pdf>.

5 The call for evidence is published on the Committee's website at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/procedure-committee/inquiries/parliament-2017/powers-commons-papers-inquiry-17-19/>

6 Public Administration and Constitutional Affairs Committee, Fifteenth Report of Session 2017–19, *Status of Resolutions of the House of Commons*, HC 1587, paras 65–72.

7 Oral evidence witnesses are listed on page 33. The written evidence received is listed on page 34.

The nature of the power to call for papers

5. Both Houses of Parliament have the power to require documents to be produced to assist each House in discharging its functions.⁸ Sir David Natzler, then Clerk of the House of Commons, told us that the right of the House of Commons to demand papers on this basis had never been challenged, and that the Government had consistently accepted that the House has the power to call for papers.⁹

6. Use of the power to require papers to be provided to the House, in response to an order of the House or to an address to the Sovereign, was commonplace until the second half of the nineteenth century as the primary means for the House to secure information from Ministers. Its use for this purpose declined as Ministers wishing to provide information to one or both Houses, either on their own initiative or in response to demand, did so in Command Papers, and an increase in the statutory requirements for the provision of information to Parliament led to a growth in the number of Act Papers.¹⁰

7. The power nevertheless remains in regular use: it has not been rescinded or otherwise set aside. Moreover, the House invests many of its select committees with the power to send for “papers and records” on matters falling within their order of reference.¹¹

8. The power of the House to call for papers is binding on Ministers: this is demonstrated, in the period when it was customary for private Members to move motions for papers, by the approach of Ministers to motions which the Government opposed.¹² Ministers would press for such motions to be withdrawn, would seek to amend motions calling for papers, or would negotiate over the papers to be produced, in the knowledge that if the motion were agreed to by the House they would be obliged to comply with it.¹³

9. The Clerk of the House noted that the regulation of the power is a matter for the House as a whole, and not a matter of order upon which the Chair may adjudicate.¹⁴

The scope of the power

10. The power to call for papers is exercisable by the House. In theory it remains capable of being exercised without limitation.¹⁵ No limits to its exercise have been established in common law or in statute.

8 The first edition of *Erskine May* (1844, p. 309) states that “Parliament, in the exercise of its various functions, is invested with the power of ordering all documents to be laid before it which are necessary for its information.” House of Commons Service (PHP0005), para 2.1.

9 House of Commons Service (PHP0005), para 2.2, citing Sir David’s oral evidence to the Public Administration and Constitutional Affairs Committee on 23 October 2018, Q28.

10 *Ibid.* (PHP0005), paras 2.1 and 5.1

11 House of Commons Service (PHP0005), paras 7.1–7.4; Dr Andrew Defty (PHP0001), para 4. For a fuller description of the power to send for papers and records as it affects select committees, see the memorandum from the then Clerk of the House, Sir Richard Barlas KCB OBE, to the Procedure Committee in 1978 (hence *Barlas memorandum*): First Report of the Select Committee on Procedure, Session 1977–78, HC (1977–78) 588-I, Appendix C, paras 36–47.

12 A list of motions for return made in the Commons and the Lords and opposed by the Government of the day is appended to the Barlas memorandum, *q.v.*, pp 29–36. The first instance cited is in 1692: the last is in 1905.

13 House of Commons Service (PHP0005), paras 5.1–5.3

14 PHP0005, para 5.3, citing the Barlas memorandum, *q.v.* p. 22.

15 PHP0005, para 5.3

11. The House has, through its practices, established certain limits to the power's use. Use of the power, as established by the practice of the House and acknowledged by successive administrations, extends to papers and reports produced by Government departments, as well as papers which are in the possession of Ministers or which Ministers have the authority to obtain.¹⁶ Where the House has ordered the production of papers discovered not to be in the Government's possession, or of a personal nature, the House has subsequently moved to rescind the order.¹⁷

12. In 1997 the House adopted a resolution on Ministerial accountability, in which the House gave its opinion on the principles which Ministers should observe in their conduct in relation to Parliament.¹⁸ Under the terms of this resolution, Ministers are expected to be "as open as possible with Parliament, refusing to provide information only when disclosure would not be in the public interest". While this resolution confirms the presumption that Ministers ought to be as open as possible in providing information to the House in all circumstances, we do not interpret it as a restraint on the House's practice in the exercise of its own power to call for papers.

13. If the power were in future to be limited, this might be achieved in the following ways:

- by the House: by an express resolution of the House modifying its practice, or (for example) by the House voting against proposals, or subsequently rescinding decisions, exercising the power in certain ways;
- by statute: a bill passed by both Houses expressly limiting the power, or
- by the courts: for example, an egregious use of the power, argued to be in violation of Convention principles, might result in judicial intervention. In this respect, the House will wish to note the recent examination of the procedure in the High Court.¹⁹

16 [PHP0005](#), para 3.3, citing *Erskine May*, 24th edition, 2011), p. 133

17 [PHP0005](#), para 5.4: see also the oral evidence of the Clerk of the Journals to the Public Administration and Constitutional Affairs Committee on 23 October 2018, [HC 1587](#), Q28.

18 The House's resolution on Ministerial accountability to Parliament, adopted on 18 March 1997, is as follows (emphasis added): *Resolved*, That, in the opinion of this House, the following principles should govern the conduct of Ministers of the Crown in relation to Parliament: (1) Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their Departments and Next Steps Agencies; (2) It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister; (3) **Ministers should be as open as possible with Parliament, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with relevant statute and the Government's Code of Practice on Access to Government Information (Second Edition, January 1997)**; (4) Similarly, Ministers should require civil servants who give evidence before Parliamentary Committees on their behalf and under their directions to be as helpful as possible in providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code (January 1996)

19 See the judgment of Master McCloud in [Warsama & another v the Foreign and Commonwealth Office & others](#), [2018] EWHC 1461 (QB), 15 June 2018, and para 27 below.

Law Officers' advice

14. There is a convention within Government, referred to in the Ministerial Code, that “the fact that the Law Officers have advised or have not advised, and the content of their advice, must not be disclosed outside Government without their authority.”²⁰ *Erskine May* cites the convention and states that in consequence the opinions of the Law Officers “are not usually laid before Parliament, cited in debate or provided in evidence before a select committee, and their production has frequently been refused.”²¹ There is nevertheless historic and recent precedent for the voluntary disclosure of legal advice given within Government, either to the House or through general publication. Legal advice has on occasion also been disclosed in response to orders made by select committees.²²

15. Until the resolutions of the House of 13 November and 4 December 2018, there had been no recorded instance of the Government complying with a formal direction from the House to release legal advice, nor of successful resistance to such a direction.²³ So, although a limit on its exercise of the power in this respect may hitherto have been perceived, the House, by its recent actions, has demonstrated that it does not at present recognise that limit. Another committee of the House has recently argued that the Law Officers' convention represents “an established limit” to the power to call for papers: but we can find no evidence of any test which has established that limit in practice.²⁴

16. The power of the House of Commons to require the production of papers is in theory absolute. It is binding on Ministers, and its exercise has consistently been complied with by the Government. The way in which the power is exercised is a matter for the House and not subject to the discretion of the Chair.

17. The House, by its practice, has observed limitations on the power: it does not use the power to call for papers which Ministers do not have the authority to obtain, nor does it use it to obtain papers of a personal nature.

