The Osmotherly Rules

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The Osmotherly Rules (the Rules) give guidance on the role of civil servants and other Government officials appearing before select committees. The purpose of the Rules is to assist staff in Government departments dealing with requests for information from select committees, including: the provision of evidence, handling select committee reports and drafting responses to such reports.

Various versions of the Rules have been in operation since 1980, but they have never been formally accepted by Parliament. The Rules were most recently updated in October 2014 in a document officially titled *Giving Evidence to Select Committees - Guidance for Civil Servants*. It is publicly available from the gov.uk website. This iteration of the Rules restates the primacy of the principle of ministerial accountability but also confirms that civil servants who are defined as "Senior Responsible Owners" of the Government's major projects will now be directly accountable to Parliament for the implementation of their project.

Although the Rules are said to outline a number of longstanding conventions that have developed in the relationship between Parliament and successive Governments; they are also contentious, as they set out a number of restrictions on civil servants' engagement with select committees.

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

Contents

1 Summary

The Osmotherly Rules (hereafter the Rules) set out detailed guidance for civil servants and other Government officials giving evidence before select committees (the guidance, most recently re-published by the Cabinet Office in October 2014, is formally titled: *Giving Evidence to Select Committees - Guidance for Civil Servants*).

The purpose of this guidance is to help staff in Government departments deal with requests for information from select committees, including: the provision of evidence, handling select committee reports and drafting responses to such reports.

The Rules are a Government document: they have never been formally accepted by either House of Parliament. Nevertheless, they remain the official guidance available on the subject of evidence from civil servants (although the Rules themselves indicate that they should be read in conjunction with the Civil Service Code).

The issue of whether select committees can compel named civil servants to appear before them is one of increasing importance since it impacts on how Parliament can hold the Government to account. While senior civil servants might once have been described by commentator Peter Hennessy (now Lord Hennessy of Nympsfield) as "scarcely household names in their own household"; it is now suggested that they ought to attend before committees to "publicly answer for aspects of public administration."[1] Hence, it has been argued that "the kind of 'facelessness' that was perhaps still possible in the 1970s seems to have been superseded by the challenges of twenty-first century governance."[2]

One might imagine that if a select committee of the House of Commons wished to arrange to take evidence from a reluctant official, it would simply be able to summon his or her attendance in the usual fashion;[3] however, the issue then arises as to how a committee would be able to enforce attendance: since this would have to be done by the House itself rather than the individual select committee.

There have been several occasions where committees have had cause to criticise the Government for its reluctance to allow witnesses the committee had invited to appear before them to attend. And there have also been particular issues in seeking the appearance of special advisers as witnesses (these cases are considered in further detail in sections 2 and 4 of this note).

However, criticisms have also come from civil servants: in particular concerns have been expressed about the treatment of certain civil servants by some select committees. Commenting on an appearance by the Chief Executive of the Civil Service, John Manzoni, at the Public Accounts Committee, David Penman (the General Secretary of the FDA[4]) said that the opening question posed by Stephen Phillips MP: "What is the point of you?" was "gobsmackingly disrespectful"; and suggested that it was:

> [S]ymptomatic of a very negative approach adopted by some politicians in both government and parliament. This is not the first exchange at a select committee that has raised an eyebrow. Of course, committees such as the PAC need to robustly

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[1] D Grube, *An Invidious Position? The Public Dance of the Promiscuous Partisan*, (2014) Political Quarterly Vol. 85, No. 4, p420

[2] *Ibid*

[3] For details of this, see: M. Jack et al, *Erskine May: Parliamentary Practice*, 24th Edition (London: LexisNexis, 2011) p 820

[4] A union that represents senior civil servants and officials

> examine witnesses, but I've seen them question the intelligence of some civil servants and almost ritually humiliate others. It's hard at times to see where the public scrutiny ends and the self-promotion begins.[5]

By contrast the former Leader of the House of Commons, Sir George Young, has argued that:

> I think the House of Commons was always slightly miffed when the civil servants said: 'that is a matter for the minister', when the civil servant knew the answers to the question, or knew much more about it than the minister […]
>
> So I think parliament probably welcomes the increased exposure of civil service to this sort of questioning. It's not just civil servants who are getting slightly tougher treatment from the select committees, it's everybody and it may be that senior civil servants are better able to look after themselves than some of the other witnesses.[6]

Peter Riddell of the Institute for Government commented on a change in the most recent version of the Rules. This confirms that civil servants, who are defined as "Senior Responsible Owners" (SROs) of the Government's major projects, will now be directly accountable to Parliament. He observed that it is a "potentially important change, both for select committees and for the running of major projects" on the basis that, although the revised Rules restate the primacy of the principle of ministerial accountability to Parliament; crucially, they "widen the definition of civil servants who have direct accountability." In particular, SROs "will be personally accountable to select committees and "be expected to explain the decisions and actions they have taken during the period they are responsible for delivery of their project."[7]

He argued that "this is unquestionably an advance" but suggested that:

> [M]uch will depend on how candid officials are in practice about what they have been asked to do by ministers, including current ones. This has normally been an area where officials have preferred discretion to confrontation. And the revised rules pointedly say that 'it is important to be clear that SRO accountability relates only to implementation, it will remain for the minister to account for the relevant policy decisions and development'. The line between policy and implementation is often uncertain and imprecise, and offers opportunities for obfuscation and evasion.[8]

The Rules also provide the Government's official position on responding to select committee reports. The current version provides that "Departments should aim to provide the considered Government response to both Commons and Lords Select Committee Reports within two months of their publication." However, the Rules also contain a general disclaimer to the effect that: "where a report is complex or technical in its nature, or is dependent on other reports and / or external events, the response may require longer. In such cases, the Committee should be kept informed on the response timetable."

