The Osmotherly Rules

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The Osmotherly Rules, as currently drafted, give guidance on the operation of the Select Committee system, and the role of officials appearing before the Committees, and the central principles of evidence giving, including a section on the limitations on the provision of evidence. Various versions have been in operation since 1980, but they have never been formally accepted by the Commons. Following the Hutton and Butler inquiries, the Prime Minister agreed to undertake the review on Committees' access to Government 'persons and documents' when he gave evidence to the Liaison Committee on 3 February 2004. A new version was issued in July 2005 and is available on the websites of the Leader of the House at http://www.commonsleader.gov.uk/output/page1312.asp# and on the Cabinet Office website at http://www.cabinetoffice.gov.uk/propriety_and_ethics/civil_service/select_committees/index.asp .

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A. Summary

These Rules set out detailed guidance for civil servants giving evidence before select committees. The Rules are a Government document, and they have never been formally accepted by the Commons. Nevertheless, they remain the only official guidance available on the subject of evidence from civil servants. Its overall purpose is set out in para 53 as follows:

> 53. The central principle to be followed is that it is the duty of officials to be as helpful as possible to Select Committees. Officials should be as forthcoming as they can in providing information, whether in writing or in oral evidence, to a Select Committee. Any withholding of information should be decided in accordance with the law and care should be taken to ensure that no information is withheld which would not be exempted if a parallel request were made under the FOI Act.

The 2005 version of the Rules reflect the enactment of the *Freedom of Information Act 2000,* which replaced the non-statutory *Code of Practice on Access to Government Information.* The previous Rules in 1997had a reference to withholding information according to a public interest test:

> 46…Any withholding of information should be limited to reservations that are necessary in the public interest; this should be decided in accordance with the law and the exemptions as set out in the Code. (1997)[1]

The public interest test is presumably retained in 2005 through the reference to parallel requests under the FoI Act. The FoI Act includes a public interest test applicable to most exemptions which may be cited.[2]

B. Introduction

These Rules were first formally issued in May 1980 by E.B.C. Osmotherly, a civil servant in the Machinery of Government Division in the Cabinet Office, and they quickly became associated with his name.[3] The rules had first came to public attention with the Procedure Committee report of 1977-78[4] which recommended the creation of departmental select committees published them. Earlier drafts of the Rules had clearly existed in the 1970s. This committee was relatively satisfied with the document, noting that the Government when making the document available, explained that the Memorandum 'was prepared entirely for use within Government" and was sent to us 'for information' and 'without prejudice as to the existing practice on the disclosure of internal documents.'

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1 Selections of the 1997 version of the Rules is online at http://www.leeds.ac.uk/law/teaching/law6cw/min-1.htm The Rules were deposited in the Library as Dep 4375 in January 1997. The 2005 Rules are Dep 05/987

2 For further detail see Library Standard Note 2950 *Freedom of Information requests*

3 *Memorandum of Guidance for Civil Servants Appearing before Select Committees* [Dep 8664]. See generally Library Research Paper 02/35 *Departmental Select Committees*

4 HC 588 1977-78 paras. 7.12-7.16

The Rules were however criticised as unduly restrictive, precluding all discussions of interdepartmental exchanges on policy issues, civil service advice to Ministers, and the level at which decisions are taken. The commentator Peter Hennessey noted that in January 1984 in the newspaper of the Campaign for Freedom of Information,[5] the then leaders of the main Opposition parties, (Labour, Liberal and SDP) had pledged to reform the rules.

These issues were highlighted by the Westland affair of 1985-6, where there was a Cabinet dispute about allocation of Government contracts for helicopters. The Government was anxious that officials should not be questioned by committees on their individual conduct, and this was reflected in their response to the relevant Liaison[6] and Treasury[7] Committee Reports.[8] This response contained supplementary guidelines to be read in conjunction with the Osmotherly rules. Paragraphs 1-4 of this supplementary guidance emphasised that inquiries into the conduct of a civil servant would be considered the responsibility of the minister- civil servants, subject to ministerial instructions, could answer questions 'which seek to establish the facts of what has occurred' but would not answer questions 'which seek to assign criticism or blame to individual civil servants.' If a committee were to find that its inquiries raise matters of 'conduct' then the committee should not pursue those inquiries but should inform the minister and await the report of the examination of his case. A new version of the rules was issued in March 1988 incorporating the supplementary guidance.[9]