18. Until November 2018 the House had not used the power to require the production of legal advice to Government from the Law Officers. The House's resolution of 13 November 2018 requiring the disclosure of such advice, and its subsequent order of 4 December 2018 demanding compliance with the resolution, represents a potential extension of the historic use made of the power.

19. We therefore make this report to advise the House of the potential implications of its recent decisions and to make recommendations on its future practice.

20 [Ministerial Code](#) (Cabinet Office, January 2018), para 2.13

21 *Erskine May*, 24th edition (2011), p. 447

22 [PHP0005](#), paras 5.11–5.13

23 *Ibid.* ([PHP0005](#)), para 5.14

24 Public Administration and Constitutional Affairs Committee, [Status of Resolutions of the House of Commons](#), para 69

2 Exercising the power through a motion for return

20. The House's power to call for papers is exercised by means for a "motion for return": a motion requiring the provision to the House of a return of information of a specified character.²⁵ Motions for return are typically directed at Government departments, though they can also be directed at the House itself or at others.

Use of the power by Ministers: motions for unopposed return

21. Ministers often use the power to call for papers to facilitate the publication of documents which the Government wishes to place in the public domain with the protection against actions for defamation or other legal proceedings which is provided by Parliamentary privilege.²⁶ The power is also used annually for the formal production of certain fiscal information required by the House, and for the production of a statistical digest of information about the House and its Committees in each session.²⁷

22. In the 2017–19 Session to date ten motions for return have been moved in the House to secure papers Ministers wished to have published: five of these have been moved by Cabinet Ministers in person. Such motions have facilitated the publication of, for instance, the report of a review of how the Home Office handled information received in relation to allegations of child sexual abuse in Rotherham, and the report of the review of the official response to the Hillsborough disaster in 1988.²⁸

23. The continued use of the power to call for papers in this way demonstrates that it is in current use to secure information held by the Government or by the House (for instance, the information on the performance of the economy held by the Treasury and published as the Budget Red Book, and the data on House of Commons activities gathered by the House of Commons Service), as well as to secure the publication of papers in the possession of Ministers or papers which they have the authority to obtain, such as the reports of major public inquiries commissioned by Ministers.

Motions for unopposed return: practice

24. The settled practice of the House in considering motions for return moved by Ministers has been to take them at the beginning of the sitting day, in the period reserved for unopposed business. The Clerk of the House indicated that this procedure "was introduced originally to avoid the inconvenience [to] the House of having formally to consider motions by Ministers for returns of largely uncontroversial information from

25 "Return" is used here in the sense of "an official report or statement submitted in response to a formal demand".

26 House of Commons Service ([PHP0005](#)), paras 3.2 and 3.3

27 The Budget "Red Book", formally known as the Budget Report, provided to the House at the same time as the Chancellor of the Exchequer's annual Financial Statement, is presented as a return to an Order of the House. So are the annual accounts of the Contingencies Fund. The Sessional Returns, a collection of returns of statistical and other information about the business of the House and its committees in a session, are published early in the subsequent session as a return to an order of the House, formally moved by one of the Deputy Speakers.

28 The motions for papers moved by Ministers in the 2017–19 Session to date are listed in Table 1 of the annex to this report.

their own Departments.”²⁹ Notice is given of the intention to call for an unopposed return, by means of the Government tabling a motion in the name of the responsible Minister on the previous sitting day. If the department providing the information is headed by a Secretary of State, the motion is for an humble Address to the Sovereign, asking her to give directions for the return of the paper: if it is the Treasury, or another department not headed by a Secretary of State, the motion is for an order requiring the paper to be provided.³⁰

25. If it is evident that the Department is prepared to provide the return in response to the motion, the motion is set down on the Order Paper at the time reserved for unopposed business. No objection may be taken to the motion when it is moved: *Erskine May* indicates that “it is a settled principle that a motion for return which is proposed by the Minister responsible for the department concerned ought not to be opposed by any other Member”.³¹

26. Once the motion has been agreed, to, in the form of a resolution or order, the Department lays the paper requested before the House, and it is printed by order of the House in the sessional series of House of Commons papers. Typically the paper is laid, and published, on the same day the motion is passed: publication is often timed to coincide with a Ministerial statement. Where the call for papers is given effect through a resolution for an humble Address, no address is required to be presented to the Sovereign by the senior Government whip who holds the position of the Vice-Chamberlain of the Household. Ministerial compliance with the request, through the production of the papers requested, is sufficient to discharge the obligation.

Recent judicial examination: the Warsama case

27. The use of the unopposed return procedure has recently been examined by the courts, and its use as “a means by which the Executive prints material which would otherwise lead to a risk of legal liability, including for violation of Convention Rights” has been sustained.³² While the court accepted the privilege arguments advanced by the Government, there remains a chance that the matter may be raised again on appeal.³³

29 House of Commons Service ([PHP0005](#)), para 3.4

30 The Clerk of the House explained that the distinction between the use of either procedure was a matter of constitutional theory and was of no practical difference. House of Commons Service ([PHP0005](#)), paras. 4.1–4.4

31 [PHP0005](#), para 3.7, citing *Erskine May* (24th edition, 2011) p. 352

32 *Warsama & another v the Foreign and Commonwealth Office & others*, [2018] EWHC 1461 (QB), 15 June 2018, esp para 100. The claimants alleged that the report of the [Wass Inquiry](#), published on 10 December 2015 following a motion for unopposed return, breached their rights under Article 8 of the European Convention on Human Rights. The FCO submitted that the content of the inquiry report was protected by Parliamentary privilege. The judgment examined, among other things, the basis of the FCO's claim, given that there did not appear to be a previous relevant judgment (para 13) which dealt with a privilege defence to a claim against a paper produced in response to a motion for unopposed return. The judgment found that the unopposed return procedure did provide a defence against claims which sought to challenge the accuracy or the content of the paper (para 110).

33 *Ibid.* paras 118–130: leave was given to the claimants to appeal, and the FCO to counter-appeal, given the public interest, the constitutional interest of the matters decided and the lack of previous high authority on the points raised.

Motions for return not moved by Ministers

28. As explained above, the tabling of motions for return by private Members to secure the production of Government papers is a practice which fell out of use as Ministers volunteered information under more categories to the House or were required to provide it by other means.

29. The practice was revived earlier in this Session.³⁴ Ten such motions have been tabled in the name of the Leader of the Opposition, as matters to be taken on Opposition days, in the 2017–19 Session to date.³⁵ Of these, five have been agreed to without a division, and five have been negatived on division.

30. Notice of these Opposition motions has generally been given on the day before they are to be debated. Unlike motions for unopposed return, there has been no requirement to ascertain in advance whether the Government has the information sought in the motion, nor whether Ministers are willing to provide it as requested.

31. On six occasions the Opposition motion has sought the provision of papers to a select committee, rather than to the House as a whole. On the four occasions that such motions have been agreed to by the House, the committee to which the information has been provided has been able to assess the information provided, to determine whether the House's instruction has been complied with and to decide whether to report the information to the House and publish it.³⁶

32. In one instance the committee to which the information was provided had not been consulted on the preparation of the motion and had not previously sought the papers concerned, but considered itself under a responsibility "to ensure that the House's unambiguous instruction was carried out".³⁷

Papers sought in Opposition motions for return

33. The papers which the Opposition has sought to require the Government to provide have fallen into the following categories:

- a) reports and other papers whose existence has been substantiated (for example, in written answers or other communications from Departments);³⁸
- b) records of legal advice surmised to have been prepared for Ministers and the Cabinet;³⁹
- c) reports and other papers surmised to have been prepared for Cabinet committees,⁴⁰ and

34 The Clerk of the House observed that the use of such motions in the current Parliament has been "in no small part a reaction to the decision of the Government not to oppose Opposition Day motions in the division lobbies": [PHP0005](#), para 5.16.