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[5] *Civil Service World*, "Opinion: Dave Penman, FDA", 17 December 2014
[6] *Civil Service World*, "Civil service exposure 'good for accountability' – Sir George Young", 5 March 2015
[7] *Ibid*
[8] Peter Riddell, *The updated guidance on the Osmotherly Rules*, Institute for Government Blog, 20 October 2014

2 Historical background

Section 2 of this note describes the historical background to the establishment of the Rules and some of their earlier iterations. Readers who want analysis of the current Rules may wish to read ahead to section 3 of this note.

2.1 The origins of the Rules

The Rules were drafted 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).[9] The Rules had first come to public attention following the publication of the Procedure Committee report of 1977-8 which recommended the creation of departmental select committees.[10] They were issued formally in May 1980.

Earlier drafts of the Rules had clearly existed in the 1970s. The Procedure Committee noted that the Government (when making the document available) had explained that the Memorandum "was prepared entirely for use within Government" and was sent to the Committee "for information" and "without prejudice as to the existing practice on the disclosure of internal documents."

Some criticised the Rules as being unduly restrictive since, amongst other things, they precluded discussions of civil service advice to Ministers and the level at which decisions were taken. In 1984, Peter Hennessy noted (in the newspaper of the Campaign for Freedom of Information) that the then leaders of the main Opposition parties (then the Labour Party, the Liberals and the SDP) had pledged to reform the Rules. The issue was highlighted by the Westland Affair of 1985-6, where there was a Cabinet dispute about the allocation of Government contracts for helicopters. The Government was anxious that officials should not be questioned by select committees on their individual conduct and this was reflected in their response to the relevant Liaison and Treasury and Civil Service Committee reports.[11]

The Government response contained supplementary guidelines, to be read in conjunction with the Rules.[12] 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 individual civil servants." If a committee were to find that its inquiries raised a matter of "conduct" then, it was stated, the committee should not pursue those inquiries; but should instead inform the minister and await the report of the examination of the case. A new version of the Rules was issued in March 1988, incorporating the supplementary guidance.

The Procedure Committee examined the Rules in 1990. It received evidence from Professor Gavin Drewry, on behalf of the Study of Parliament Group. He observed that the Rules had "accurately been described by the Liaison Committee as 'a fair statement of a not very satisfactory situation'"; and he argued that the generally negative tone of the Rules:

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[9] See: *Memorandum of Guidance for Civil Servants Appearing before Select Committees* [Deposited Paper 8664]. See also: House of Commons Library Research Paper 02/35 *Departmental Select Committees*, 10 May 2002

[10] Procedure Committee, First Report 1977-8, HC 588, paras 7.12-7.16

[11] Liaison Committee, Report Session 1986-7, HC 100 and Treasury and Civil Service Committee, Report Session 1986-7, HC 62

[12] HM Government, *Accountability of Ministers and Civil Servants*, CM 78, February 1987

> [M]ust […] have a depressing effect on official attitudes towards committees, and we consider that they should now be re-drafted (and probably considerably shortened) in the light of experience. We hope that the Procedure Committee will so recommend.

In spite of this criticism, the Procedure Committee concluded that:

> 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.[13]

Lord St John of Fawlsey (who was Leader of the House in 1979, when the current system of departmental select committees was introduced) later described the Procedure Committee as "extremely feeble" for having accepted the Rules.[14]

The Government's response to the Procedure Committee noted the power of the House of 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. In particular, it stated that it was 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. It did not agree that it would be appropriate for committees to press officials as to whether details of 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.[15]

In 1994, a Treasury and Civil Service Committee report entitled *The Role of the Civil Service*[16] received evidence on the Rules. The Committee noted that the system of individual ministerial responsibility

> 132. […] depends upon two vital elements: clarity about who can be held to account and responsible when things go wrong: confidence that Parliament is able to gain the accurate information required to hold the Executive to account and to ascertain where responsibility lies. [17]:

In relation to the Rules, it observed, amongst other things, that:

> 130. […] 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

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[13] Procedure Committee, Report 1989-1990, HC 19
[14] Radio 4, *Analysis Programme*, 21 November 2001
[15] HM Government, *Response to Procedure Committee*, Cm 1523, p 8-11
[16] Treasury and Civil Service Committee, *The Role of the Civil Service*, Report Session 1993-4, HC 27
[17] For more on the constitutional convention of ministerial accountability, see House of Commons Library, *Individual Ministerial Accountability*, Standard Note 6467

> 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 Select Committee, I re-read the 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 [...]

