The Accountability Debate: Codes of guidance and *Questions of Procedure for Ministers*

Research Paper 97/5

24 January 1997

A number of documents and codes are in existence which offer guidance on accountability to Parliament for Ministers and civil servants. This Paper looks at *Questions of Procedure for Ministers, the Code of Practice on Access to Government Information,* the Osmotherly Rules *(Departmental Evidence and Response to Select Committees)* the new *Guidance on Answering Parliamentary Questions: Basic Do's and Dont's.* The Civil Service Code of Conduct, the Code of Conduct for Members and the Resolution proposed by the Public Service Committee. Each code is examined in terms of the guidance offered on Parliamentary accountability. Library Research Paper *The Accountability Debate: Next Steps Agencies no 97/4* and Library Research Paper *The Accountability Debate*: *Ministerial Responsibility no 97/6* should be read in conjunction with this Paper. This Paper replaces no 96/53, *Questions of Procedure for Ministers.*

Oonagh Gay
Home Affairs Section

House of Commons Library

Introduction and Summary

Several codes of conduct now exist which provide guidance on accountability to Parliament in addition to statute and Parliamentary law, including privilege.[1] *Questions of Procedure for Ministers (QPM)* has achieved a new constitutional status[2] following its publication in 1992 and its subsequent amendment as a result of the Nolan Committee recommendations in May 1995. *The Code of Access to Government Information* came into effect in April 1994 and gave guidance to civil servants and Ministers on the provision of Government information. The Public Service Committee Report of July 1996 examined the Code in terms of its relevance to Parliamentary accountability and the Government has now accepted changes to both *QPM* and the Code in its response. A new version of the Code will take effect from February 1997. The Osmotherly Rules (*Departmental Evidence and Response to Parliamentary Committees*) for civil servants have also been subject to modifications, following critical examination by the Public Service Committee, and a new set of guidance - *Guidance on Answering Parliamentary Questions: Basic Do's and Dont's* has been issued by the Government for civil servants drafting answers to questions.

The Civil Service Code which came into force in January 1996 also offers guidance to civil servants on their accountability to Parliament, and Members of Parliament are subject to the new *Code of Conduct* which was adopted in July 1996. Finally, the Public Service Committee has recommended a new Resolution on accountability, encompassing both Ministers and civil servants to which the Government is committed in principle if there is all-party agreement.

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1 The specific responsibilities of Accounting Officers are not considered in this Paper which is concerned with general principles of accountability

2 see Research Paper 96/82, The Constitution: Principles and Development for a discussion on constitutional conventions

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I Questions of Procedure for Ministers

A. Introduction

Questions of Procedure for Ministers was first published in May 1992 although its existence was well known unofficially in the media, academic texts and in Parliament.[3] It was first issued to Ministers on a confidential basis by Clement Attlee in 1945 although elements within it are older. The initial versions were primarily concerned with procedure rather than conduct[4] but it now contains paragraphs on the secrecy of Cabinet proceedings, collective responsibility,[5] relationship with civil servants, acceptance of gifts and Ministers' private interests as well as the duty of accountability to Parliament.[6] The Nolan Committee summarised the status of *Questions of Procedure* (*QPM*) in its first report as follows:[7]

> 9. QPM has no particular constitutional status, but because it is issued by each Prime Minister to ministerial colleagues at the start of an administration or on their appointment to office, and any changes can only be authorised by the Prime Minister, it is in practice binding on all members of a Government. The records show that QPM has grown organically over the years, beginning as a document that was not much more than what Lord Trend described as 'tips on etiquette for beginners' but with fresh sections being added to deal with new circumstances. Over the years, the growth in QPM has largely been in the area of conduct and not procedure.
>
> 10. We do not believe that the explanation for this is a decline in ministerial standards of conduct. We think that the addition of ethical material to QPM has resulted from a combination of responses to specific incidents and a general trend, not confined to Government, towards codification of what might once have been assumed to be common ground.

Peter Madgwick and Diana Woodhouse state that *QPM* "may now be taken as the defining constitutional document on Prime Minister and Cabinet."[8]

Dr Peter Hennessy, Professor of Contemporary History at Queen Mary and Westfield College, has described in his evidence to the Nolan Committee his concern that Sir

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3 Tony Benn submitted his 1976 copy of *QPM* to the Treasury and Civil Service Sub-Committee inquiry on civil servants and Ministers [HC 92 1985-86] but declined to give evidence in private session on the document. The Committee would not hear the evidence in public.

4 Earlier versions can be found in the Public Record Office subject to the 30 year rule

5 On which see a full discussion in "*The Collective Responsibility of Ministers: an outline of the issues*" Library Research Paper 96/55

6 Hennessy notes in *Whitehall* [1989] that in 1945 it consisted of 35 paragraphs - by 1976 it had grown to 132 paragraphs. The 1992 version has 134 paragraphs.

7 First Report of the Committee on Standards in Public Life Cm 2850 May 1995, p.120

8 *The Law and Politics of the Constitution*, 1995

Robin Butler, the Cabinet Secretary, had denied the status of *QPM* as a constitutional convention with the exception of paragraph 27 on ministerial accountability to Parliament.[9] However the acceptance by the Government of amendments to its wording by the Nolan Committee inevitably increases its importance as a constitutional text, as Professor Hennessy notes in his 1995 book *The Hidden Wiring*.[10]

The Public Service Committee report of July 1996 (see below) noted that "it seems extraordinary to us that the only explicit statement of how Ministers are expected to discharge their obligations to Parliament appears not in a Parliamentary document, but in a document issued by the Prime Minister which deals (amongst other things) with the travelling expenses of their spouses and the acceptance of decorations from foreign governments".[11] The report noted that this contributed to an illusion that the obligations on Ministers in relation to Parliament were derived from the instructions of the Prime Minister, and not from Parliament itself. But the 'convention' that Ministers should not mislead the House was in fact derived from the concept of a contempt of Parliament (para. 54).[12]