35 The motions are listed in Table 2 of the annex to this report.

36 For details see Annex, Table 2.

37 Work and Pensions Committee, Fifth Report of Session 2017–19, [Universal Credit Project Assessment Reviews](#), HC (2017–19) 740, para 2

38 Motions of 1 November and 5 December 2017 and 24 and 31 January 2018

39 Motion of 13 November 2018

40 Motion of 16 May 2018

- d) records of internal communications and discussions surmised to have occurred within or between Departments on specified matters.⁴¹

The Government divided the House on each of the five Opposition motions for return seeking papers under categories c) and d): on each occasion the motion was negatived.

Compliance with resolutions and orders of the House calling for papers

34. Where Ministers move motions for unopposed return, questions over compliance with the order or resolution of the House do not in practice arise. The motion is accepted for tabling on the understanding that the Department is in a position to provide the papers to the House forthwith, and a return of the paper requested is typically made at the same sitting.

35. Determining compliance with motions not moved by Ministers is less straightforward in the context of contemporary House procedure and the politically-charged atmosphere in which Opposition motions for papers are moved.

- There is no recognised procedure to assess the papers provided to the House as a whole in response to a resolution or order, and no means of appeal against non-compliance, short of raising the issue as a matter of privilege.
- Where papers have been provided to a body of the House, compliance has been easier to assess. Select committees in receipt of papers have been able to review the information they have received and to determine whether the House's instructions have been complied with. They have also established processes to determine whether the information provided ought to be published, either in full or in redacted form.

Compliance with recent resolutions for papers from Opposition motions

36. The first four motions for return proposed as Opposition business and agreed to by the House required information to be provided to select committees. In each case, the committee to which papers were required to be provided reported receipt of the papers and either confirmed compliance with the House's request or raised no explicit concern over non-compliance.⁴²

41 Motions of 2 May, 23 May and 17 October 2018 and 14 May 2019

42 For details see Annex, Table 2. The first such motion, tabled for debate and decision on 1 November 2017, required several papers to be provided by return: a "list of sectors analysed under the instruction of Her Majesty's Ministers, and referred to in the [Answer of 26 June 2017 to Question 239](#)", to be provided to the House, and "the impact assessments arising from those analyses", to be provided to the Committee on Exiting the European Union. The motion was agreed to without a division. [On 27 November 2017 the Department for Exiting the European Union provided to the Exiting the European Union Committee papers which purported to comply with the second element of the resolution](#). On 6 December 2017 the Committee resolved that these papers complied with the terms of the resolution: [Formal Minutes of the Committee on Exiting the European Union, Session 2017–19, Resolved](#), That, in view of the statement that no impact assessments have been undertaken, the Committee considers that the Government's response to the resolution of the House of 1 November has complied with the terms of that resolution.

The resolution of the House of 13 November 2018

37. A fifth resolution for a humble Address requiring papers was passed on 13 November 2018. It is instructive to summarise the sequence of events to illustrate the issues arising from the House's use of the power to call for papers in this instance.

38. The Government did not arrange for a return of the information requested to be made, and instead presented to the House a paper which sought to address the House's concerns. The House found that the information provided did not meet the terms of the resolution, and consequently adopted a resolution which found Ministers in contempt.

The Opposition motion and its interpretation

39. The motion tabled by the Leader of the Opposition on 12 November called for the following papers to be provided to Parliament:

any legal advice in full, including that provided by the Attorney General, on the proposed withdrawal agreement on the terms of the UK's departure from the European Union including the Northern Ireland backstop and framework for a future relationship between the UK and the European Union.⁴³

The motion was moved by the Shadow Secretary of State for Exiting the European Union, Keir Starmer MP, as the first item of business on 13 November 2018, an allotted Opposition day.⁴⁴ In moving the motion, Keir Starmer sought to define the papers to be provided should the motion pass, and the conditions under which the papers were to be provided:

first, the publication of the final advice provided by the Attorney General to the Cabinet concerning the terms of any withdrawal agreement; secondly, that this to be made available to all MPs; and thirdly, that it should be made available after any withdrawal agreement is reached with the EU, but in good time to allow proper consideration before MPs are asked to vote on the deal.⁴⁵

40. Keir Starmer asserted, on the basis of press reports, that on 17 October 2018 the Cabinet had asked the Attorney General for "a full assessment of the legal ramifications of the backstop" and had been provided with "a summary of the Attorney General's advice on the options for the backstop" in early November.⁴⁶ He maintained that "there is no doubt that there will be final legal advice if the Government are able to reach an agreement with the EU. It is that final advice that we want to see [...]".

43 The subject matter of the debate was changed during the course of the day on 12 November: notice had previously been given that the matter to be debated would be a motion relating to mental health. [Order Paper \(Future Business A\)](#), 12 November 2018, p. 22.

44 [Order Paper](#), 13 November 2018, p. 6. A backbench amendment to the motion was tabled, the effect of which would have been to require the production of "a full, reasoned position statement laying out the Government's political and legal position on the proposed withdrawal agreement on the terms of the UK's departure from the European Union including the Northern Ireland backstop and framework for a future relationship between the UK and the European Union, to include a statement as to the Government's position on the legal effect of the proposed withdrawal agreement in respect to the UK's ability to withdraw unilaterally from the backstop and to prevent the imposition of regulatory barriers between Northern Ireland and Great Britain." The amendment was not selected.

45 HC Deb, 13 November 2018, [col. 192](#)

46 *Ibid*, [col. 191](#). "The backstop" refers to the arrangements for the border between Northern Ireland and the Republic of Ireland negotiated between the UK and the EU which, under a withdrawal agreement, are intended to come into effect if no other solutions to maintain the current open border can be agreed once the UK leaves the EU.

41. Ministers advanced arguments against the motion from the Despatch Box, but did not seek to divide the House. The motion therefore passed unopposed.⁴⁷ In points of order raised immediately after the House's decision, Members sought to clarify the obligations on the Government arising from it: no Ministerial statement was made in response.⁴⁸ The then Clerk of the House told us that he was not aware of the Government having made any attempt to discuss how the resolution of the House might be complied with.⁴⁹

The Government paper on 'overall legal effect'

42. An agreement between the United Kingdom and the EU on the UK's withdrawal from the EU was endorsed by heads of state and government at the European Council meeting of 25 November 2018.⁵⁰ On 2 December a newspaper published extracts from what was said to be a letter sent to Cabinet ministers by the Attorney General containing legal advice on the backstop provisions in the agreement.⁵¹ On 3 December the Attorney General presented to Parliament a Command Paper which purported to describe the "overall legal effect" of the agreement of 25 November 2018.⁵² On the same day he made a statement to the House "to inform the debate [...] on the motion to approve the withdrawal agreement and the political declaration" scheduled to begin on 4 December.⁵³ Neither the Command Paper nor the statement made reference to the resolution of 13 November, and the Command Paper did not purport to be a return to the resolution of the House.