A new version of the Rules was issued in December 1994, by now entitled *Departmental Evidence and Response to Select Committees.* The 1994 Rules also made reference to a new non-statutory *Code of Practice on Access to Government Information* issued as part of an Open Government Initiative and new paragraphs appeared on the position of retired officials.[18]

Changes to the Rules formed one of the conclusions to the Scott Report into the export of arms to Iraq. The Scott Report said that ministers should have allowed retired civil servants to appear before the Trade and Industry Select Committee into Arms for Iraq in 1992. It noted the Government's starting point that it would be "inappropriate for former MoD officials to give […] evidence since they would no longer speak on behalf of MoD Ministers"; but stated that "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." Scott concluded that there was a strong argument in favour of the Government facilitating evidence to the committee if it lay within its power to do so; and stated that the retired officials were "primary witnesses to the facts themselves."[19]

Following the debate on the Scott Report, the Public Services Committee reviewed the operation of the Rules in its report, *Ministerial Accountability and Responsibility*.[20] It concluded that although a wholesale review of the Rules was probably unnecessary, a number of points needed clarification. The Committee recommended a change to indicate a presumption that Ministers would agree to requests from select committees that chief executives should give evidence. It also recommended a new resolution for Ministers to underline the obligation to be as open as possible with the House to "underline the fact that as witnesses before a Committee, civil servants are themselves bound by an obligation not to obstruct or impede Members or Officers of the House in the performance of their duty."[21] It further recommended that Ministers should accept requests by committees that individually named civil servants give evidence to them, accepting the possibility that officials might be personally criticised.

The Government did not accept all of the Committee's recommendations. Although a resolution on accountability was passed before the 1997 election; there was a dispute between the Committee and the Government as to the extent to which the resolution should apply to civil servants. A final accommodation was reached in the last few days of the Major administration. Paragraph 4 of the resolution set out the general statement of principles behind the appearance of civil servants:

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[18] Presumably to buttress the Government's case in the Scott Inquiry into the export of arms to Iraq where the Trade and Industry Select Committee had been discouraged from taking evidence from former Ministry of Defence civil servants.

[19] *Report of the Inquiry into the Export of Defence Equipment and Dual Use Goods to Iraq and Related Prosecutions*, 15 February 1996, HC 115 at F.4.64

[20] Public Services Committee, *Ministerial Accountability and Responsibility*, Session 1995-96, HC 313, paras 72-83

[21] *Ibid*, para 82

> […] 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.[22]

The terms of the new resolution were alluded to in the first paragraph of the *Ministerial Code* issued by Tony Blair in May 1997.

2.2 The 1997 edition of the Rules

The January 1997 version of the Rules omitted certain paragraphs relating to limitations on the provision of information and advised officials explicitly about the Code of Practice on Access to Government Information.[23] The Rules were subject to some minor revision in 1999 before being placed on the Cabinet Office website.

2.3 Pressure for reform: Reports of the Liaison and Foreign Affairs Committees

At a 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 indicated that there had been a "continuing struggle between committees and successive Governments to establish a *modus operandi* on attendance by civil servants" since at least the 1970s. It highlighted the Westland Affair and the Scott Inquiry and noted that the Government had agreed that attendance should be normal, subject to the qualifications that attendance was on behalf of Ministers and under their directions and that there should be no use of committees as disciplinary tribunals. In relation to the attendance of Dr Kelly, it stated:

> 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.[24]

The Note also examined the operation of the Rules in relation to the provision of documents, indicating that the Rules set out that the Government's commitment is to provide as much information as possible. But that does not "amount to a commitment to provide access to

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[22] The resolution was agreed to by the Commons on 19 March and by the Lords on 20 March 1997. The resolution passed in the Lords had a slightly different wording adding an extra paragraph 5, to the effect that: "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." See also: House of Commons Library *Parliamentary Resolutions on Ministerial Accountability*, Standard Note 608

[23] A detailed analysis of the other changes made in 1997 appears in a historic House of Commons Library Research Paper 97/5 *The Accountability Debate: Codes of Guidance and Questions of Procedure for Ministers*

[24] Liaison Committee, *Scrutiny of Government: Select Committees after Hutton (Note by the Clerks)* (last accessed 13 March 2015)

internal files, private correspondence, including advice given on a confidential basis, or working papers" and "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". The Note commented that "there is no commitment that pre-existing documents, as distinct from information, will be made available in response to requests."

The Note indicated that the Government makes use of the exemption on "internal discussion and advice", namely: "information whose disclosure would harm the frankness and candour of internal discussion; and concluded that while "select committees could be more active in requesting documents rather than information […] eventually the question of principle will have to be faced as to whether select committees should enjoy substantially enhanced access to official documentation."

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

> Our Chairman wrote to the Prime Minister (requesting his attendance and that of Alastair Campbell); the Cabinet Office Intelligence Co-ordinator; the Chairman of the Joint Intelligence Committee; the Chief of Defence Intelligence; the Head of the Secret Intelligence Service; and the Director of GCHQ. None of them replied. It was the Foreign Secretary who informed us that they would not appear.[25]

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).[26]

2.4 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. These included:

- The implementation of the *Freedom of Information Act 2000* (which required the Government to change the reference to the non-statutory Code of Practice on Access to Government Information);
- A desire to make changes in relation to the role of members of Non-Departmental Public Bodies and staff (following a report from the Standards and Privileges Committee which had 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[27]);
- The need to take account the position of special advisers: in comments to the Liaison Committee, then Leader of the House, Peter Hain, had indicated that the redraft of the rules would consider a range of issues including that of special advisers.