Despite criticism of the Rules as negative and inhibiting from the academic members of the Study of Parliament Group to the 1990 Procedure Committee, the Committee were not anxious for wholesale reform of the Rules:

> 157. Our overall approach to the Osmotherly Rules is a pragmatic one, however. We have received no evidence that their existence or current working has placed unacceptable constraints on Select Committees across the whole range of their scrutinising functions. As Professor Hennessy himself pointed out the Rules are in any case honoured more in the breach than the observance. (This is perhaps just as well given their scope and detail). Above all, we are conscious of the danger, described during evidence, that a wholesale review at Parliament's behest could simply result in a new set of guidelines which, whilst superficially less restrictive, would then be applied rigorously and to the letter. At the risk of accusations of defeatism, therefore, we believe that discretion is the sensible approach, particularly unless further experience demonstrates an urgent need for change.[10]

The Government response noted the powers of the Commons to call for papers and witnesses following a motion of the House, but upheld its belief that the process of arriving at decisions bound by collective responsibility should remain confidential:

> Government's commitment to provide as much information as possible to select committees has been met largely through the provision of memoranda, written replies to questions and oral evidence. It does not amount to a commitment to provide

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5 *Secrets* no 1 January 1984

6 HC 100 1986-87

7 HC 62 1986-87

8 *Accountability of Ministers and Civil Servants* Cm 78 February 1987

9 Dep 3797.

10 HC 19-1989-90

> access to internal files, private correspondence, including advice given on a confidential basis, and working papers. In the Government's view it would be destructive of the confidential relationships that ought to exist within government if such papers were liable to be made available to committees on request. The Government recognises that the House may pass a motion for the production of papers on address. Should the need for debate on such a motion arise it would be for a committee to argue sufficient cause why the House should exercise its power to require the production of papers, and for the Government to offer any considerations of public policy for withholding them, but the need for such formal confrontation has so far been avoided.

The Committee noted that restrictions on the giving of information by officials relating to the need to protect collective responsibility should be interpreted as liberally as possible, for example where they concern the level at which decisions are taken and the involvement of different departments. It is the essence of collective responsibility that decisions reached by the Cabinet and its committees are binding on all members of the Government, and that the process of arriving at collective decisions is confidential. While officials can play some part in explaining the reasoning and information behind those decisions once they have been announced, the Government does not agree that it is appropriate for committees to press them to reveal whether a particular decision was cleared in correspondence, or in Cabinet or Cabinet committee, or to ask whether the decision was taken with or without reference to particular departments. Such lines of questioning would entail a risk that inferences will be drawn or further questions put as to the views taken by various parties in the course of collective deliberation:[11]

Lord St John of Fawsley (who as Leader of the House in 1979 had introduced the system of departmental Select Committees) described the Procedure Committee as "extremely feeble" for having accepted the Osmotherly rules.[12] He said:

> What they should have said was, these rules are out of date; they should be swept away entirely and we should start again appointing a special committee to go into this question above and come up with a modest set of rules and present those to the executive.

The Treasury and Civil Service Committee Report of 1994 *The Role of the Civil Service*[13] received evidence on the Osmotherly Rules summarising as follows, without making specific recommendations on their wording or status:

> 130. The Osmotherly Rules which guide civil servants on assistance to Select Committees have been considered by previous Select Committees and were discussed in evidence to the Sub-Committee. A number of Select Committees have emphasised that these notes of guidance are an internal Government document with no Parliamentary status whatever and which has never been endorsed by Select Committees. This was acknowledged by Sir Robin Butler in 1988, who said that it "would not be proper" for a Committee to endorse the guidance.' Professor Peter Hennessy was highly critical of the Osmotherly Rules, describing them as an affront to Parliament, providing sixty ways for civil servants to say no to Select Committees." A former civil servant recalled that "when I last had to give evidence to a Commons