The finding of contempt

43. Following the presentation of the Government's Command Paper to the House, Keir Starmer, together with representatives of four other political parties, wrote to the Speaker alleging that the Government had not complied with the terms of the resolution of 13 November. They asked the Speaker to give precedence the following day, as a matter of privilege, to a motion alleging that the Government was in contempt of Parliament.⁵⁴ The Attorney General also wrote to the Speaker with his observations on the matter: he argued that the Government was in considerable difficulty in knowing how to comply with the resolution.⁵⁵ Precedence was given to a motion, tabled by Keir Starmer and signed by representatives of five other parties, which was taken as the first item of public business on 4 December.⁵⁶ The Leader of the House moved an amendment to have the matter referred to the Committee of Privileges, which was negatived: the main motion was agreed to on

47 HC Deb, 13 November 2018, [cols 199–206](#) [Chancellor of the Duchy of Lancaster, Rt Hon David Lidington MP] and [232–35](#) [Solicitor General, Robert Buckland MP]

48 *Ibid.*, [cols 235–36](#).

49 [Q83](#) (Sir David Natzler)

50 The [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#) was laid before Parliament on 26 November 2018.

51 "[Revealed: Brexit legal advice could sink Theresa May](#)", *The Sunday Times*, 2 December 2018. The report did not mention the date of the letter which was said to be the source of the report.

52 [EU Exit: Legal position on the Withdrawal Agreement](#), December 2018, Cm 9747.

53 HC Deb, 3 December 2018, [cols. 546–81](#)

54 Nick Thomas-Symonds MP ([PHP0002](#)), annex

55 [Attorney General letter to the Speaker regarding the Motion for Return on Law Officers' advice](#), 3 December 2019, also deposited in the Library as [DEP2018–1196](#).

56 Speaker's Statement, [HC Deb](#), 3 December 2018, col. 625. Caroline Lucas MP did not sign the letter alleging contempt but signed the privilege motion.

division. The House thereby ordered the Government to publish “the final and full legal advice provided by the Attorney General to the Cabinet concerning the EU Withdrawal Agreement and the framework for the future relationship”.⁵⁷

Compliance with the resolution of 13 November and the order of 4 December

44. On 5 December 2018 the Attorney General made a written Ministerial statement announcing that “a copy, in full, of the final advice that I provided to Cabinet on 14 November [sic] on the legal effect of the Withdrawal Agreement” had been placed in the libraries of both Houses in fulfilment of the direction given in the resolution of the House of 13 November.⁵⁸ The advice, in the form of a letter to the Prime Minister dated 13 November 2018, was also published online.⁵⁹

45. In the absence of any further complaint endorsed by the House, the Government can be considered to have complied with the requirements of the resolution of 13 November and the order of 4 December.

Observations

46. We make the following observations on the resolution of the House of 13 November 2018 and the subsequent proceedings:

- a) The motion for return was tabled by the Opposition on the afternoon of the sitting day before the debate was due to take place. This gave little if any time for discussions to take place to ascertain what information was being sought in the return and whether it could be provided.
- b) During the course of the debate, the Member moving the motion sought to clarify the information required, and to state what he would consider to comprise compliance with the resolution of the House if it were agreed to. This proposition was not formally endorsed by the House, and the Attorney General later claimed that the resolution was ambiguous.
- c) The Law Officers' convention prevented Ministers from disclosing to anyone outside Government whether any advice provided by the Attorney General existed. The existence of a letter, dated 13 November 2018, which might have fallen within the scope of the resolution was only indicated by a press report on 2 December.

57 Votes and Proceedings, 4 December 2018: *Resolved*, That this House finds Ministers in contempt for their failure to comply with the requirements of the motion for return passed on 13 November 2018, to publish the final and full legal advice provided by the Attorney General to the Cabinet concerning the EU Withdrawal Agreement and the framework for the future relationship, and orders its immediate publication. This is thought to be the only recorded instance of the House passing a resolution finding Ministers in contempt. The then Clerk of the House, Sir Richard Barlas, reported to the Procedure Committee in 1978 that no record could be found of the House holding a Minister of the Crown in contempt: First Report of the Select Committee on Procedure, Session 1977–78, HC (1977–78) 588-III, Appendix 40, para 5.

58 *Exiting the EU: Publication of Legal Advice*, HCWS 1142, 5 December 2018.

59 [Letter from the Attorney General to the Prime Minister](#), dated 13 November 2018, published on GOV.UK by the Department for Exiting the European Union.

- d) Ministers apparently did not seek to discuss how the resolution might be moderated or otherwise complied with. The papers sought in the motion for return were not laid before Parliament as a response to the resolution: instead, the Government presented a legal commentary on the provisions of the withdrawal agreement signed on 25 November.
- e) It was left to the House as a whole to adjudicate, following debate, on a claim that the Government had not complied with the resolution of 13 November. There was no mechanism for a body of the House to assess the competing claims and to provide a report to the House for its information. Nor was there a mechanism for a body of the House to assess, on behalf of the House, Ministerial claims that the public interest merited the withholding of certain information.

3 Issues arising from recent practice

47. As we observe above, the decision of the House to insist upon the disclosure of legal advice in breach of a Government convention of long standing represents a potential change to the House's practice in calling for papers. **The Attorney General has made clear in his written statement of 5 December, and in oral evidence to the Procedure Committee,⁶⁰ that his decision to provide his legal advice to the House and to publish it did not, in his view, constitute a precedent for the future provision or publication of any such advice. This report is intended to assist the House in clarifying its practice.**

48. The Government has raised concerns about the recent practice of the House in the consideration and adoption of motions tabled by private Members seeking the production of papers. These may be summarised as follows:

- Ministers are required to balance competing claims as to where the public interest lies, together with conventions and statutory provisions concerning disclosure, when deciding to release information;⁶¹
- Current practice on the tabling and consideration of motions for return does not allow consideration of whether disclosure of the information requested is in the public interest;⁶²
- The House is not in a position to determine whether the public interest is served by the disclosure of the information, as it cannot by definition know its content.⁶³

Government conventions and statutory provisions on disclosing information

49. The Government has argued that Ministers are under “a clear legal duty” to consider whether it is in the public interest to disclose information. While no authority for this duty is cited in the Government's evidence to us, it is claimed that the duty is “reflected in the Ministerial Code and both the Freedom of Information Act 2000 and the Official Secrets Act 1989.”⁶⁴ The House is said to have acknowledged this principle when passing the two Acts cited above, and in adopting its resolution on Ministerial accountability to Parliament in March 1997.⁶⁵ The Government further argues that even where there are specific exemptions in certain statutes to allow Ministers to provide sensitive information to Parliament without breaking the law, the House ought not to require the production of such information where it would, for instance, breach a legitimate expectation that Ministers would hold the personal data of individuals in confidence.⁶⁶

50. The Government states that recent motions for return have “created a tension between Ministers' competing duties”: on the one hand, Ministers have a duty “of transparency to Parliament” and a duty to respect decisions of the House “as a matter of convention”, and on the other hand they have duties of confidentiality where certain categories of

60 [Q71](#)

61 [HM Government \(PHP0004\)](#), para 2

62 [PHP0004](#), para 3

63 [PHP0004](#), para 4

64 [PHP0004](#), para 5

65 [PHP0004](#), para 6: see above, para 12.

66 [PHP0004](#), para 10, citing the Data Protection Act 2018.

paper are concerned.⁶⁷ Motions for the production of Cabinet sub-committee papers⁶⁸ and for commercially sensitive data,⁶⁹ as well as the motion of 13 November 2018 for the production of Law Officer advice,⁷⁰ are said to have caused Ministers particular concern.