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[25] Foreign Affairs Committee, *The Decision to go to War in Iraq*, Session 2002-3, HC 813, para 6

[26] See: Foreign Affairs Committee, *Implications for the Work of the House and its Committees of the Government's Lack of Co-operation with the Foreign Affairs Committee's Inquiry into The Decision to go to War in Iraq*, Session 2003-4 HC 440, paras 13-14

[27] See: House of Commons Committee on Standards and Privileges, *Privilege: Protection of a Witness*, Session 2003-4, HC 447

The 2005 Rules made no explicit reference to the resolutions on ministerial accountability passed in 1997 (although the Ministerial Code noted the importance of the resolutions in its introductory paragraph).

2.5 Recent developments

The Civil Service Reform Plan (June 2012)

The Coalition Government considered the issue of civil service accountability in its *Civil Service Reform Plan* published in June 2012. This review argued that there were:

> [S]ome immediate steps that can be taken to sharpen accountability and give clearer codification, presentation and understanding of the respective roles and responsibilities of Accounting Officers and Ministers as one of the steps in strengthening the culture of responsibility and accountability across the organisation.

Two such steps that were identified were:

- requiring explicit Accounting Officer sign off of implementation plans, major gateway reviews and Cabinet Committee papers; and
- establishing the expectation that former Accounting Officers return to give evidence to Select Committees on a time limited basis where there is a clear rationale to do so.[28]

The Liaison Committee Report (November 2012)

In November 2012, the Liaison Committee published a report, *Select Committee Effectiveness, Resources and Powers*, which considered the impact of the Rules. In terms of the provision of information and witnesses, the Committee indicated that there had occasionally been difficulties in obtaining papers or information and that committees had also sometimes had difficulties in securing the attendance of named officials.

It said:

> 110. Several committees mention that scheduling their work was made difficult by delays in the production of papers by the department or lack of advance notice of decision making by Government. The Business, Innovation and Skills Committee, for example, reported that its inquiries were hampered by delays in the publication of a number of policy documents. The Public Administration Select Committee (PASC) complained that the Department for Culture, Media and Sport and the Department for International Development had been late in supplying evidence on their departmental change programmes; and on another occasion, the Government had chosen to publish its IT Strategy White Paper on the same day as the Minister was giving evidence on the matter to PASC, which limited PASC's ability to scrutinise the policy being announced. The Chair of the Energy and Climate Change Committee noted that, while DECC told his committee informally about forthcoming business, it would be helpful to have a more formal arrangement for receiving planning information, on a confidential basis.
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> 111. In other cases, committees' work has been impeded by the Department's unwillingness to provide information. The Defence Committee reported it had been driven by the MoD's reluctance to provide information about the history of the UK's involvement in Helmand to call in retired Ministers and military personnel, "all of whom proved more helpful than their successors". The International Development Committee

[28] HM Government, *Civil Service Reform Plan*, June 2012, p 20

> said that it had been frustrated by DfID's refusal to share advice to ministers on the closure of the bilateral Burundi programme on the ground that it would not be provided if requested under the Freedom of Information Act
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> […]
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> 112. Other committees have had difficulties in securing the attendance of particular officials. In some cases, the responsible official has moved on to another job, or has retired. The Defence Committee reported an instance in which it was told by the department that the witness it had asked for was not the appropriate person only to be told by his replacement and the Minister at the evidence session that they were surprised he was not there.

It concluded that the Rules "should not have any bearing on whom a select committee should choose to summon as a witness"; adding:

> The Osmotherly rules are merely internal for Government. They have never been accepted by Parliament. Where the inquiry relates to departmental delivery rather than ministerial decision-making, it is vital that committees should be able to question the responsible official directly — even if they have moved on to another job. It does of course remain the case that an official can decline to answer for matters of policy, on the basis that it is for the minister to answer for the policy, but officials owe a direct obligation to Parliament to report on matters of fact and implementation. This does not alter the doctrine of ministerial accountability in any way. Ministers should never require an official to withhold information from a select committee. It cannot be a breach of the principle of ministerial responsibility for an official to give a truthful answer to a select committee question. No official should seek to protect his or her minister by refusing to do so.[29]

The Committee also noted complaints about the timeliness and quality of replies to select committee reports (discussed further below).

A debate was held on the Committee's report on the 31 January 2013.[30] The question of the Rules was addressed by then Leader of the House, Andrew Lansley, who observed that the Government was rewriting the Rules. He stated that the Government was talking to the Liaison Committee and the House of Lords Constitution Committee and that plans were "in place for former accounting officers to be held to account".[31]

Report of the House of Lords Constitution Committee (November 2012)

At the same time as the Liaison Committee was considering the Rules, they were also being assessed by the House of Lords Constitution Committee. Its report, *The accountability of civil servants*, was also published in November 2012.[32] The Committee said that, in recent years, "new questions have been raised about the personal accountability of civil servants, partly stimulated by the renewed energy of certain parliamentary committees, whose chairs are now directly elected by MPs."

The Committee considered the convention of ministerial accountability, noting two particular concerns, namely:

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[29] Liaison Committee, *Select committee effectiveness, resources and powers*, Session 2012-13, HC 697, para 113

[30] HC Deb 31 January 2013 c 1125

[31] *Ibid* at c 1146

[32] House of Lords Committee on the Constitution, *The accountability of civil servants*, Session 2012-13, HL Paper 61

- the size and complexity of the state have grown so greatly since the convention was first recognised that it is now unrealistic, even absurd, to expect a minister to be responsible for everything done by a department.