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11 Cm 1523, p.8-11

12 Radio 4 *Analysis* programme 21 November 2001 Transcript pp 16-17

13 HC 27 Session 1993-94

> Select Committee, I re-read the [Osmotherly] Rules and considered then that for any civil servant to follow them would make his or her evidence at best anodyne, or at worst positively misleading". Mr Waldegrave accepted that the guidance contained in the Osmotherly Rules was "very detailed" and indicated that he was prepared to consider some of the apparently unnecessarily restrictive parts of the Rules, but he reaffirmed that the Rules were restrictive precisely because they were designed to maintain "the proper system of accountability through Ministers". Subsequently the Government announced its intention to revise the guidance in the light of the Open Government White Paper and comments made in evidence by Members of the Committee. Professor Hennessy proposed that the Liaison Committee should indicate that it was no longer prepared to put up with the Osmotherly Rules and should seek to negotiate new rules with the Government." This idea was opposed by a former Clerk of Committees of the House of Commons, who argued that such negotiation might compromise the rights of Select Committees to ask questions and the rights and privileges of the House of Commons more generally.

A new version of the Osmotherly Rules was issued in December 1994, now entitled *Departmental Evidence and Response to Select Committees*.[14] New paragraphs appeared on the position of retired officials and on Agency Chief Executives.[15]

C. The Rules and the Code of Practice on Access to Government Information

The 1994 Rules also made reference to the new non-statutory *Code of Practice on Access to Government Information,* issued as part of the Open Government initiative. The 1994 edition noted that the principles of openness that the Rules enunciated should be taken to apply also to Parliament and its Select Committees. The Select Committee on the Parliamentary Commissioner for Administration report on *Open Government* considered this advice to be 'unacceptably casual', and recommended that the Rules be revised to take full account of the provisions of the Code.[16] The Government accepted this recommendation. :[17] The further version of the rules incorporated this recommendation in January 1997 (see below).

D. The Resolution on Parliamentary Accountability in 1997

Changes to the Osmotherly Rules formed one of the conclusions to the Scott Report into the export of arms to Iraq. The report argued that ministers should have allowed retired civil servants to appear before the Trade and Industry Select Committee inquiry into Arms for Iraq in 1992.[18] It said:

> The provision of evidence to establish the relevant facts ought not to have been regarded as a matter on which the officials with first hand knowledge of those facts would have been giving evidence 'on behalf of Ministers'.[19]

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[14] 'Dep NS 815

[15] Presumably to buttress the Government's case in the Scott Inquiry where the Trade and Industry Select Committee had been discouraged from taking evidence from former MOD civil servants

[16] HC 84 Session 1995-96

[17] HC 75 Session 1996-97

[18] HC 115 Session 1996-97 F4.64

Following the debate on the Scott report on 26 February 1996, the Public Service Committee decided to widen its inquiry into agencies into a review of ministerial responsibility. The Public Service Committee Report published in July 1996 reviewed the operation of the Osmotherly Rules, rehearsing earlier clashes between Select Committees and the Government [20] The report concluded that a wholesale review of the Rules was probably unnecessary but a number of points needed to be made clear. In particular, the Committee recommended a change in the Osmotherly Rules to indicate a presumption that Ministers will agree to requests from Select Committees that Chief Executives should give evidence, and that Chief Executives should give evidence to Select Committees on matters which are delegated to them in the Framework Document.

The report also recommended a new resolution for Ministers which would underline the obligation to be as open as possible with the House. This would incorporate the giving of evidence by civil servants. This was 'to underline the fact that as witnesses before a Committee, civil servants are themselves bound by the obligation not to obstruct or impede Members or Officers of the House in the performance of their duty.'[21] It further recommended that Ministers accept requests by Committees that individually named civil servants give evidence to them, accepting the possibility that officials might be personally criticised. In such cases Ministers and Committees could discuss the terms on which the officials will give evidence, if necessary agreeing to procedures similar to those adopted by the Scott Inquiry.