51. The motion of 16 May 2018, for the production to the House of Cabinet sub-committee papers, was opposed by the Government and negatived on division. That of 24 January, for the production to the Public Accounts Committee of information the Government considered commercially sensitive, was not pressed to a division by Ministers: the Government states that it was able to work with the Chair of the Committee to provide the information in a way which ensured it was not disclosed publicly. That of 13 November was similarly not pressed to a division, though the Attorney General told us that in his view the Government should have opposed the motion.⁷¹

52. The present Attorney General, Rt Hon Geoffrey Cox MP, and a former Attorney General, Rt Hon the Lord Morris of Aberavon KG QC, both considered the Law Officers' convention on the disclosure of legal advice to Government to be of the highest importance to the effective conduct of Government business.⁷² For the Opposition, Nick Thomas-Symonds MP, the Shadow Solicitor General, also recognised the force of the convention, but argued that in the exceptional circumstances faced on 13 November it was justifiable for the House to press the Attorney General to authorise the disclosure of his legal advice.⁷³

53. The Leader of the House asked us to consider recommending to the House a procedure for handling motions for return not moved by Ministers.⁷⁴ She suggested that the Government should not in future be required to produce, on the basis of a majority vote in the House, sensitive material which could compromise the national interest if disclosed. Instead, she proposed a process where a senior member of the House—someone of the standing of a select committee chair—could establish what papers requested in a motion for return existed, and how they could be provided to the House in a way which did not damage the national interest. She asked us to recommend a means for determining whether a requirement for papers had been complied with. She went on to suggest that, in adopting this procedure, the House should renounce its right to seek certain categories of paper:

[...] Law Officers' advice, Cabinet papers, nationally significant material must not be subject to this type of blunt instrument in future.

54. We examine below whether the House ought to modify its practice in calling for papers so as to put certain categories of Government information beyond the scope of the power. We then examine whether any other modifications to the House's practice are required in the light of recent uses of the power.

67 [PHP0004](#), para 11

68 [PHP0004](#), paras 12–13, citing the motion of 16 May 2018

69 [PHP0004](#), para 19 (motion of 24 January 2018)

70 [PHP0004](#), paras 14–18

71 [Q47](#) [Rt Hon Geoffrey Cox QC MP]

72 [Qq5–10](#) [Lord Morris of Aberavon]; [Q46](#) [Rt Hon Geoffrey Cox QC MP]

73 [Qq35–37](#)

74 [Q69](#)

Should the House restrict the types of paper it is entitled to demand?

55. The Government claims that its duty to protect the public interest by refusing to publish or otherwise disclose certain types of information ought to outweigh the existing powers of the House to call for papers. Ministers have expressed concern that a majority decision of the House to call for papers might place Ministers in an invidious position: release papers in breach of conventions designed, in the Government's view, to protect the public interest, or face the unpalatable prospect of being held in contempt by the House.

The Law Officers' convention

56. These matters were brought to a head by the Attorney General's initial refusal to authorise the release to the House of his legal advice to the Prime Minister and Cabinet, even when required to do so by a resolution of the House. Mr Cox sought clarity about how the House's power to call for papers ought to be exercised in the future in this respect. In his view, the confidentiality of Law Officer advice ought not "if the House is to do its job aright" to be placed "at the mercy of a majority".⁷⁵

57. The evidence we have taken on the Law Officers' convention, from a serving Attorney General and from a distinguished predecessor, indicates to us that the convention is necessary to the proper and effective functioning of the Executive. The Executive has a right to receive legal advice on the privileged terms which govern the relationship between every lawyer and client.

58. It was suggested to us that the House might adopt a self-denying ordinance which could recognise that, as a matter of practice, the House would not normally seek the production of papers covered by the Law Officers' convention.⁷⁶ Such a resolution would be comparable to the House's successive resolutions on matters *sub judice*, where the House has recognised limitations on its freedom to discuss any matter, so as not to interfere with the jurisdiction exercised by the courts.⁷⁷ It would also establish that the House's use of the power was in line with the practice on the convention described in *Erskine May*.⁷⁸

59. Though a convenient solution which would be relatively easy to implement, we do not think that it is appropriate for the House to pass a resolution limiting the exercise of its power in this way. To do so would be to give explicit recognition to an Executive convention on the provision of information which Ministers have defined and which they alone exercise.

60. **Since the Law Officers' convention is simply that—a convention—and may be disappplied at the discretion of the Attorney General, it was in our view entirely in order for Members to seek the exercise of that discretion, and the release of the Attorney General's advice, through a motion for return. It was an orderly motion put before the House for decision, and the Government chose not to oppose it. The Government's subsequent difficulties arose from the failure of Ministers to engage with the direction the House had given.**

75 [Q68](#)

76 [Q84](#) (Sir David Natzler): see also [Q59](#) (Andrea Leadsom)

77 [Q83](#)

78 See above, paras 14–15

61. **This is not to say that the House ought not to respect the convention. We recognise the importance of the Law Officers' convention to the good functioning of Government.**

Other Government conventions on the release of information

62. The Government refers to several other conventions restricting the provision of information which have developed in Whitehall. Although the Leader suggested to us that they are “long-standing conventions of the House”,⁷⁹ they are in fact conventions which are interpreted by Ministers alone, in the pursuit of their duties in the public interest. For good reason, the House has never explicitly recognised these conventions as a limit on its power to seek information.⁸⁰ Although the Leader suggested that the House might adopt a self-denying ordinance in respect of these conventions, we do not think there is a case for the House to acknowledge them as limits on the House's power to call for papers.⁸¹

63. **There is ample evidence, albeit historic, of the House constraining inappropriate uses of the power to call for papers: for instance, the House does not use its power to call for personal papers or papers which are not within the Government's power to obtain. We do not believe that the House's power to call for papers ought to be further tailored to entrench the Government's view of what should be the limitations for the provision of information to the House.**

64. **The House ought not to place prior restraint on its general power to seek information from the Government. Motions seeking the exercise of that power may be debated: in the normal course of events, if the Government majority in the House disagrees with the proposition, such motions are defeated.**

Should the House change the way it handles motions for return?

65. We have also considered whether the recent use of motions for return on Opposition days merits any changes to the House's practice in handling such motions. In doing so we have taken into account the concerns raised by Ministers about the risks they perceive to the national interest in continuing with current practice, and we have examined whether any changes to existing practice might mitigate those risks.

The Government's concerns over existing practice

66. The Leader of the House told us of her misgivings over the potential scope of motions for return aimed at securing Government information. She considered the procedure to be a “blunt instrument” for obtaining information, which

does not enable Her Majesty's Loyal Opposition to understand the significance, the potential implications of the information that is being

79 [Q69](#)

80 The Clerk of the Journals told us (at [Q90](#)) that “where there have been cases or occasions when a possibility of reaching a common agreement on how the relationship should work, emerge and develop, the House has not always been very keen to adopt them. [In the case of the Government's [guidance for officials on giving evidence to select committees](#) (the Osmotherly Rules)], the Liaison Committee has never endorsed them so [the House has] not been prepared to sign up to the limitations on the accountability those rules would contain.”