- ministers have on occasion tended to distance themselves from failures in government, stating that errors were made by civil servants. It is thought odd that a minister has to be responsible for what are clear errors by civil servants—for example, the loss of a disc containing confidential information on 25 million people by junior officials at Her Majesty's Revenue and Customs.

In spite of these difficulties, the Committee concluded that the convention that ministers are constitutionally responsible for all aspects of their departments' business is "an essential principle underlying the arrangements that enable Parliament properly to perform its function of holding the Government to account." It took the view that: "The convention is clear, straightforward and leaves no gaps."

In relation to the Rules, the Committee concluded that although the rules did not impose restrictions on select committees:

> 71. […] in view of the importance of the Osmotherly rules in guiding civil servants in their dealings with select committees, we recommend that future revisions of the rules should be published in draft to enable scrutiny by Parliament and its select committees. Whatever the outcome of that scrutiny, the rules will remain an executive document and should not be taken to have the formal approval of Parliament.

On calling named civil servants, the Committee recommended that:

> 79. […] where a select committee requests evidence from a named senior civil servant the Government should accede to that request unless there are exceptional reasons not to do so. Taking evidence from civil servants is complementary to, not a replacement for, the accountability of ministers. We recommend that the revised Osmotherly rules incorporate this change in emphasis.

On the issue of criticising civil servants, the Committee stated:

> 99. We are conscious that select committees are not disciplinary tribunals and do not contain the safeguards that employees are entitled to in a disciplinary process. However, when the evidence a committee receives leads it to conclude that a particular civil servant has been at fault, that committee should not be precluded from expressing criticism and, in extreme cases, recommending that the department consider appropriate disciplinary procedures.
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> 100. Select committees should only take such action where there are strong grounds for doing so. The decision on all such disciplinary matters should remain within the relevant department.

Government response to the House of Lords Constitution Committee

In its response to the House of Lords Constitution Committee, published in February 2013, the Government addressed each of the Committee's conclusions and recommendations on the Rules.

The Government response indicated, amongst other things, that:

> The rules already make clear that where a select committee requests evidence from a named senior civil servant, the presumption should be that Ministers will agree to meet such a request.

> The Osmotherly rules clearly set out the principle of Ministerial Accountability and the accountability of civil servants to Ministers. When a civil servant gives evidence to a select committee, they are doing so to contribute to the process of Ministerial accountability to Parliament, and on behalf of their Ministers.
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> The Osmotherly rules already state that 'in giving evidence to Select Committees, officials should take care to ensure that no information is withheld which would not be exempted if a parallel request were made under the Freedom of Information Act.' The rules are also clear that as Ministers are ultimately accountable for deciding what information is to be given, their views should be sought if a question arises of withholding information which a Committee has asked for.
>
> The Government accepts the Committee's recommendation that the management and discipline of civil servants is a matter for the relevant department, and guidance for departments on this issue is set out in the Osmotherly rules. The Government will consider the Committee's recommendation as part of the review of the Osmotherly rules.[33]

Other developments

The Institute for Government issued a report in September 2013, titled *Civil Service Accountability to Parliament*. It argued that the constitutional convention of ministerial responsibility can "lead to frustrations on the part of select committees about their ability to get to the heart of operational failings in Whitehall and to hold those responsible to account effectively."

The authors, Akash Paun and Pepita Barlow, stated that:

> […] the Osmotherly Rules are not a prescriptive and binding set of procedures for civil servants to follow when dealing with select committees. Rather they describe existing conventions and practice and provide guidance in cases of uncertainty. The current review of the rules nonetheless provides a useful opportunity to assess the nature of the Whitehall-Westminster relationship, and to consider whether current conventions are conducive to effective accountability.

Nonetheless, they acknowledged that:

> [T]here are cases when committees encounter un-cooperative attitudes, with certain departments operating a more restrictive policy than others in terms of allowing committees access to officials. There are also particular challenges when committees seek to question officials who have moved post and officials from departments other than the one they are directly responsible for scrutinising.
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> Yet perhaps the more significant challenge for select committees is not whether they can get the most appropriate civil servants to attend, but what those officials are able to tell the committee under questioning. Committee chairs recognise that officials will not be able to discuss the content of policy advice to ministers. However, they report frustration when officials stick tightly to the ministerial line and give away as little as possible about operational and performance issues, for instance when major projects run into trouble.

In January 2014, during a debate on *The Future of the Civil Service*, Lord Wallace of Saltaire (a Government spokesman for the Cabinet Office) made two brief comments on the Rules. He indicated:

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[33] Extracts from the *Government response to the Lords Constitution Committee's report on the Accountability of Civil Servants*, 7 February 2013

> One of the many things that has changed over the past 40 years is the relationship between Parliament and civil servants. Parliamentary inquiries by my honourable friend Bernard Jenkin's committee [The Public Administration Select Committee], Margaret Hodge's committee [The Public Accounts Committee] and others are a regular part of life in a way that they were not 40 years ago. That is a desirable development. We are now having to think about how we rewrite the Osmotherly rules to fit in with this new development.[34]

He went on to say:

> How do we strengthen Civil Service accountability? That takes us to the Osmotherly rules and the question of how far Parliament and parliamentary committees should be examining officials directly. We have already gone a long way down that road, as we well know. That requires some further study and investigation because of course one wants to protect officials from too aggressive parliamentary scrutiny. That question therefore relates to Parliament as much as Ministers.[35]

3 The current edition of the Rules

On 17 October 2014, the Cabinet Office Minister, Francis Maude, issued a Written Statement on the Rules. A significant change in the 2014 edition of the Rules is that although the guidance restates the primacy of the principle of ministerial accountability it confirms that civil servants who are defined as "Senior Responsible Owners" of the Government's major projects will now be directly accountable to Parliament for the implementation of their project.