The Government response to the Public Service Committee report accepted the first of the recommendations relating to Chief Executives but not the second. [22] It saw value in a resolution on accountability but considered the proposed wording unacceptable because the Government wished to emphasise that civil servants were giving evidence on behalf of their Minister.[23]

The resolution on accountability was passed just before the 1997 election. However this was not before a tussle between the Committee and the Government as to the extent to which the resolution should apply to civil servants. The original text recommended by the committee in July 1996 stated placed equal obligations on civil servants to be as open as possible with parliament when giving evidence. The Government response acknowledged the value of a resolution, but objected to the wording, because it claimed it had the effect of weakening the line of accountability from civil servants to ministers and from ministers to Parliament'.[24] All party talks then began outside the remit of the Committee, and a final accommodation was reached in the last few days of the Major administration. Neither side obtained quite what was wanted. Paragraph 4 of the resolution (in bold)set out the general statement of principle behind the appearance of civil servants before select committees:

> 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 to be held to account, for the policies, decisions and actions of their departments and Next Steps Agencies;

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20 *Ministerial Accountability and Responsibility* HC 313 Session 1995-96 paras. 72-83

21 Para. 82

22 HC 67 Session 1996-97

23 Response to Recommendation 12

24 Response to Recommendation 12

> 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;
> **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 and truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code.**[25]

The resolution passed in the Lords had a slightly different wording, adding an extra paragraph:

> 5 The interpretation of 'public interest' in paragraph 3 shall be decided in accordance with statute and the Government's Code of Practice on Access to Government Information; and compliance with the duty in paragraph 4 shall be in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code.

The terms of the resolution were alluded to in the first paragraph of the *Ministerial Code*, issued by the new Prime Minister, Tony Blair in May 1997.The operation of the resolution in relation to Parliamentary Answers has been reviewed in successive reports by the Public Administration Select Committee which took over the work of the Public Service Committee.[26] The new version of the Ministerial Code in July 2005 contains a reference to the resolutions, but no longer sets out the text of the resolutions.[27]

E. The 1997 edition of the Rules

The January 1997 version of the Osmotherly Rules omitted certain paragraphs in earlier texts dealing with limitations on the provision of information and advised officials explicitly about the Code of Practice on Access to Government Information in new paragraph 8. It also rephrased aspects of the paragraphs on Ministerial accountability in para 38. ..[28]The Rules were subject to some minor revision in 1999 before being placed on the Cabinet Office website.[29]

F. The pressure for reform from the Liaison Committee

At the meeting of the Liaison Committee on 16 October 2003 , the members decided to review the working of select committees in the light of the Hutton Inquiry into the circumstances surrounding the death of Dr David Kelly. A note by the clerks to the Committee

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25 The resolution was agreed to by the Commons on 19 March and by the Lords on 20 March 1997

26 HC 136 Session 2001-2

27 *Ministerial Code: A Code of Ethics and Procedural Guidance for Ministers* July 2005 Cabinet Office Dep 05/1003 at http://www.cabinetoffice.gov.uk/propriety_and_ethics/ministers/ministerial_code/

28 A detailed analysis of other changes made in 1997 appears in Library Research Paper 97/5 *The Accountability Debate: Codes of Guidance and Questions of Procedure for Ministers*

29 http://www.cabinet-office.gov.uk/central/1999/selcom

is available from its website at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmliaisn/memo/memo.pdf This noted the following in relation to the Rules:

> **Civil Servants**
> 5. At least since the 1970s, there has been a continuing struggle between committees and successive Governments to establish a modus operandi on attendance by civil servants. The Government's position is set out in the so called Osmotherly rules. These have, however, never been approved by the House, which asserts that it is not for Ministers unilaterally to abridge or fetter its powers to call evidence. On the other hand, political reality implies that these powers cannot be enforced against the wishes of a Government with a majority in the House. The resulting agreement to disagree, on this point, together with undertakings by Government, most notably set out in the Resolution of 19 March 1997, have created informal conventions which normally enable committees to carry out their work without major hindrance. However, periodically there are refusals of cooperation over particular Government witnesses.
> **Named Civil Servants and their 'Conduct'**
> 6. In the mid 1980s, the Westland affair led to disagreement between the Liaison Committee and the Government about the attendance of named civil servants and whether committees should be able to examine their 'conduct'. ..
> 7. In the mid 1990s, the limitations imposed on committees' access to civil servants contrasted with the undertaking given to Sir Richard Scott for his arms to Iraq inquiry that any civil servants that he wanted to give evidence would be required to do so – on their own behalf, not that of the Minister: in other words their duty was to the inquiry not their Minister.
> 8. The presumption that similar treatment should be given to select committees was recommended by the Public Service Committee in its Second Report in 1996. In its Reply (1996-97, HC 67) the Government agreed that such attendance should be normal but added the qualifications referred to in May, ie
> • attendance on behalf of Ministers and under their directions
> • no use of committees as disciplinary tribunals.
> **Attendance of Dr Kelly**
> 9. The attendance of Dr Kelly before the Foreign Affairs Committee on 15 July 2003 raised just such issues. After he had been identified in the media as the source of a journalist's story, the Committee sought to take evidence from him. In effect, this request was made in respect of his personal behaviour, rather than as a spokesman for government policy or as an expert witness on factual matters. Indeed, the extent to which Dr Kelly had acted beyond departmentally authorised limits was a principal issue before the Committee. His Minister, the Secretary of State for Defence, Mr Hoon, authorised his appearance, but on condition that the Committee only questioned Dr Kelly on those matters which were directly relevant to the evidence given by Andrew Gilligan, and not on the wider issue of Iraqi WMD and the preparation of the Dossier. However, once approval had been given, Mr Hoon was not in a position to enforce his proposed conditions; and, in the event the questioning touched on some of the matters supposedly off limits.[30]