81 [Q59](#)

sought. [...] An humble Address is a request for information without knowing, first, whether the information exists or, secondly, what form it takes.⁸²

The Attorney General argued that “in a court there is a well-designed system to enable matters of public interest, commercial sensitivity, confidentiality to be vetted, to be examined and redacted, but on a motion [for return] there is no such facility and ability for the House.”⁸³

67. The Leader argued that such motions, if agreed to by the House, might require Ministers to disclose information which could compromise national security. She further argued that certain of the motions tabled by the Opposition would have been very challenging to comply with, given the nature of the material requested. For instance, the request proposed in the motion of 2 May 2018 (for “all papers, correspondence and advice including emails and text messages [...] to and between Ministers, senior officials and Special Advisers” within a defined period relating to the treatment of the Windrush generation, if agreed to, would in her view have been

exponentially costly and time-consuming, asking for every single email ever written. It was just an impossible request that would have taken months and months, significant amounts of time to comply with.”⁸⁴

68. The Attorney General suggested that the constitutional duties of Ministers were not solely to Parliament, and included duties to the Sovereign:

If the House consistently puts those duties in conflict, then it is an acutely difficult situation for those who face those intersecting duties.”⁸⁵

Mr Cox said that he had complied with the order of the House of 4 December out of respect of the House's constitutional position. He pointedly did not rule out the prospect of facing further sanction by the House for refusing to reveal information where he considered himself under a countervailing obligation not to do so.⁸⁶

Procedural options

69. There remain a number of procedural options open to Ministers who are unwilling to contemplate the disclosure of information sought in a motion for return.

Defeating the motion

70. Using the Government's majority to defeat a motion for return is the surest method of ensuring that the information requested is not disclosed. On five occasions in this Session the Government whipped its Members to vote against motions for return: in each case agreement to the motion would have resulted in a requirement to produce very substantial quantities of information, or to reveal the existence of advice to Cabinet committees or to Ministers.

82 [Q80](#)

83 [Q66](#)

84 [Q53](#)

85 [Q81](#)

86 [Q71](#) and [Q75](#)

71. It is apparent that the Opposition has used motions for return to require the Government to engage substantively in Opposition day procedures by deploying the majority it claims to command in the House.⁸⁷ The Leader of the House told us that the Government chose to vote on Opposition days on a case-by-case basis, and rejected suggestions that Ministers were no longer “engag[ing] in Opposition-led debate and scrutiny”.⁸⁸

72. One element of the Government's concern over the use of motions for return seems to be that the Opposition has been able to use them to oblige the Government to divide the House. To the extent that this is the case, the point at issue is a political one, concerning the parliamentary tactics practised in periods of minority government. It is not clear to us that the underlying political issue will be successfully addressed by means of changes to the House's procedure or practice.

Discussing the provision of material required

73. Although Ministers have outlined their general misgivings over the revival of the motion for return procedure, the Government's key difficulty over the use of the procedure stems from the fact that it did not seek to divide the House on an Opposition motion on 13 November 2018. Had the motion been opposed in the division lobbies, the Government would have been in a stronger position to resist disclosure of the material sought, even if the motion had been carried.

74. Once the motion had passed, it appears that no attempt was made by the Government to discuss with the Opposition sponsors of the motion what material they sought and how it might be provided in ways acceptable to both sides.⁸⁹ Furthermore, the material eventually provided to the House on 3 December did not purport to be a response to the House's demand for information of 13 November. Ministers therefore failed to engage with the procedure in a constructive fashion.

Amending the motion

75. The historic precedents for the use of motions for return indicate that, where the Government was unwilling to provide the information sought, Ministers would often negotiate with the mover of the motion in advance of, and sometimes during, the debate on the motion. The motion would then pass in an amended form, for example requiring “extracts” of the papers demanded rather than the full versions: this practice enabled a subsequent accommodation to be reached on the information to be provided to the House and published.⁹⁰

76. The House's present practice in considering motions does not, for good reason, accommodate the moving of oral amendments to motions during the course of debate. There is nevertheless scope for Ministers to table amendments to the Opposition motion between the time of tabling and the rise of the House on the sitting day before the debate.

77. It is worth noting that no amendments have been tabled by the Government to any of the Opposition motions for return tabled in this session.

87 [Q72](#) (Nick Smith MP)

88 *Ibid.* (Andrea Leadsom MP)

89 [Q25](#) (Nick Thomas-Symonds MP)

90 House of Commons Service ([PHP0005](#)), para 5.2

Provision to a committee of the House

78. A feature of the recent revival of the motion for return procedure has been the provision of papers to a committee of the House rather than to the House itself. Six of the ten motions for return proposed by the Opposition called for the delivery of papers to committees rather than to the House itself. Where such motions were agreed to by the House, Ministers were in each instance able to reach an agreement with the committee as to how the information should be provided, and in each case the committee either reported compliance with the decision of the House or raised no complaint.

- The Government indicated that in one instance commercially sensitive information was provided to the Public Accounts Committee in a way which ensured that it was not made public.
- The Work and Pensions Committee similarly analysed the universal credit project assessment reviews provided to it by the Government and reported on its analysis. The Committee did not publish the reviews themselves: it acknowledged that publication of the reviews would set a precedent which could change the nature of the project assessment review process, and it chose not to usurp the ongoing statutory process to determine publication under the Freedom of Information Act 2000.⁹¹

79. The Clerk of the House confirmed that the chairs and staff of select committees with experience of handling confidential information were well placed to assess information provided to them in confidence and to judge what ought to be released, balancing representations from Ministers with the committee's interest in obtaining the information necessary to pursue its work.⁹²

80. Where the House has required information to be provided to select committees, those committees have worked constructively with Ministers to balance the competing interests around disclosure of the information provided.

81. We note that in at least one case a motion for return required papers to be provided to a committee without the prior engagement or agreement with that committee. **We consider that where a motion for return engages a select committee, the consent of that committee ought to be secured before the motion is debated. We therefore recommend that where any motion for a return of papers requires papers to be provided to a select committee, the consent of the chair of the Committee, or another Member speaking with the authority of the Committee, ought to be signified on the Order Paper or in the Chamber before the Chair may propose the question on the motion.**

91 Work and Pensions Committee, Fifth Report of Session 2017–19, *Universal Credit Project Assessment Reviews*, HC 740, para 6. See also the Committee's correspondence on the issue, published here: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/inquiries/parliament-2017/inquiry2/>

92 [Q87](#)

Our view

82. We have considered the adequacy of the existing procedure and practice of the House in calling for papers, and the use of the procedure in the present session. **In our view, the difficulties encountered by the Government over motions for return are political rather than procedural ones. It is unlikely that purely procedural solutions will address the underlying political difficulties between Government and Opposition over the use of Opposition days.**

83. **We therefore see no case for wholesale change to the House's practice over the use of motions to call for papers. There are already a number of procedural safeguards built into the system which, if activated, would mitigate the risk of disclosure of sensitive information in a way which would damage the national interest.**

84. **Ministers are responsible for putting before the House their arguments against the disclosure of information which they believe requires protection. If they then cannot persuade the House to endorse those arguments by the process of decision and vote—or do not attempt to do so—they must determine how far they should comply with the resulting resolution or order of the House. It is not for the House to put in place procedures and practices which shield Ministers from the exercise of this responsibility.**

85. The Opposition motion moved on 14 May 2019 sought the production of all briefing papers prepared for Ministers in a particular Department after a specified date.⁹³ In the course of the ensuing debate no Member sought to make a case for the public interest in disclosing the information requested.⁹⁴ The House divided on the motion and it was defeated.