Mr Maude said:

> Our Civil Service Reform Plan committed to reviewing the Osmotherly Rules—the guidance to departments governing the nature of Ministers' and civil servants' interactions with Select Committees. Following consultation with the Liaison Committee I will today publish updated guidance on gov.uk. This restates the primacy of the principle of ministerial accountability but confirms that the Senior Responsible Owners (SROs) of the Government's major projects (as defined by the Major Project Authority's Portfolio) will now be directly accountable to Parliament for the implementation of their project. We also confirm that former Accounting Officers can be called to give evidence about their previous responsibilities within a reasonable time period. We will publish a list of SROs in due course and update it periodically.[36]

The introductory "general principles" explain that:

> 4. The Civil Service Code makes clear that civil servants are accountable to Ministers who in turn are accountable to Parliament. It therefore follows that when civil servants give evidence to a Select Committee they are doing so, not in a personal capacity, but as representatives of their Ministers.
>
> 5. This does not mean that officials may not be called upon to give a full account of government policies, or the justification, objectives and effects of these policies, but their purpose in doing so is to contribute to the process of ministerial accountability not to offer personal views or judgements on matters of government policy - to do so could undermine their political impartiality.
>
> 6. **Accounting Officers: The Accounting Officer is the person who is accountable to Parliament for the stewardship of the department's resources**. It is for the

[34] HL Deb 16 January 2014 c390
[35] HL Deb 16 January 2014 c391
[36] HC Deb 17 October 2014 c 53WS

> Accounting Officer in each department, acting within Ministers' instructions, and supported by their Boards, to control and account for the department's business. Alongside this, Accounting Officers have a personal responsibility to account to Parliament (through the Public Accounts Committee) for the compliance of their departments with the principles set out in Managing Public Money. The PAC may seek assurance on propriety, regularity, value for money and feasibility of the use of the public money provided by Parliament to their departments.
>
> 7. **Senior Responsible Owners** of major projects can also be asked to account for the implementation and delivery of major projects for which they are responsible.

3.1 Liaison Committee Report (March 2015)

The Liaison Committee considered the new edition of the Rules in its legacy report, published on 24 March 2015. It commented that they had been published after a "long delay" and concluded that the new Rules contained "little radical change". It indicated that:

> The most significant developments are to make the Senior Responsible Owners (SROs) of major projects directly accountable to the relevant departmental committee and for former Accounting Officers to appear before the Committee of Public Accounts.[37]

3.2 Summoning of Named Officials

In relation to the summoning of named officials, the current version of the Rules state that although Parliament has the powers to call any individuals to give evidence, "it remains the right of a Minister to suggest an alternative civil servant" and that if there is no agreement between the department and the committee about who should appear "the Minister can offer to appear personally before the committee:

> 11. Parliament has powers to call any individual to give evidence. However, in accordance with Ministerial accountability, where evidence relates to Government policy or action, it is given by Ministers or officials on their behalf. Officials providing evidence to Select Committees do so under Ministerial agreement and instruction. Further guidance on the position of Accounting Officers and senior responsible owners is set out [below]
>
> 12. When a Select Committee indicates that it wishes to take evidence from any particular named official, including special advisers, the presumption is that Ministers will seek to agree such a request. However, the decision on who is best able to represent the Minister rests with the Minister concerned. It remains the right of a Minister to suggest an alternative civil servant, or additional civil servant(s), to the person named by the Committee if he or she feels that would be a better way to represent them. If there is no agreement about which official should most appropriately give evidence, the Minister can offer to appear personally before the Committee.
>
> 13. If a Committee nonetheless insists on a named 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 individual would have to appear before the Committee but, in all circumstances, would remain subject to Ministerial instruction and the Civil Service Code. This would be a very exceptional action.

On the issue of former officials, they provide (amongst other things) that:

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[37] Liaison Committee, *Legacy Report*, Session 2014-15, HC 954, para 14

15. Committees can request evidence from officials who have left Civil Service employment. However, former officials cannot be said to represent the Minister and hence cannot contribute directly to the line of ministerial accountability to the House. It is primarily for these reasons, as well as for obvious practical points of having access to up to date information and thinking, that Ministers would expect evidence on Government matters to be given by themselves or by serving officials who report to them. Former officials are covered by the same rules on attendance as others and a Committee could issue an order for attendance if it chooses. Former Officials giving evidence about their role in Government should give evidence in accordance with the Civil Service Code and this Guidance.

On Accounting Officers and Senior Responsible Owners (SROs), the Rules note that:

20. Formally the Accounting Officer is the person who Parliament calls to account for stewardship of the Department's resources. […]

21. The Public Accounts Committee [PAC] operates slightly differently because of the special position of Accounting Officers in relation to that Committee and the direct access of the NAO to departmental records.