[30] Also relevant is the Note by the Second Clerk to the Foreign Affairs Committee which forms part of the evidence submitted by the Committee to the Hutton Inquiry. It can be found at FAC/8/001-004 from http://www.the-hutton-inquiry.org.uk/content/fac/fac_8_0001to0004.pdf

The Note also examined the operation of the Osmotherly Rules in relation to the provision of documents:

> Above all a select committee would not be given (and might not ask for) ***documentary evidence*** as opposed to information**.** The Osmotherly Rules set out that the Government's commitment to provide as much information as possible "does not amount to a commitment to provide access to internal files, private correspondence, including advice given on a confidential basis, or working papers. Should a Committee press to see such documents, rather than accepting written or oral evidence on the subject, Departments should consult their Ministers and the Cabinet Office Central Secretariat." Para 4 of the Code of Practice warns:" There is no commitment that pre- existing documents, as distinct from information, will be made available in response to requests."[31]

It is worth noting the following extract from a Parliamentary Ombudsman report on the release of information under the Code of Practice:

> 14. The Code requires the release of information rather than specific documents. The Ombudsman's experience has shown, however, that the simplest way in which to meet a request for information is often by releasing the actual document concerned [32]

This has been an approach followed by the Parliamentary Ombudsman since this office was given responsibility for administering the Code in 1994.

The Clerks' Note concluded:

> **Issues for Consideration:**
> 20. In brief
> - • select committees tend to get information but not documents:
> - • the Government makes use of the exemption in the Code and in particular Group 2 on "Internal Discussion and Advice" –
>
> "Information whose disclosure would harm the frankness and candour of internal discussion including: proceedings of Cabinet and Cabinet committees; internal opinion, advice, recommendation, consultation and deliberation; projections and assumptions relating to internal policy analysis, analysis of alternative policy options and information relating to rejected policy options; confidential communications between departments, public bodies and regulatory bodies"
>
> Much of the material made available to Hutton would be covered by the Code and so would not currently be provided to select committees
> - • select committees could be more active in requesting documents rather than information; but
> - • eventually the question of principle will have to be faced as to whether select committees should enjoy substantially enhanced access to official documentation.

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[31] Para 15, bullet point 3

[32] Taken from para 14 of Case A.02/03 *Failure to provide copies of progress reports on records released into the public domain under the Open Government initiative* PCA First Report HC 115 2002-3 at http://www.ombudsman.org.uk/pca/document/aoi02mo/a02-03.htm

The Prime Minister agreed to a review of the Rules in his evidence to the Liaison Committee on 3 February 2004, in the context of dissatisfaction with the provision of information to parliamentary inquiries, compared to that provided for the Hutton inquiry.