Since its publication the media and academics have from time to time made a connection between *QPM* and a resignation of a Minister, for example in the case of David Mellor in September 1992. Here, Diana Woodhouse[13] noted that Bryan Gould, then Shadow Heritage Minister, wrote to the Prime Minister about the propriety of Mr Mellor's actions in the context of the *QPM* sections relating to the acceptance of gifts and that in his reply to Mr Gould John Major indicated that, in his view, Mr Mellor had complied with the *QPM* guidelines. Gordon Brown, when Shadow Trade and Industry Secretary, cited paragraph 25 on Ministers' legal proceedings when Norman Lamont, then Chancellor of the Exchequer, instructed lawyers concerning an unsatisfactory tenant.[14] Attention has also focused on paragraph 55 concerning ministers' duties towards civil servants: Vernon Bogdanor has criticised as tautologous the requirement that Ministers have a "duty to refrain from asking or instructing civil servants to do things which they should not do."[15] The FDA has also called attention to paragraph 27, arguing that Ministerial attempts to divide responsibility for policy from responsibility for administration were without constitutional authority.[16]

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9 Cm 2850 - II p364

10 pp 189-190. A new edition in 1996 includes an extra chapter on the Scott Report. See also pp 207-209

11 para. 53 HC 313 1995/96

12 On the Committee's use of the word 'convention' in this context, see Research Paper 97/6 p. 29 fn37

13 in *Ministers and Parliament 1994*, pp 79-80, 85.

14 *Independent* 2/12/92, 'Lamont broke further rules over legal fees'. See PAC report, 'Payment of Legal Expenses incurred by the Chancellor of the Exchequer', HC 386 Session 1992/93

15 *Politics and the Constitution: Essays on British Government* [1996] p.38

16 *Times* 12/1/95 "Ministerial principles 'made up on the hoof'". See Library Research Paper no 97/6 for a general discussion on this argument

Sir Richard Scott in his report in February 1996 used paragraph 27 of *QPM* as the yardstick by which Ministers could be said to be meeting their obligation to account to Parliament.[17] He examined the changes to *QPM* made in the light of the Nolan recommendations and considered that the redraftings did not make any material difference to the substance of the obligation on Ministers not to mislead Parliament or the public.[18]

The 1992 wording of paragraph 27 is as follows:

Accountability

27. Each Minister is responsible to Parliament for the conduct of his or her Department, and for the actions carried out by the Department in pursuit of Government policies or in the discharge of responsibilities laid upon him or her as a Minister. Ministers are accountable to Parliament, in the sense that they have a duty to explain in Parliament the exercise of their powers and duties and to give an account to Parliament of what is done by them in their capacity as Ministers or by their Departments. This includes the duty to give Parliament, including its Select Committees, and the public as full information as possible about the policies, decisions and actions of the Government, and not to deceive or mislead Parliament and the public.

The 1992 version of *QPM* was revised in 1994 to take account of new rules on Ministers' membership of Lloyds. The amendment was set out in a lengthy Parliamentary Answer[19]

B. The Nolan amendments to *QPM*

The Treasury and Civil Service Select Committee considered *QPM* as part of its inquiry into the role of the Civil Service. It considered that *QPM*, the Armstrong memorandum and the Civil Service Management Code were inadequate as a framework for maintaining the essential values of the Civil Service.[20] It recommended the establishment of a civil service code of ethics (para 103-107) an independent appeals procedure based on a strengthened Civil Service Commissioner body (paras 108-112) and a Civil Service Act to provide statutory backing to maintain the essential values of the Civil Service (para 116). The Committee published a draft Code of Ethics as Annex 1.

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17 References to *QPM* are to be found in D2.112, D4.57, D4.63, D6.50, D6.53-4, K8.1, K8.4, K8.14

18 *Report of the Inquiry into the Export of Defence Related Equipment and Dual Use Goods to Iraq and Related Prosecutions*, HC 115 Session 1995/96, K8.5

19 HC Deb vol 247 21/7/94 c.551-553

20 HC 27 Session 1993/94 para. 101

The Government response published in *The Civil Service : Taking Forward Continuity and Change*[21] accepted the proposal for a new Civil Service Code, and provided a revised version of the Committee's draft as an Annex. However it did not accept that *QPM* was inadequate:[22]

> The Committee is not specific in its criticisms of the Armstrong Memorandum and *Questions of Procedure for Ministers*. The Government does not accept that they are unsound or inadequate in their account of constitutional relationships. The proposals which follow in the Committee's report address the need for a concise summary of the ethics and values of the Civil Service, in a way which addresses the position of all civil servants.
>
> The Government congratulates the Committee on the draft Code published as Annex 1 to its Report which brings together clearly and concisely the key principles in *Questions of Procedure for Ministers* and the Civil Service Management Code.
>
> As described in paragraphs 2.8 and 2.9 above, the Government accepts the Committee's proposal for a new Civil Service Code, to apply to all civil servants, summarising the constitutional framework within which they work and the values they are expected to uphold. A revised draft Code, suggesting a number of changes to the text proposed by the Committee with an associated commentary, is annexed, as a basis for further consultation.

The Government response provided a commentary on the amendments it proposed to the Committee's draft Civil Service Code. The commentary traced the antecedents of the Code (which was mainly drawn from *QPM*, the Armstrong Memorandum,[23] and the Civil Service Management Code). Probably the most controversial amendment was the addition of 'knowingly' to the Committee's draft paragraph 3 of the Civil Service Code. This had rephrased paragraph 27 of *QPM* which governs the duty of Ministers to Parliament:[24]

> **PARAGRAPH 3** "This Code should be seen in the context of the duties and responsibilities of Ministers set out in Questions of Procedure for Ministers which include:
>
> - accountability to Parliament;

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21 Cm 2748 January 1995

22 Response to Recommendation 11 Cm 2748 January 1995

23 The Armstrong Memorandum "*The Duties and Responsibilities of Civil Servants in Relation to Ministers*" was first issued in May 1985 following the Ponting case and amended in December 1987 (see below). It was incorporated into the Civil Service Management Code, but it has been superseded by the new Civil Service Code which came into force on 1 January 1996

24 proposed new Civil Service Code showing Government amendments to Select Committee draft Annex Cm 2748

- the duty to give Parliament and the public as full information as possible about the policies, decisions and actions of the Government, and not to deceive or knowingly mislead Parliament and the public;

- the duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching decisions: and

- the duty to comply with the law including international law and treaty obligations. and to uphold the administration of justice;

together with the duty to familiarise themselves with the contents of this Code and not to ask civil servants to act in breach of it."