22. The Government publishes Permanent Secretary objectives annually, at the start of the performance year. This supports the Government's commitment to improving transparency and accountability; departments should ensure that copies of the objectives are sent to departmental Select Committees and the Public Accounts Committee. […]

28. Where a Committee wishes to take evidence from an SRO of one of these major projects it will be on the understanding that the SRO will be expected to account for the implementation and delivery of the project, as defined by published SRO appointment letters approved by the relevant Minister, and for their own actions. Appointment letters will make clear the point at which an SRO becomes directly accountable for the implementation of the project in question. The SRO will also be able to disclose to the Committee where a Minister or official has intervened to change the project during the implementation phase in a way which has implications for cost and/or timeline of implementation. In this respect the SRO should also be able to disclose their advice about any such changes.

29. Accounting Officers are ultimately accountable for the performance of all the business under their control, including major projects for which an individual SRO has direct accountability and responsibility. And in this respect, if a Select Committee calls for evidence from an SRO, the Accounting Officer of the department may also be called to support the SRO at a hearing.

30. This line of direct accountability for SROs does not alter the special position and relationship of Accounting Officers with the PAC.

3.3 Provision of information

The latest version of the Rule set out detailed guidance on the provision of information to Committees (including the provision of sensitive information in confidence). In terms of more general information the Rules indicate:

39. Although the powers of Select Committees to send for "persons, papers and records" relating to their field of enquiry are unqualified, there are certain long-standing conventions on the provision of information which have been observed in practice by successive administrations on grounds of public policy

> 40. The Government is committed to being as open and as helpful as possible with Select Committees. The presumption is that requests for information from Select Committees will be agreed to. Where a department feels that it cannot meet a Committee's request for information, it should make clear its reasons for doing so, if appropriate in terms similar to those in the Freedom of Information Act (without resorting to explicit reference to the Act itself or to section numbers). If the problem lies with disclosing information in open evidence sessions or in memoranda submitted for publication, departments will wish to consider whether the information requested could be provided on a confidential basis.

In relation to sensitive information, they state (amongst other things) that:

> 47. It is to the benefit of Committees in carrying out their task of scrutinising Government activities, and to Government in explaining its actions and policies, for sensitive information, including that carrying a protective security marking, to be provided from time to time on the basis that it will not be published and will be treated in confidence. Procedures have been developed to accommodate this. The Department informs the Clerk that the information in questions can be made available only on an in-confidence basis with an explanation of the reasons. Such information should not be made available until the Committee has agreed to handle it appropriately, either by treating it wholly in confidence or by agreeing to publish it with agreed redactions.
>
> 48. It is important when submitting such information to make clear that the papers are provided in confidence and are not for publication. Information provided to Committees in confidence will be covered by Parliamentary privilege. In cases of particular sensitivity, departments should ask to be consulted before release. It should be appreciated, however, that once evidence is given to a Committee, whether in confidence or not, it becomes the property of the Committee, to deal with as it thinks fit.

In addition, the Rules provide guidance on dealing with issues that are *sub judice* (matters awaiting the adjudication of the courts).

3.4 Responding to select committee reports

The Rules provide that "Departments should aim to provide the considered Government response to both Commons and Lords Select Committee Reports within two months of their publication." However, the Rules also contain a general disclaimer to the effect that: "where a report is complex or technical in its nature, or is dependent on other reports and / or external events, the response may require longer. In such cases, the Committee should be kept informed on the response timetable."

They go on to state that:

> 69. The two month timetable may not always be possible to achieve as Committee Reports tend to address issues which require consideration in depth and this may involve consultation both within and outside Government before a substantial reply can be provided. If it appears that preparing a response is going to take longer than it should, the department should write to the Committee (at Ministerial level to the Chairman or at official level to the Clerk) explaining the reasons and indicating the likely timetable. Only in exceptional circumstances should a response be deferred for more than six months after the Report's publication. A further option is to provide an interim response within the set period and a fuller response at a later date.

This two month timetable has proved contentious and the failure by some Government departments to observe it has been remarked upon by the Liaison Committee and in the Chamber.

The former noted that:

> 106. Several committees complain about the timeliness of Government responses to reports. […] responses are quite frequently late. A bad example was set by the Cabinet Office which took nine months to respond to our report on Public Appointments and Select Committees. The Environmental Audit Committee reported that the Government took six months to respond to its report on the Budget 2011 and Environmental Taxes. Worst of all, the Communities and Local Government Committee reported that the Government had still not reported, two years on, to the report of its predecessor on Preventing Violent Extremism.
>
> 107. Other committees — and some outside observers — complain about the content of responses. The Defence Committee said that "departmental replies to reports are usually very defensive, often late, and show little appetite for dialogue with the Committee". The Public Administration Select Committee has complained that the government response to its second report on strategic thinking actually misrepresents the report. The Regulatory Policy Institute's Better Government Programme described government responses as "models of evasion".[38]

In March 2014, Bernard Jenkin, the Chair of the Public Administration Select Committee asked the (then) Leader of the House, Andrew Lansley:

> Will my right hon. Friend tell us what the point is of the Osmotherly rules? […] It is with great regret that I must tell him that the Public Administration Select Committee has today published a report criticising the Government for failing to respond to our report on the business appointment rules, which are very controversial and not very satisfactory, for 20 months. We published the report in July 2012 but are still waiting for a response. We feel that we have been extraordinarily patient. Does he agree that his Department ought to have a system for chasing Government Departments on behalf of the House to ensure that they respond to Select Committee reports on time?[39]

In the House of Lords, Lord Lexden complained about a delay of 10 months in responding to a report of the House of Lords Constitution Committee and asked:

> Would my noble friend accept that, in the interests of the House as a whole, the Government might strengthen their commitment to their own undertaking, included in the handbook,
>
> > "to respond in writing to the reports of select committees, if possible, within two months of publication"?
>
> Is she aware that, when responses arrive late, they are not always accompanied by the serious explanation of the delay that politeness demands? Finally, as regards the variable quality of the responses, may I invite my noble friend to read the short, rather perfunctory response to the Constitution Committee's very substantial report on the constitutional implications of coalition government, for which the committee waited nearly 10 months?[40]

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[38] Liaison Committee, *Select committee effectiveness, resources and powers*, Session 2012-13, HC 697
[39] HC Deb 27 Mar 2014 c464-5. See also. e.g. HC Deb 10 July 2014 c441;
[40] HL Deb 12 January 2015 c656

4 Parliament's power to send for persons, papers and records

It might be thought that the existence of the Rules is a matter for the Government and that, Parliament could simply summon named civil servants under its power to send for persons, papers and records.[41] Generally speaking, select committees issue informal invitations to witnesses to appear; however, if a committee summons a witness formally (by an order signed by the Chair) then failure to attend is potentially a contempt (and if a witness fails to appear when summoned in this manner, his or her conduct is reported to the House).

However there are some practical difficulties with this approach.

The current (24th) edition of Erskine May observes that:

> Civil servants frequently give evidence to select committees, although successive governments have taken the view that they do so on behalf of their Ministers and under their direction, and that it is therefore customary for Ministers to decide which officials should represent them for that purpose.

Whilst noting the existence of the Rules, it goes on to indicate that:

> The guidance, however, has not been approved by Parliament and has no parliamentary status. Although select committees have from time to time commented upon its provisions, they have never formally agreed to them.[42]

The Rules themselves acknowledge that "if a Committee […] insists on a named 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."

Any problems that arise lay not so much in the power to send for persons, papers or records, but in the powers of enforcement available to committees.[43] Although committees could in principle summon a named official, any such summons would have to be enforced by the House (a point which is made in the current version of the Rules). The difficulty is that, in such circumstances, the Government might seek to use its majority in the House to block such a move.

In addition to the examples noted by the Foreign Affairs Committee and Liaison Committee (above)[44] committees have noted particular problems in seeking the appearance of Government special advisers as witnesses. Examples include:

- The Public Administration Select Committee (PASC) invited Jonathan Powell, Special Adviser to the Prime Minister, to give evidence in 2000 but Sir Richard Wilson, Cabinet Secretary and Head of the Home Civil Service, appeared before the Committee.[45]

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[41] It is worth noting that a general rule Members of either House (including Ministers) may not be formally summoned to attend as witnesses before select committees (there are exceptions relating to Standards and Privileges)

[42] M. Jack et al, *Erskine May: Parliamentary Practice*, 24th Edition (London: Lexis Nexis, 2011), p821-822. See also: Procedure Committee, Second Report 1989-90, HC 19, para 155

[43] See: e.g. R. Kelly, *Select Committees: Powers and Functions*, in A. Horne, G. Drewry and D. Oliver, *Parliament and the Law* (Oxford: Hart, 2013) pp186-196 where he notes (amongst other things) in relation to enforcement that in recent years "questions about the ability of either House of Parliament to sanction those who do not cooperate with select committees have grown."

[44] Foreign Affairs Committee, *The Decision to go to War in Iraq*, Session 2002-3, HC 813, para 6 and Foreign Affairs Committee, *Implications for the Work of the House and its Committees of the Government's Lack of Co-operation with the Foreign Affairs Committee's Inquiry into The Decision to go to War in Iraq*, Session 2003-4 HC 440, paras 13-14; Liaison Committee, *Select committee effectiveness, resources and powers*, Session 2012-13, HC 697, paras 110-113

- The Transport, Local Government and the Regions Committee experienced similar problems in relation to Lord Birt, Tony Blair's unpaid special adviser, in relation to an inquiry into transport policy.[46]

In spite of these criticisms, in its legacy report at the close of the 2010-15 Parliament, the Liaison Committee concluded that its overall impression was that "government departments are taking committees seriously and engaging positively with them." It stated that "while there have been occasions of late replies to reports and disagreements about witnesses and evidence, most relationships between select committees and departments appear to be constructive."[47]

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

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

[47] Liaison Committee, *Legacy Report*, Session 2014-15, HC 954, para 16

Further Reading

Peter Riddell, *The updated guidance on the Osmotherly Rules*, Institute for Government Blog, 20 October 2014.

Pepita Barlow, *Revising the Osmotherly Rules: a cure for ailing accountability?*, Institute for Government Blog, 4 September 2013.

R. Rogers and R. Walter, *How Parliament Works*, 6th Edition, (London: Pearson, 2006) pp358-359.

R. Blackburn and A. Kennon, *Griffiths and Ryle on Parliament: Functions, Practice and Procedure*, 11.095-11.106.