G. The 2005 edition of the Rules

As well as pressure from the Liaison Committee a number of other developments made a revision of the Rules necessary. The implementation of the *Freedom of Information Act 2000* required the Government to change the references to the non-statutory *Code of Practice on Access to Government Information.* In addition, the Government announced that they would make changes in relation to the role of NDPB members and staff following the fifth report from the Standards and Privileges Committee in 2003-4 which found that a contempt of Parliament had occurred when a witness, Judy Weleminsky, had been subject to apparent censure following her evidence to a select committee. The Government accepted that the Osmotherly Rules should be changed, both to make the duties of NDPBs more explicit and to explain the role of parliamentary privilege. For further details see the sixth report from Standards and Privileges of 2003-4[33]

In comments to the Liaison Committee in October 2004, Peter Hain, then Leader of the House, indicated that the redraft of the Rules would consider a range of issues, including that of special advisers:

> We have made a number of positive and very significant changes in response: namely, making clear the presumption that Committees' requests on attendance of civil servant witnesses, including Special Advisers, will be agreed to; making clear the presumption that the provision of information will be agreed to, including the presumption of cooperation on joined-up inquiries, including a new paragraph on parliamentary privilege in relation to evidence from civil servants and non-departmental public body staff, and encouraging departments to be proactive in providing relevant information and documents to Committees. So I see this as an opportunity for reform, but if you have any further issues or suggest amendments to the initial stab at this, then we would be very pleased to look at them in a constructive way. Thank you.[34]

H. The text of the current edition of the Rules

It might be thought surprising that there is no explicit reference in the 2005 Rules to the resolutions on ministerial accountability passed in both Houses in March 1997, which make specific reference to the duties of civil servants in providing evidence to select committees.[35] The 2005 version of the *Ministerial Code* notes the importance of the resolutions in its introductory paragraph 1.6. The resolutions themselves have not yet been updated to remove references to the *Code of Practice on Access to Government Information.*

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[33] Sixth Report of 2003-4 HC 1055 at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmstnprv/1055/105502.htm

[34] Q 1 19 October 2005 Oral Evidence given by Rt Hon Peter Hain at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmliaisn/1180/4101901.htm

[35] For further detail, see Standard Note 608 *Parliamentary Resolutions on Ministerial Accountability*

The paragraph which deals with ministerial accountability was rephrased in the 1997 version of the Rules, and the 2005 drafting is similar, as follows:

> 40. Civil servants who give evidence to Select Committees do so on behalf of their Ministers and under their directions.
>
> 41. This is in accordance with the principle that it is Ministers who are accountable to Parliament for the policies and actions of their Departments. Civil servants are accountable to Ministers and are subject to their instruction; but they are not directly accountable to Parliament in the same way. It is for this reason that when civil servants appear before Select Committees they do so, on behalf of their Ministers and under their directions because it is the Minister, not the civil servant, who is accountable to Parliament for the evidence given to the Committee. This does not mean, of course, that officials may not be called upon to give a full account of Government policies, or indeed of their own actions or recollections of particular events, but their purpose in doing so is to contribute to the central process of Ministerial accountability, not to offer personal views or judgements on matters of political controversy (see paragraphs 55-56), or to become involved in what would amount to disciplinary investigations which are for Departments to undertake (see paragraphs 73 -78).

The paragraphs on the summoning of named officials were also rephrased in 1997, with the drafting retained in substance in 2005. They now state that where a committee insists on a particular official appearing before them, that official would remain subject to Ministerial instruction. The current wording is as follows:

> 43. The line of ministerial accountability means that it is for Ministers to decide which official or officials should represent them.
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> 44. Where a Select Committee indicates that it wishes to take evidence from a particular named official, including special advisers, the presumption should be that Ministers will agree to meet such a request. However, the final decision on who is best able to represent the Minister rests with the Minister concerned and it remains the right of a Minister to suggest an alternative civil servant to that named by the Committee if he or she feels that the former is better placed to represent them. In the unlikely event of there being no agreement about which official should most appropriately give evidence, it is open to the Minister to offer to appear personally before the Committee.
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> 45. Where a civil servant is giving evidence to a Select Committee for the first time, Departments will wish to ensure that they provide appropriate guidance and support. Committees may be willing to consider requests for individuals to be supported in oral evidence sessions by more experienced civil servants
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> 46. It has also been agreed that it is not the role of Select Committees to act as disciplinary tribunals (see paragraphs 73-78). A Minister will therefore wish to consider carefully a Committee's request to take evidence from a named official where this is likely to expose the individual concerned to questioning about their personal responsibility or the allocation of blame as between them and others. This will be particularly so where the official concerned has been subject to, or may be subject to, an internal departmental inquiry or disciplinary proceedings. Ministers may, in such circumstances, wish to suggest either that he or she give evidence personally to the Committee or that a designated senior official do so on their behalf. This policy was set out in the then Government's response to a report from the Public Service Committee on Ministerial Accountability and Responsibility (First Report, Session 1996-97, HC 67).
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> 47. If a Committee nonetheless insists on a particular official appearing before them, contrary to the Minister's wishes, the formal position remains that it could issue an order for attendance, and request the House to enforce it. In such an event the official, as any other citizen, would have to appear before the Committee but, in all circumstances, would remain subject to Ministerial instruction under the terms of this Guidance and the Civil Service Code.