[from the draft Civil Service Code in Cm 2748]

'Knowingly' was also inserted into draft paragraph 5 governing the duty of civil servants, so that they "should not deceive or knowingly mislead Ministers, Parliament or the public." These additions were justified as consistent with the Government response to recommendation 17 of the Committee's report:

17. We consider that any Minister who has been found to have knowingly misled Parliament should resign (paragraph 134).

As the Prime Minister made clear in his letter to the Chairman of the Sub-Committee of 5 April 1994:

"It is clearly of paramount importance that Ministers give accurate and truthful information to the House. If they knowingly fail to do this, then they should relinquish their positions except in the quite exceptional circumstances of which a devaluation or time of war or other danger to national security have been quoted as examples."

This letter was placed in the Library as part of the evidence to the Treasury and Civil Service Select Committee.[25] The use of 'knowingly' is retained in the final version of the Civil Service Code.

The Nolan Committee in its first report[26] also examined the text of the draft code and made some recommendations concerning *QPM*.[27] Firstly the Nolan Committee commented that the first paragraph of *QPM* should be amended to say "it will be for individual Ministers to judge how best to act in order to uphold the highest standards. **It will be for the Prime Minister to determine whether or not they have done**

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25 Unprinted Paper 6, The Chairman of the SubCommittee was Giles Radice

26 *Standards of Conduct in Public Life* Cm 2850 May 1995

27 Recommendation 16 Chapter 3

so in any particular circumstance." The Committee argued that Ministers did not make ethical judgements in isolation, and to remain in office they needed to retain the confidence of the Prime Minister. In a question of conduct, that would involve the Prime Minister's own judgment of the case, and this should be reflected in *QPM*.[28] The Nolan Committee had heard evidence from Peter Hennessy, that the phrase 'it will be for individual Ministers to judge...' was very recent since it had not appeared in the 1983 version which was in Professor Hennessy's possession.[29]

The Government response to Nolan published in 1995 did not fully accept the Nolan recommendation: noting "the amendment proposed would, in the Government's view, go too far towards suggesting that the Prime Minister's relationship with his Ministerial colleagues is that of invigilator and judge."[30] Its proposal was: "It will be for individual Ministers to judge how best to act in order to uphold the highest standards. They are responsible for justifying their conduct to Parliament. And they can only remain in office for as long as they retain the Prime Minister's confidence." This proposal has been incorporated into the final text. Professor Hennessy has criticised the wording as too feeble.[31] Some witnesses to the Public Service Committee argued that the unwillingness to accept the Nolan Committee's words was an "abdication of responsibility".[32]

Probably the most important recommendation from the Nolan Committee was as follows:

> **We recommend that the Prime Minister puts in hand the production of a document drawing out from QPM the ethical principles and rules which it contains to form a free-standing code of conduct or a separate section within a new QPM. If QPM is to remain the home for this guidance, we recommend that it is retitled 'Conduct and Procedure for Ministers' to reflect its scope.**
>
> 16. The precise wording of the new guidance will be a matter for the Prime Minister. We believe, however, that the following essential principles should be spelt out, supported where necessary by detailed rules, some of which already exist in QPM:
>
> *Ministers* of *the Crown are expected to behave according to the highest standards* of *constitutional and personal conduct. In particular they must observe the following principles* of *ministerial conduct:*
>
> *i) Ministers must ensure that no conflict arises, or appears between their public duties and their private interests;*

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28 Chapter 3, para. 13

29 Further detail is given in pp 39-40 of *The Hidden Wiring* [1995] by Peter Hennessy

30 Response to Recommendation 12 Cmnd 2931 July 1995

31 *The Hidden Wiring*, p.196

32 para. 52 HC 313 1995/96

ii) Ministers must not mislead Parliament. They must be as open as possible with Parliament and the public;

iii) Ministers are accountable to Parliament for the policies and operations of their departments and agencies;

iv) Ministers should avoid accepting any gift or hospitality or which might, or might appear to, compromise their judgement or place them under an improper obligation;

v) Ministers in the House of Commons must keep separate their roles as Minister and constituency Member;

vi) Ministers must keep their party and ministerial roles separate. They must not ask civil servants to carry out party political duties or to act in any other way that would conflict with the Civil Service Code.

Little comment has been made in the specific wording suggested by Nolan here, but Adam Tomkins has described it as bland and disappointing, lacking important matters of detail.[33]

The Government response to Nolan published in July 1995[34] accepted this recommendation noting "The Prime Minister intends to implement it in the next revision of Questions of Procedure for Ministers by amending the first paragraph on the lines of the draft at Annex A." This Annex amended the Nolan wording given above in recommendation 16:

ANNEX A. CONDUCT AND PROCEDURE FOR MINISTERS

Key to amendments: **xxx** = additions; and ~~strikeout~~ = deletions. Shaded passages are additions by the Government and passages which are struck out are deletions.

Ministers of the Crown are expected to behave according to the highest standards of constitutional and personal conduct **in the performance of their duties**. In particular they must observe the following principles of Ministerial conduct:

i. **Ministers must uphold the principle of collective responsibility**;

ii. Ministers are accountable to Parliament for the **policies, decisions and actions** ~~policies and operations~~ of their departments and agencies;

iii. Ministers must not **knowingly** mislead Parliament **and the public and should correct any inadvertent errors at the earliest opportunity.** They must be as open as possible with Parliament and the public, **withholding information only when disclosure would not be in the public interest**;

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33 *Legal Studies* March 1996 "A Right to mislead Parliament?" by Adam Tomkins

34 Cm 2931

iv. Ministers must ensure that no conflict arises, or appears to arise, between their public duties and their private interests;

v. Ministers should avoid accepting any gift or hospitality which might, or might **reasonably** appear to, compromise their judgment or place them under an improper obligation;

vi. Ministers in the House of Commons must keep separate their roles as Minister and constituency Member;

vii. **Ministers must not use public resources for party political purposes. They must uphold the political impartiality of the Civil Service**. ~~Ministers must keep their party and Ministerial roles separate. They must not ask civil servants to carry out party political duties or~~ **and not ask civil servants** to act in any other way which would conflict with the Civil Service Code.