86. **The House alone determines the scope of its power to call for papers. In its consideration of each motion it is able to discern whether an inappropriate or irresponsible use of the power is sought, and whether it is being asked to require the production of information from Ministers on a scale disproportionate to the matter under debate. We expect that in each such case the House will continue to exercise its judgment in favour of a responsible use of the power.**

93 The motion for return sought the production of “any briefing papers or analysis provided to the Secretary of State for Health and Social Care or his Ministers since 9 July 2018 including impact assessments of public health spending reductions and any assessments made on falling life expectancy and the minutes of all discussions between the Department of Health and Social Care and NHS England on funding pay risks for Agenda for Change staff working on public health services commissioned by local authorities.”.

94 HC Deb, 14 May 2019, cols [146–197](#).

Conclusions and recommendations

The House's power to call for papers

1. The power of the House of Commons to require the production of papers is in theory absolute. It is binding on Ministers, and its exercise has consistently been complied with by the Government. The way in which the power is exercised is a matter for the House and not subject to the discretion of the Chair. (Paragraph 16)
2. The House, by its practice, has observed limitations on the power: it does not use the power to call for papers which Ministers do not have the authority to obtain, nor does it use it to obtain papers of a personal nature. (Paragraph 17)
3. Until November 2018 the House had not used the power to require the production of legal advice to Government from the Law Officers. The House's resolution of 13 November 2018 requiring the disclosure of such advice, and its subsequent order of 4 December 2018 demanding compliance with the resolution, represents a potential extension of the historic use made of the power. (Paragraph 18)
4. We therefore make this report to advise the House of the potential implications of its recent decisions and to make recommendations on its future practice. (Paragraph 19)

Issues arising from recent practice

5. The Attorney General has made clear in his written statement of 5 December, and in oral evidence to the Procedure Committee, that his decision to provide his legal advice to the House and to publish it did not, in his view, constitute a precedent for the future provision or publication of any such advice. This report is intended to assist the House in clarifying its practice. (Paragraph 47)
6. Since the Law Officers' convention is simply that—a convention—and may be disapplied at the discretion of the Attorney General, it was in our view entirely in order for Members to seek the exercise of that discretion, and the release of the Attorney General's advice, through a motion for return. It was an orderly motion put before the House for decision, and the Government chose not to oppose it. The Government's subsequent difficulties arose from the failure of Ministers to engage with the direction the House had given. (Paragraph 60)
7. This is not to say that the House ought not to respect the convention. We recognise the importance of the Law Officers' convention to the good functioning of Government. (Paragraph 61)
8. There is ample evidence, albeit historic, of the House constraining inappropriate uses of the power to call for papers: for instance, the House does not use its power to call for personal papers or papers which are not within the Government's power to obtain. We do not believe that the House's power to call for papers ought to be further tailored to entrench the Government's view of what should be the limitations for the provision of information to the House. (Paragraph 63)

9. The House ought not to place prior restraint on its general power to seek information from the Government. Motions seeking the exercise of that power may be debated: in the normal course of events, if the Government majority in the House disagrees with the proposition, such motions are defeated. (Paragraph 64)
10. Where the House has required information to be provided to select committees, those committees have worked constructively with Ministers to balance the competing interests around disclosure of the information provided. (Paragraph 80)
11. We consider that where a motion for return engages a select committee, the consent of that committee ought to be secured before the motion is debated. *We therefore recommend that where any motion for a return of papers requires papers to be provided to a select committee, the consent of the chair of the Committee, or another Member speaking with the authority of the Committee, ought to be signified on the Order Paper or in the Chamber before the Chair may propose the question on the motion.* (Paragraph 81)
12. In our view, the difficulties encountered by the Government over motions for return are political rather than procedural ones. It is unlikely that purely procedural solutions will address the underlying political difficulties between Government and Opposition over the use of Opposition days. (Paragraph 82)
13. We therefore see no case for wholesale change to the House's practice over the use of motions to call for papers. There are already a number of procedural safeguards built into the system which, if activated, would mitigate the risk of disclosure of sensitive information in a way which would damage the national interest. (Paragraph 83)
14. Ministers are responsible for putting before the House their arguments against the disclosure of information which they believe requires protection. If they then cannot persuade the House to endorse those arguments by the process of decision and vote—or do not attempt to do so—they must determine how far they should comply with the resulting resolution or order of the House. It is not for the House to put in place procedures and practices which shield Ministers from the exercise of this responsibility. (Paragraph 84)
15. The House alone determines the scope of its power to call for papers. In its consideration of each motion it is able to discern whether an inappropriate or irresponsible use of the power is sought, and whether it is being asked to require the production of information from Ministers on a scale disproportionate to the matter under debate. We expect that in each such case the House will continue to exercise its judgment in favour of a responsible use of the power. (Paragraph 86)

Annex: motions for return in the 2017–19 Session

Table 1: Motions for unopposed return, Session 2017–19 to date

Date and form of motion	Papers required, and body addressed	Mover	Date of return (paper reference)
06.07.2017 Order	Accounts of the Contingencies Fund, 2016–17 <i>HM Treasury</i>	Heather Wheeler (Whip)	Same day (HC 187)
11.07.2017 Order	Returns for Session 2016–17 of information and statistics <i>House of Commons</i>	Chairman of Ways and Means	13.07.2017 (HC 1)
18.07.2017 Resolution for humble Address	Mouncher Investigation Report, dated 18 July 2017 Home Office	Amber Rudd (Secretary of State)	Same day (HC 292)
19.07.2017 Resolution for humble Address	Statutory Inspection of Avon Fire and Rescue Authority, dated 19 July 2017 <i>Home Office</i>	Amber Rudd (Secretary of State)	Same day (HC 289)
01.11.2017 Resolution for humble Address	Report, entitled " The patronising disposition of unaccountable power ' – A report to ensure the pain and suffering of the Hillsborough families is not repeated ", dated 1 November 2017 <i>Home Office</i>	Guto Bebb (Whip)	Same day (HC 511)
22.11.2017 Order	Autumn Budget 2017 <i>HM Treasury</i>	Chancellor of the Exchequer	Same day (HC 587)
05.12.2017 Resolution for humble Address	Parts of a Paper, entitled The Report of the Macur Review (Revised Redacted Version): An independent review of the Tribunal of Inquiry into the abuse of children in care in the former county council areas of Gwynedd and Clwyd in North Wales since 1974 , dated 5 December 2017 <i>Wales Office</i>	Alun Cairns (Secretary of State)	Same day (HC 390)
20.06.2018 Resolution for humble Address	Report of the Gosport Independent Panel , dated 20 June 2018 <i>Department of Health</i>	Christopher Pincher (Whip)	Same day (HC 1084)

Date and form of motion	Papers required, and body addressed	Mover	Date of return (paper reference)
28.06.2018 Order	Account of the Contingencies Fund 2017–18 <i>HM Treasury</i>	Craig Whittaker (Whip)	Same day (HC 1327)
17.07.2018 Resolution for humble Address	The Rotherham Independent Review: a review into information passed to the Home Office in connection with allegations of Child Sexual Abuse in Rotherham (1998–2005), volumes I and II, dated 17 July 2018 <i>Home Office</i>	Rebecca Harris (Whip)	Same day (HC 1446-I and -II)
29.10.2018 Order	Autumn Budget 2018 <i>HM Treasury</i>	Chancellor of the Exchequer	Same day (HC 1629)
13.12.2018 Resolution for humble Address	The Independent Breast Screening Review 2018, dated 13 December 2018 <i>Department of Health</i>	Gareth Johnson (Whip)	Same day (HC 1799)

Source: Votes and Proceedings of the House of Commons. Table correct on 15 May 2019.