However a change in the 2005 Rules is the acceptance that special advisers might be summoned Para 44 now specifically refers to special advisers as included within the presumption that the request of a select committee to take evidence from a particular named official should be met. This has been a long-running area of dispute between select committees and Government. See in particular the report from the Public Administration Select Committee in 2001 which contained as evidence a letter from the then head of the Home Civil Service stating that the Government did not consider it appropriate for special advisers to give evidence about their own roles.[36]

I. Conduct of Individual Officials

Paragraphs on the conduct of individual officials were rephrased in 1997 with additions warning that '"disciplinary and employment matters are a matter of confidence and trust." The current edition reads as follows:

> 73. Occasionally questions from a Select Committee may appear to be directed to the conduct of individual officials, not just in the sense of establishing the facts about what occurred in making decisions or implementing Government policies, but with the implication of allocating individual criticism or blame.
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> 74. In such circumstances, and in accordance with the principles of Ministerial accountability, it is for the Minister to look into the matter and if necessary to institute a formal inquiry. Such an inquiry into the conduct and behaviour of individual officials and consideration of disciplinary action is properly carried out within the Department according to established procedures designed and agreed for the purpose, and with appropriate safeguards for the individual. It is then the Minister's responsibility to inform the Committee of what has happened, and of what has been done to put the matter right and to prevent a recurrence. Evidence to a Select Committee on this should be given not by the official or officials concerned, but by the Minister or by a senior official designated by the Minister to give such evidence on the Minister's behalf.
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> 75. In this context, Departments should adhere to the principle that disciplinary and employment matters are a matter of confidence and trust (extending in law beyond the end of employment). In such circumstances, public disclosure may damage an individual's reputation without that individual having the same "natural justice" right of response which is recognised by other forms of tribunal or inquiry. Any public information should therefore be cast as far as possible in ways which do not reveal individual or identifiable details. Where Committees need such details to discharge their responsibilities, they should be offered in closed session and on an understanding of confidentiality.

J. Provision of information and documents

A paragraph in the 1997 guidance headed Provision of Information through Memoranda has been omitted in 2005. This paragraph read:

> 50. The Government's commitment to provide as much information as possible to Select Committees is met largely through the provision of memoranda, written replies to Committees' questions and oral evidence from Ministers and officials. It does not amount to a commitment to provide access to intemal files, private correspondence, including

[36] *Special Advisers: Boon or Bane?* HC 293 Session 2000-2001

> advice given on a confidential basis or working papers. Should a Committee press to see such documents, rather than accepting written or oral evidence on the subject, Departments should consult their Ministers and Machinery of Government and Standards Group, OPS.

There is no replacement for this paragraph, and its omission appears to create a presumption that a select committee's request for documents, as opposed to information, may be treated more favourably than under the 1997 version. This appears to be the tenor of the comments by Peter Hain to the Liaison Committee in October 2004:

> ***Mr Hain:*** If I perhaps expand briefly in response to the point I made right at the outset, that there should be a presumption of disclosure of documents. That is what the revised guidance says, but Ministers reserve the right to look at it on a case-by-case basis, so I do not think that Select Committees should, as a matter of course, be denied the right to legitimate access to documents; on the contrary, Select Committees should be able to get hold of documents that it is appropriate for Select Committees to have. But in the end, in accordance with ministerial accountability, Ministers have to decide what particular documents and, for that matter, which particular officials might be appropriate to help the Select Committee.[37]

However, the 2005 Guidance does not state this in explicit terms. Para 62 does indicate that ' the presumption is that requests for information from select committees will be agreed to'.