[from the Government's response to the First Report from the Committee on Standards in Public Life Cm 2931]

In the notes to Annex A the Government response noted that "the proposed addition of 'knowingly' reflects the restatement of this principle in the draft Civil Service Code, as set out in Taking Forward Continuity and Change"[35] and in the Prime Minister's letter to Giles Radice of 5 April 1994. The addition of "and the public" is also consistent with paragraph 27 of *QPM* and the draft Civil Service Code".[36] Paragraph 27 governs the accountability of Ministers and Parliament.[37] Following the statement by Roger Freeman on the Government response to Nolan on 18 July 1995 there was criticism that the phrase 'in the public interest' in the Annex at sub-paragraph (iii) was not defined and that it would therefore be Ministers who would determine the public interest.[38] When the statement was repeated in the Lords Baroness Blatch, for the Government, defined "knowingly" as follows:[39]

> The noble Lord, Lord Rodgers of Quarry Bank, was concerned about the term "knowingly mislead". We shall, of course, debate the matter in much more detail when the time comes, but the use of the word "knowingly" here refers to wilfully or wantonly knowingly misleading the House. We in this House have a proud record. Those of us who sit on the Front Benches in this House may have gone through the pain of unwittingly misleading the House, but we have a tradition in this House of Ministers coming to the Dispatch Box to make amends for any statement in which they may have misled the House unwittingly. That is a very different matter from knowingly misleading either House. If we knowingly mislead the House, the culpability is ours personally. There is a real distinction to be made. We recognise that distinction

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35 pages 29,47 and 48

36 Annex A p.33

37 Note that the changes to *QPM* are to paragraph 1, not paragraph 27 the text of which remains as given on p.7 of this Paper

38 HC Deb 18/7/95 vol 263 1473-1484

39 HC Deb. 18/7/95 vol. 566 c.163

in our suggestion that we alter the *Questions of Procedure for Ministers* in both Houses.

In the debate on the Government response to Nolan on 2 November 1995 Roger Freeman gave an amended version of sub-paragraph (iii) of the new paragraph 1:[40]

"Ministers must not knowingly mislead Parliament and the public and should correct any inadvertent errors at the earliest opportunity, They must be as open as possible with Parliament and the public, withholding information only when disclosure would not be in the public interest, which should be decided in accordance with established Parliamentary convention, the law, and any relevant Government Code of Practice."

I have provided three references: first, established parliamentary convention - I have given the reference in "Erskine May" - secondly, the law; and, thirdly, any relevant Government code of practice. My hon. Friend has also drawn attention to the document on open government that we have published already. I hope that the amendment provides greater clarity. Right hon. and hon. Members will no doubt wish to study the record and perhaps reflect further upon the debate.

Mr Freeman said the new paragraph became effective immediately.[41] The new paragraph 1 reads therefore as follows:[42]

"Ministers of the Crown are expected to behave according to the highest standards of constitutional and personal conduct in the performance of their duties. In particular they must observe the following principles of Ministerial conduct:

(i) Ministers must uphold the principle of collective responsibility;

(ii) Ministers are accountable to Parliament for the politics, decisions and actions of their departments and agencies;

(iii) Ministers must not knowingly mislead Parliament and the public and should correct any inadvertent errors at the earliest opportunity. They must be as open as possible with Parliament and the public withholding information only when disclosure would not be in the public interest, which should be decided in accordance with established Parliamentary Convention, the law, and any relevant Government Code of Practice;

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40 c.456

41 c.457. It is perhaps curious that no-one challenged Roger Freeman during the debate in the use of the term 'Parliamentary convention' when the Public Service Committee Report of 1995/96 [HC 313] later concluded that the convention was in fact Ministerial. See p.15 below

42 Note, however, that a new version of paragraph 1(iii) is planned for incorporation into the next version of *QPM*, according to the Government response to the Public Service Committee Select Committee. See p.16 below for the text

(iv) Ministers must ensure that no conflict arises, or appears to arise, between their public duties and their private interests;

(v) Ministers should avoid accepting any gift or hospitality which might, or might reasonably appear to, compromise their judgment or place them under an improper obligation;

(vi) Ministers in the House of Commons must keep separate their roles as Ministers and constituency Members;

(vii) Ministers must not use public resources for party political purposes. They must uphold the political impartiality of the Civil Service, and not ask Civil Servants to act in any other way which would conflict with the Civil Service Code.

These notes detail the arrangements for the conduct of affairs by Ministers. They are intended to give guidance by listing the principles and the precedents which may apply. They apply to all Members of the Government (the position of Parliamentary Private Secretaries is described separately in Section 3)."

"The notes should be read against the background of the general obligations listed above, and in the context of protecting the integrity of public life. It will be for individual Ministers to judge how best to act in order to uphold the highest standards. They are responsible for justifying the conduct to Parliament. And they can only remain in office for so long as they retain the Prime Minister's confidence."

Paragraph 27 (Accountability of Ministers to Parliament) remains in the text of *QPM*, but it is understood that the new paragraph 1 is to be read in preference to it.[43]

The new version of *QPM* is not likely to be published until after the next General Election.