Table 2: Motions for return taken on Opposition days, Session 2017–19 to date

Date and allotted day	Papers required	Destination	Outcome
01.11.2017 4th Resolution for humble Address	(1) The list of sectors analysed under the instruction of Her Majesty's Ministers, and referred to in the Answer of 26 June 2017 to Question 239 (2) The impact assessments arising from those analyses	(1) House; (2) Committee on Exiting the European Union	Agreed to without division Committee agrees that request has been complied with, 6 December 2017 (Formal Minutes, Session 2017–19)
05.12.2017 6th Resolution for humble Address	The five project assessment reviews carried out into universal credit between 2012 and 2015 by the Government's Major Projects Authority now known as the Infrastructure and Projects Authority, and any subsequent project assessment reviews carried out into universal credit by the Infrastructure and Projects Authority between 1 January 2016 and 30 November 2017 that have been provided to Her Majesty's Ministers at the Department for Work and Pensions	Work and Pensions Committee	Agreed to without division Committee reports compliance, 24 January 2018 (Fifth Report, Session 2017–19)
24.01.2018 8th Resolution for humble Address	The assessments of risks of Government Strategic Suppliers by Her Majesty's Ministers referred to in the Answer of 19 December 2017 to Question 114546 and any improvement plans which Crown Representatives have agreed with such strategic suppliers since 2014.	Public Accounts Committee	Agreed to without division Committee reports provision of papers (Forty-first Report, Session 2017–19, para 2)

31.01.2018 Unallotted Resolution for humble Address	The EU exit analysis which was referred to in his response to an Urgent Question in the House on 30 January by the Parliamentary Under-Secretary of State for Exiting the European Union	(1) Committee on Exiting the European Union (2) all Members on a confidential basis	Agreed to without division Committee reports compliance (Third Report, Session 2017–19, para 118); analysis published by Committee, 8 March 2018
02.05.2018 10th Resolution for humble Address	All papers, correspondence and advice including emails and text messages, from 11 May 2010 up to and including 1 May 2018, to and between Ministers, senior officials and Special Advisers relating to policy decisions including on the Immigration Acts 2014 and 2016 with regard the Windrush generation cases, including deportations, detentions and refusal of re-entry, the setting of deportation and removal targets and their effect on the Windrush generation, and action taken within Government following the concerns raised by Caribbean Governments with the Foreign and Commonwealth Office including the original decision by the Prime Minister not to meet Caribbean Heads of Government and officials, and all copies of minutes and papers relating to the Cabinet's Immigration Implementation Taskforce	Home Affairs Committee	Negated on division (221–361)
16.05.2018 11th Resolution for humble Address	All papers, presentations and economic analyses from 1 January 2018 up to and including 16 May 2018 prepared for the European Union Exit and Trade (Strategy and Negotiations) Cabinet sub-committee, and its sub-committees, on the Government's preferred post-Brexit customs arrangements including a Customs Partnership and Maximum Facilitation	House	Negated on division (269–301)

23.05.2018 12th Resolution for humble Address	Written submissions received by Ministers since 8 June 2017 on proposals for reform of the Health and Social Care Act 2012, on the creation of accountable care organisations in the NHS, and on the effect of outsourcing and privatisation in the NHS including the creation of wholly-owned subsidiary companies; and minutes of all discussions on those subjects between Ministers, civil servants and special advisers at the Department of Health and Social Care, HM Treasury and the Prime Minister's Office	Health and Social Care Committee	Negated on division (230–295)
17.10.2018 17th Resolution for humble Address	Any briefing papers or analysis provided to the Secretary of State for Work and Pensions since 8 January 2018 on the impact of the roll-out of universal credit on recipients' and household income and on benefits debts	Parliament	Negated on division (279–299)
13.11.2018 18th Resolution for humble Address	Any legal advice in full, including that provided by the Attorney General, on the proposed withdrawal agreement on the terms of the UK's departure from the European Union including the Northern Ireland backstop and framework for a future relationship between the UK and the European Union	Parliament	Agreed to without division House determines that demand has not been complied with and finds Government in contempt, 4 December 2018
14.05.2019 Unallotted Resolution for humble Address	Any briefing papers or analysis provided to the Secretary of State for Health and Social Care or his Ministers since 9 July 2018 including impact assessments of public health spending reductions and any assessments made on falling life expectancy and the minutes of all discussions between the Department of Health and Social Care and NHS England on funding pay risks for Agenda for Change staff working on public health services commissioned by local authorities.	Parliament	Negated on division (230–286)

Source: Votes and Proceedings of the House of Commons. Table correct on 15 May 2019.

Formal minutes

Wednesday 8 May 2019

Mr Charles Walker, in the Chair

Mr Peter Bone	David Linden
Nic Dakin	Sir Edward Leigh
Chris Elmore	Melanie Onn
Sir David Evennett	Alison Thewliss
Helen Goodman	Mr William Wragg

The power of the House of Commons to call for papers

The Committee deliberated.

[Adjourned till Wednesday 15 May at 2.30 pm.]

Wednesday 15 May 2019

Mr Charles Walker, in the Chair

Bob Blackman	Helen Goodman
Mr Peter Bone	Sir Edward Leigh
Chris Elmore	Melanie Onn
Sir David Evennett	Alison Thewliss

The power of the House of Commons to call for papers

The Committee deliberated.

Draft Report (*The House's power to call for papers: procedure and practice*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 86 agreed to.

Annex agreed to.

Summary agreed to.

Resolved, That the Report be the Ninth Report of the Committee to the House.

Ordered, that the Chair do make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 22 May at 2.30 pm.]

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

Wednesday 30 January 2019

Rt Hon the Lord Morris of Aberavon KG QC [Q1–22](#)

Wednesday 20 February 2019

Nick Thomas-Symonds MP, Shadow Solicitor General and **Joanna Cherry QC MP**, Shadow SNP Spokesperson (Justice) [Q23–45](#)

Wednesday 27 February 2019

Rt Hon Andrea Leadsom MP, Lord President of the Council and Leader of the House of Commons, and **Rt Hon Geoffrey Cox QC MP**, Attorney General for England and Wales [Q46–82](#)

Sir David Natzler KCB, Clerk of the House of Commons, and **Mark Hutton**, Clerk of the Journals, House of Commons [Q83–91](#)

Published written evidence

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

PHP numbers are generated by the evidence processing system and so may not be complete.

- 1 Defty, Dr Andrew ([PHP0001](#))
- 2 HM Government ([PHP0004](#))
- 3 House of of Commons Service ([PHP0005](#))
- 4 SNP Westminster Group ([PHP0003](#))
- 5 Thomas-Symonds MP, Mr Nick ([PHP0002](#))

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Report	Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report	HC 386
Second Report	Written Parliamentary questions: progress report for Session 2016–17, monitoring in the 2017 Parliament, and electronic tabling	HC 661
Third Report	Debates on Estimates days: piloting new arrangements	HC 739
Fourth Report	Term limits for select committee chairs in the 2017 Parliament	HC 816
Fifth Report	Proxy voting and parental absence	HC 825
Sixth Report	Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018	HC 1395
Seventh Report	Time limits on speeches in the Chamber	HC 1157
Eighth Report	Motions under section 13(1) of the European Union (Withdrawal) Act 2018	HC 1664
First Special Report	Review of Estimates memoranda by the House of Commons Scrutiny Unit: response to the Committee's Fifth Report of Session 2016–17	HC 1156