The Liaison Committee concluded in its annual report for 2004:

> 130. When the Committee took evidence on the new text from the Leader of the House in October, we continued to express concern at the remaining gap between the access to information and persons enjoyed by outside reviews such as the Hutton Inquiry, and our own past experience in select committees. Nevertheless, we were encouraged by the Leader's new emphasis on "the presumption that the provision of information will be agreed to". He said:
> We have made a number of positive and very significant changes in response: namely, making clear the presumption that Committees' requests on attendance of civil servant witnesses, including Special Advisers, will be agreed to; making clear the presumption that the provision of information will be agreed to, including the presumption of cooperation on joined-up inquiries, including a new paragraph on parliamentary privilege in relation to evidence from civil servants and non-departmental public body staff, and encouraging departments to be proactive in providing relevant information and documents to Committees.[231]
> 131. Mr Hain assured us that "there has not been such a clear-cut presumption before" (Q15) although Ministers' reserved the right to look at [access] on a case-by-case basis (Q11).[232][38]

[37] Q11. Evidence 19 October 2004
[38] HC 419 2004-5

K. Rules applicable in the Scottish Parliament

In contrast to state or provincial legislatures in Commonwealth Parliaments such as Australia and Canada, parliamentary privilege has not been conferred on the Scottish Parliament, which is a creature of statute. The *Scotland Act 1998* instead gave the Parliament statutory powers to gather information.[39] However, the Scottish Parliament have recently passed a resolution on accountability, following some tension between Parliament and Executive over a Parliamentary investigation into the Scottish Qualifications Agency.:[40]

> That the Parliament notes that the Executive is committed to a policy of openness, accessibility and accountability in all its dealings with the Parliament and its Committees; further notes both the Parliament's right and duty to hold the Executive to account including the power to invoke section 23 of the Scotland Act and the public interest in maintaining the confidentiality of exchanges between officials and Ministers concerning policy advice; observes that other Parliaments with strong freedom of information regimes do not disclose the terms of such exchanges; calls, to that end, for the Executive and the Parliament to observe the following principles:
> (i) consistent with its policy of openness, the Executive should always seek to make as much information as possible publicly available as a matter of course and should respond positively to requests for information from the Parliament and its Committees;
> (ii) officials are accountable to Ministers and Ministers in turn are accountable to the Parliament and it follows that, while officials can provide Committees with factual information, Committees should look to Ministers to account for the policy decisions they have taken;
> (iii) where, exceptionally, Committees find it necessary to scrutinise exchanges between officials and Ministers on policy issues, arrangements should be made to ensure that the confidentiality of these exchanges is respected, and commends these principles to Committees as guidelines to be followed in their dealings with the Executive.

The document is entitled *Scottish Executive evidence and responses to committees of the Scottish Parliament.* It bears evident similarities with the Osmotherly Rules. The *Protocol between Committee Clerks and the Scottish Executive* can be found at http://www.scottish.parliament.uk/business/g-spse/sp-se-protocol.htm The Scottish Parliament Procedure Committee examined the operation of the Executive rules in a recent report on the application of the founding principles of the Scottish Parliament. It noted that the civil service was a reserved matter:

> 531. The Civil Service is a reserved matter under the terms of the 1998 Act. Civil servants serving the Scottish Executive are members of the Home Civil Service which also serves Ministers of the UK Government and the National Assembly for Wales. The consequence is that the terms of civil servants' engagement with the Parliament are not under the Parliament's control. Any change in these terms would appear to require changes to primary legislation at Westminster…

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[39] See sections 23-26

[40] SPOR vol 8 no. 14, cc1246-7, 1.11.00

The Committee recommended a development of the relationship between Parliament and civil servants:

> 538. To an important extent the Parliament's ability to develop its relationship with, and obtain the co-operation of, the civil service in the work of committees is likely to depend upon Members' own willingness to press for officials' attendance and to seek to engage with them using the existing conventions. The agreed conventions do appear to provide considerable scope to develop these relationships.
> 539. **We therefore consider that it is important that the Parliament and its committees should continue to call for evidence from officials serving the Scottish Executive and should develop this highly significant relationship. We also consider that MSPs should use the agreement that they can telephone or e-mail civil servants directly, using the Executive directory on the Parliament's intranet, in order to consolidate good relationships.**[41]

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41 *Procedure Committee Third Report 2003* www.scottish.parliament.uk/S1/official_report/cttee/proced-03/prr03-03-vol01-03.htm#P1421_354086