C. The Scott Report[44]

Sir Richard Scott noted in his report that the reformulation of *QPM* did not make any material difference to the substance of the obligation resting on Ministers not to mislead Parliament or the public:

K8.5 The qualification of "mislead" by the addition of the adverb "knowingly" does not, to my mind, make any material difference to the substance of the obligation resting on Ministers not to mislead Parliament or the public. It must, I believe, always have been the case that misleading statements made in ignorance of the true facts were not regarded as a breach of a Minister's obligation to be honest with Parliament and the public. Questions might, of course, arise as to why the Minister was ignorant of the true facts and thus unable to have rendered to Parliament an accurate account of his stewardship. Similarly, the replacement of an obligation to give "as full information as possible about the policies, decisions and actions of the Government" by an obligation to be "as open as possible with Parliament and the public,

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43 *Report of the Inquiry into the Export of Defence Related Equipment and Dual Use Goods to Iraq and Related Prosecutions* (Scott Report) HC 115 Session 1995/96 K.8.5

44 *Report of the Inquiry into the Export of Defence Related Equipment and Dual Use Goods to Iraq and Related Prosecutions*" HC 115 Session 1995/96

withholding information only where disclosure would not be in the public interest" ought not to bring about any difference of substance. In effect, the qualifying phrase, "withholding information..." etc, is clarifying the circumstances in which it would not be possible for information to be made public. It is generally accepted, and rightly so, that there always have been and always will be some subjects in respect of which full information, or sometimes any information, cannot be given. Sir Robin Butler, in evidence to the Inquiry and also to the 1994 Select Committee, instanced information about imminent changes in interest rates or in exchange rates. The public interest may require information about such matters to be withheld from Parliament. This necessity should not, however, be allowed to obscure the fact that the withholding in the public interest of information from Parliament and the public involves a dilution, *pro tanto,* of the obligations imposed by Ministerial accountability. It follows that the withholding of information by an accountable Minister should never be based on reasons of convenience or for the avoidance of political embarrassment, but should always require special and carefully considered justification. The interpretation of "in the public interest" in the new formulation should, in my opinion, adopt that approach.

Adam Tomkins has suggested that the addition of 'knowingly' was not as innocuous as Scott considered, since the important point about ministerial responsibility was that ministers are constitutionally accountable for everything in their department regardless of personal knowledge.[45]

D. The Public Service Committee Inquiry

Sir Richard Scott concluded that the term 'in the public interest' needed further Government clarification in relation to the obligation on Ministers to supply information to Parliament.[46] Following the debate on the Scott Report on 26 February 1996[47] the Public Service Committee decided to widen the inquiry it had begun into Next Steps Agencies into a review of ministerial and parliamentary accountability including an examination of *QPM* amongst other documents and consideration as to whether it would need amendment in the light of the Scott Report.[48] Ian Lang, for the Government, had welcomed in advance such a widening of the inquiry in the Commons debate and said that the Government proposed to submit evidence.[49]

On 29 March 1996 Roger Freeman, Chancellor of the Duchy of Lancaster, submitted evidence to the Public Service Committee on Ministerial accountability and the

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45 *Public Law* 1996, 'Government Information and Parliament misleading by design or default? pp.484-489

46 K8.14

47 HC Deb vol 272 c.589-693

48 Public Service Committee *Information for the Press* 7/3/96

49 c.593

provision of information by Government to Parliament. He noted, amongst other topics, the expansion of the first paragraph of *QPM* and underlined its importance:[50]

> 10. The Government last year expanded the first paragraph of "Questions of Procedure for Ministers" into a seven point code of Ministerial conduct. The second and third points constitute the current summary formulation by the Government of the principal obligations which Ministers, as members of the Executive, owe to Parliament.

The memorandum examined how the text of paragraph 1 (iii) had been created from the time of the Armstrong memorandum through to the changes following Nolan. It discussed the terms "established Parliamentary convention" "the law" and "relevant Government Codes of Practice" referring to *Erskine May*, some 200 Acts on the statute book which contain provisions designed to protect certain types of information and the current Open Government Initiative. Briefly, the memorandum set out the Government's understanding of the established requirements of Ministerial accountability and the longstanding conventions governing the provision of information to Parliament.

The Public Service Committee report was published in July 1996.[51] The general recommendations are not comprehensively covered in this Paper, but the report recommended a number of alterations to *QPM*. For new paragraph 1 it recommended that the wording be brought into line with that in the *Code of Practice on Access to Government Information*. Since at present *QPM* implied that public interest was the only relevant test for disclosure and did not mention personal privacy (para. 40). It also recommended that the Code of Practice on Access to Government Information should not be used to restrict obligations on Ministers. The Committee noted the admission by Roger Freeman in evidence to the Committee, that the term "Parliamentary convention" in the current wording of para. 1(iii) was really a Ministerial decision. The report recommended "There is no longer anything that can be called a "Parliamentary convention" that determines which Questions Ministers may answer. There are only Ministerial conventions. We believe that the reference to "Parliamentary convention" in the new text of *Questions of Procedure for Ministers* is unnecessary and inaccurate and should be removed" (para 39). In addition, the report supported the Notes recommendations on the (para.39) wording of *QPM* in respect of the role of the Prime Minister that the Prime Minister should take responsibility to ensure that Ministers live up to the standards required of them.[52]

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50 *Ministerial accountability and the provision of information by Government to Parliament. Memorandum by the Chancellor of the Duchy of Lancaster 19.3.96*

51 HC 313 Session 1995/96

52 See p.9 of this Paper

The report therefore noted that *QPM* gave the only explicit statement of how Ministers should discharge their obligations to Parliament, and recommended that the House itself underline the obligations of Ministers to be open with the House, and not mislead it, by passing a Resolution on accountability.[53]

The Government response to the Public Service Committee report accepted the need for some re-wording and gave the following amendment of para. 1(iii):
"Ministers must not knowingly mislead Parliament and the public and should correct any inadvertent errors at the earliest possible opportunity. They must be as open as possible with Parliament and the public, withholding 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" [Annex B].

The response noted that *QPM* would be amended accordingly when the next version was issued. The response explicitly accepted the Committee's points on "Parliamentary convention" and reference to the *Code of Practice on Access to Government Information*, but did not change the wording with regard to the role of the Prime Minister, continuing to believe "that the current wording of *Questions of Procedure for Ministers* provide a balanced statement of the proper relationship between a Prime Minister and his Ministerial colleagues".[54]

In evidence to the Public Service Committee enquiry on accountability, Ann Taylor, for the Opposition, noted that *QPM* would be rewritten if there were a Labour Government and that "knowingly" in para 1(iii) would be removed.[55]

II The Code of Practice on Access to Government Information[56]

In July 1993 the Government published a White Paper on Open Government[57] which proposed a Code of Practice on Access to Government Information. This would guarantee the volunteering of certain information to the public and the release of other information on request subject to a number of exemptions. The Code came into effect on 4 April 1994. A new version of the Code was issued in January 1997.[58] The Parliamentary Commissioner for Administration provides an external review mechanism for requests made under the Code.

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53 See below Part VII

54 Response to recommendation 6

55 HC 313-III Q1055

56 This section does not offer a comprehensive guide to the Code or the debate on freedom of information but is concerned solely with its use in connection with Parliamentary accountability. Research Paper 93/17 and 92/4 give a general background on the freedom of information debate and a later Research Paper will examine the Code more generally

57 Cm 2290

58 Dep 4374

The information subject to the Code is set out as follows:[59]

Information the Government will release

3. Subject to the exemptions in Part II, the Code commits departments and public bodies under the Jurisdiction of the Parliamentary Commissioner for Administration (the Ombudsman):

(i) to publish the facts and analysis of the facts which the Government considers relevant and important in framing major policy proposals and decisions; such information will normally be made available when policies and decisions are announced;

(ii) to publish or otherwise make available, as soon as practicable after the Code becomes operational, explanatory material on departments' dealings with the public (including such rules, procedures, internal guidance to officials and similar administrative manuals as will assist better understanding of departmental action in dealing with the public) except where publication could prejudice any matter which should properly be kept confidential under Part 11 of the Code;

(iii) to give reasons for administrative decisions to those affected;

(iv) to publish in accordance with the Citizen's Charter:

- full information about how public services are run, how much they cost, who is in charge, and what complaints and redress procedures are available;

- full and, where possible, comparable information about what services are being provided, what targets are set, what standards of service are expected and the results achieved.

(v) to release, in response to specific requests, information relating to their policies, actions and decisions and other matters related to their areas of responsibility.

4. There is no commitment that pre existing documents, as distinct from information, will be made available in response to requests. The Code does not require departments to acquire information they do not possess, to provide information which is already published, or to provide information which is provided as part of an existing charged service other than through that service.

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[59] Open Government Code of Practice on Access to Government Information

The target for response is given as 20 days, and the scope of the Code extends to Government departments and other bodies within the jurisdiction of the Ombudsman. Departments are allowed to charge, reflecting reasonable costs. Exemptions are listed in Part II of the Code with the shaded areas indicating additions made in the January 1997 edition:-

PART II

Reasons for confidentiality

The following categories of information are exempt from the commitments to provide information in this Code. **In those categories which refer to harm or prejudices the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.**

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.

The exemptions will not be interpreted in a way which causes injustice to individuals.

1. ***Defence, security and international relations***

(a) Information whose disclosure would harm national security or defence.

(b) Information whose disclosure would harm the conduct of international relations or affairs.

(c) Information received in confidence from foreign governments, foreign courts or international organisations.

2. ***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.

3. ***Communications with the Royal Household***

Information relating to confidential communications between Ministers and Her Majesty the Queen or other Members of the Royal Household, or relating to confidential proceedings of the Privy Council.

4. ***Law enforcement and legal proceedings***

(a) Information whose disclosure could prejudice the administration of justice (including fair trial), legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigations (whether actual or likely) or whose disclosure is, has been, or is likely to be addressed in the context of such proceedings.

(b) Information whose disclosure could prejudice the enforcement or proper administration of the law, including the prevention, investigation or detection of crime, or the apprehension or prosecution of offenders.

(c) Information relating to **legal** proceedings **or the proceedings of any tribunal, public inquiry or other formal investigation** which have been completed or terminated, or relating to investigations which have or might have resulted in proceedings.

(d) Information covered by legal professional privilege.

(e) Information whose disclosure would harm public safety or public order, or would prejudice the security of any building or penal institution.

(f) Information whose disclosure could endanger the life or physical safety of any person, or identify the source of information or assistance given in confidence for law enforcement or security purposes.

(g) Information whose disclosure would increase the likelihood of damage to the environment, or rare or endangered species and their habitats.

5. ***Immigration and nationality***

Information relating to immigration, nationality, consular and entry clearance cases. **However, information will be provided, though not through access to personal records, where there is no risk that disclosure would prejudice the effective administration of immigration controls or other statutory provisions.**

6. ***Effective management of the economy and collection of tax***

(a) Information whose disclosure would harm the ability of the Government to manage the economy, prejudice the conduct of official market operations, or could lead to improper gain or advantage.

(b) Information whose disclosure would prejudice the assessment or collection of tax, duties or National Insurance contributions, or assist tax avoidance or evasion.

7. ***Effective management and operations of the public service***

(a) Information whose disclosure could lead to improper gain or advantage or would prejudice:

- the competitive position of a department or other public body or authority;
- negotiations or the effective conduct of personnel management, or commercial or contractual activities;
- the awarding of discretionary grants.

(b) Information whose disclosure would harm the proper and efficient conduct of the operations of a department or other public body or authority, including NHS organisations, or of any regulatory body.

8. ***Public employment, public appointments and honours***

(a) Personnel records (relating to public appointments as well as employees of public authorities) including those relating to recruitment, promotion and security vetting.

(b) Information, opinions and assessments given in confidence in relation to public employment and public appointments made by Ministers of the Crown, by the Crown on the advice of Ministers or by statutory office holders.

(c) Information, opinions and assessments given in relation to recommendations for honours.

9. ***Voluminous or vexatious requests***

Requests for information which are vexatious or manifestly unreasonable or are formulated in too general a manner, or which (because of the amount of information to be processed or the need to retrieve information from files not in current use) would require unreasonable diversion of resources.

10. ***Publication and prematurity in relation to publication***

Information which is or will soon be published, or whose disclosure **where the material relates** ~~would be premature in relation~~ to a planned **or potential** announcement or publication**, could cause harm (for example, of a physical or financial nature)**

11. ***Research, statistics and analysis***

(a) Information relating to incomplete analysis, research or statistics, where disclosure could be misleading or deprive the holder of priority of publication or commercial value.

(b) Information held only for preparing statistics or carrying out research, or for surveillance for health and safety purposes (including food safety), and which relates to individuals, companies or products which will not be identified in reports of that research or surveillance, or in published statistics.

12. ***Privacy of an individual***

Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.

13. ***Third party's commercial confidences***

Information including commercial confidences, trade secrets or intellectual property whose unwarranted disclosure would harm the competitive position of a third party.

14. ***Information given in confidence***

(a) Information held in consequence of having been supplied in confidence by a person who:

- gave the information under a statutory guarantee that its confidentiality would be protected.. or
- was not under any legal obligation, whether actual or implied, to supply it, and has not consented to its disclosure.

(b) Information whose disclosure without the consent of the supplier would prejudice the future supply of such information.

(c) Medical information provided in confidence if disclosure to the subject would harm their physical or mental health, or should only be made by a medical practitioner.

15. ***Statutory and other restrictions***

(a) Information whose disclosure is prohibited by or under any enactment, regulation, European Community law or international agreement.

(b) Information whose release would constitute a breach of Parliamentary Privilege.

Guidance on the interpretation of the Code has been issued by the Cabinet Office.[60] The Code does not affect statutory rights to personal information held by local authority housing and social service departments and certain education, health and medical records. Nor does it affect the operation of the *Data Protection Act 1984*.

The Government was criticised by the Campaign for Freedom of Information for not undertaking to supply documents under the Code, for excluding certain NDPBs and public bodies,[61] making too wide a range of exemptions and requiring applicants who wish to complain to the Ombudsman to do so through their MP.[62]

The Select Committee on the Parliamentary Commissioner for Administration published a report into the operation of the Code in March 1996.[63] In particular, it welcomed the public interest test in the Code and recommended that the Guidance on interpretation should make clear that any consideration of 'harm' should not take account of possible embarrassment to individual civil servants and Ministers (paras. 26-27). It also recommended that there be a clear separation in internal documents between factual analysis and sensitive policy advice (para. 44) and that the guidance be amended to make clear that the harm test applies to the first two categories listed in Exemption 2.[64] The Committee, which has a Conservative majority, also recommended a Freedom of Information Act (paras. 120-6).

The Public Service Committee Report of July 1996[65] examined the exemptions under the Code as follows:

Exemptions

> 153. But even with a Freedom of Information Act, there will always be a need for exemptions from it. What can and what cannot be revealed in public for reasons of national security and the conduct of international affairs, or because disclosure might "harm the frankness and candour of internal discussion" was a subject with which Sir Richard Scott dealt at some length. The exemptions listed in the Code of Conduct are also taken to apply, it should be noted, to information requested in Parliament. We have already discussed, and accepted the need for some limits to the right of access. Even the most open Freedom of Information regimes exempt some categories of information. Fundamentally, a right of access has to be balanced by a right of privacy; and the proper conduct of government also means that at times the workings of government may have to be obscured.

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60 Open Government: Code of Practice on Access to Government Information: Guidance on Interpretation [2nd ed., January 1997]

61 The Nolan Committee has recommended a Code of Openness for NDPBs. Cm 2850, First Report May 1995. Codes are now being implemented

62 Campaign for Freedom of Information: *Testing the Open Government Code of Practice, Open Government* Briefing No 1 May 1994. A more recent document: *Briefing: Experience of the Code of Practice on Access to Government Information* 10.12.96 also noted that public awareness of the Code was low

63 HC 84 Session 1995/96

64 Cabinet and Cabinet Committee proceedings, internal opinion, advice (para. 49) (See above for its recommendations on the Osmotherly Rules)

65 *Ministerial Accountability and Responsibility* HC 313 Session 1995/96

154. As we have said above, balancing the public interest in disclosure with the public interest in confidentiality is a difficult task, which is, at present, entrusted to Ministers, although the "public interest test" means that they have to scrutinise their decisions very carefully; and that their decisions are subject to examination by the Ombudsman. The Campaign for Freedom of Information have described the test as the introduction of "the important principle that even exempt information may be disclosed if there is an overriding public interest in openness". It is noticeable that Ministers are now referring to it in their answers to Parliamentary Questions. Sir Richard Scott said 'the way in which the public interest exception is used is critical so far as the ability of an individual Member of Parliament to get information from Ministers is concerned". The Ombudsman told us that he had considered the balance between the public interest in disclosure and the risk of harm or prejudice if information is disclosed, in three of the investigations which he had conducted. In one of them, he noted in his conclusions that 'the issue of when the public interest in disclosure would override any harm or prejudice which might arise from disclosure was a matter of judgement in the light of the facts of each individual cases". **We welcome the fact that there is a public interest test in the Code of Practice on Access to Government Information. We recommend that where Ministers refuse to answer Parliamentary Questions or refuse to give information in other ways they should make it clear why the information is being refused, under what aspect of the Code of Practice and whether or not the refusal of information is subject to the public interest test**.

155. Sir Richard Scott suggested that there was room for a good deal more openness on the specific issue of defence-related exports. "The confidentiality line has been used to justify the refusal to give any information about defence sales including those which are not confidential". Professor Norman Lewis also commented on the commercial confidentiality exemption that 'it is clear that the claim has operated routinely to exclude most terms of the contract" where the Government has put services out to tender. We note that the Defence Committee have made some comments on this point to the review being undertaken by the Ministry of Defence of information on defence-related exports. In particular they propose that the current presumption that Questions on the subject should not be answered unless the public interest in disclosure outweighs the public interest in keeping the material confidential, should be reversed. Material should be published unless there are compelling reasons" to avoid it. The Code already contains a general presumption of access to information; but in the categories that are exempt, the presumption is that access will be denied, unless there is an overriding public interest. We believe that the presumption even in exempt categories should be that information (or, as we argue below, documents) should be released. **We recommend that the Code be revised to make clearer that it assumes that material should be published unless there are compelling reasons not to do so; and that this general presumption applies even in the exempt categories**.

The Committee also agreed with the PCA Select Committee that the wording of the Code be amended to assert a right of access to documents subject to the exemptions of the Code (para. 160).

The Code of Practice was cited elsewhere by the Committee when considering the enforcement of its proposed Parliamentary Resolution on accountability. The Committee noted that the PCA already had a role in adjudicating on refusals to provide documents under the Code of Practice, and that MPs could complain about refusals of access to information. The Committee recommended that the *Parliamentary Commissioner Act 1967* be amended

to allow MPs to make a complaint directly and without having to act through another MP (para. 65).

The Government response to the Public Service Committee Report[66] indicated that it wished to take the views of the PCA Select Committee into account before giving a substantive response. Its initial response noted "however, as the Ombudsman was created explicitly as a channel for investigating complaints against the Executive by private citizens, the proposal would constitute a major departure from the basic principles of the 1967 Act and could involve a diversion of the Ombudsman's limited resources form his original customers."[67]

In response to the Committees more general recommendations on the Code the Government response agreed that in future reasons should be given when information is refused in response to a PQ:

30. We welcome the fact that there is a public interest test in the Code of Practice on Access to Government Information. We recommend that where Ministers refuse to answer Parliamentary Questions or refuse to give information in other ways they should make it clear why the information is being refused, under what aspect of the Code of Practice and whether or not the refusal of information is subject to the public interest test.

The Government agrees with the Committee on the importance of harm tests in the *Code of Practice on Access to Government Information. The Guidance on Answering Parliamentary Questions* at Annex C specifically refers to the need to consider the provisions of the Code of Practice when deciding whether information should be disclosed and in particular the need to reach a judgement as to whether disclosure would not be in the public interest. The Government agrees that in future reasons should invariably be given when information is being refused in response to a Parliamentary Question and that, except in those cases described in the following paragraph, these reasons should relate to the exemptions laid down in the Code. There may, particularly in the fields of defence, security and international relations, be cases where specifying the reason for non-disclosure in any detail would itself be prejudicial to the public interest; in such cases a reason will still be given but this may properly need to be in general terms. As the Code makes explicit which exemptions are subject to a specific harm test, the Government does not judge it necessary for this to be repeated in each individual answer to Parliamentary Questions.

There will continue to be occasions when a full answer cannot be given to a Parliamentary Question because the information is not available to the relevant Department or could only be obtained at disproportionate cost. Answers in such circumstances will continue to make clear that it is for these reasons (rather than for reasons connected with the Code) that information cannot be provided.

The Government response also accepted that Part II of the Code does not make clear that the general presumption in favour of disclosure applies even in those exempt categories which contain a harm test:

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[66] HC 67 1996/67

[67] Response to Recommendation 9

31. We recommend that the Code be revised to make clearer that it assumes that material should he published unless there are compelling reasons not to do so; and that this general presumption applies even in the exempt categories.

The Government agreed, in response to Recommendation 3 of the PCA Select Committee's Second Report on Open Government, that the purpose of the *Code of Practice on Access to Government Information* should be revised to express clearly the principle of availability of government information. In the past, this principle had only been expressed in the Guidance on Interpretation. The Government agreed to expand paragraph I of the Code to read:

> "This Code of Practice supports the Government's policy under the Citizen's Charter of extending access to official information, and responding to reasonable requests for information. The approach to the release of information should in all cases be based on the assumption that information should be released except where disclosure would not be in the public interest as specified in Part II of this Code.'

The Government accepts that Part II of the Code does not make clear that the general presumption in favour of disclosure applies even in those exempt categories which contain a harm test. It has always been the intention that, except in those categories where a mandatory prohibition on disclosure applies, information should be disclosed unless the harm likely to arise from disclosure outweighs the public interest in making information available. The Government proposes to make this clear by amending the first paragraph of the preamble to the exemptions in Part II of the Code to read:

> "The following categories of information are exempt from the commitments to provide information in this Code. *In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available."*

Consequential amendment will be made to the appropriate section of the Guidance.

The Government did not wish to grant a right of access to documents although noting that the Code makes no prohibition on making documents available in response to requests for information.[68]

In a debate on Open Government on 10 December 1996[69] Tony Wright, a member of the Public Service Committee, called for a Freedom of Information Act:[70]

> There is one issue to confront and the House can no longer avoid it. We have to decide whether information the lubricant of democracy-should be considered to be a grant from Government or a right of citizenship. If the House believes that it should continue to be a grant from Government, it will be happy to continue with codes that the House has never discussed, scrutinised or approved. If, however, it believes that information is a right of citizenship, it will demand legislation to enshrine that right. The House would then be able to scrutinise the issue and examine the advantages and disadvantages of the code. The House would own the legislation.

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[68] Response to Recommendation 32

[69] HC Deb. vol. 287 c.145-173

[70] HC Deb. vol. 287 10/12/96 c.165

Derek Foster, for the Opposition, reaffirmed Labour's support for such an Act [c.169]. In response Roger Freeman announced that he would issue a revised code as soon as the House returned after the Christmas recess:[71]

> At the centre of our policy towards openness is the code on access to information, not a freedom of information Act. I am pleased that the Select Committee welcomed what we had achieved with the code on access and I shall publish, as soon as the House returns, a new, revised code on access to information and I shall place a copy in the Library. I shall also write to the right hon. Member for Bishop Auckland. The new code will take into account the various recommendations for improvement that we have received, in particular, from the Select Committee On Public Service. I hope that it will be an improvement and I am sure that it will be because it deals with what I call the harm test. The addition to the code also, if I might quote from the final draft which I have circulated to the Chairman of the Select Committee on the Parliamentary Commissioner for Administration earlier today, states:
>
> "The approach to release of information should in all cases be based on the assumption that information should be released".
>
> It is, therefore, presumptive. Later on, it states:
>
> "In those categories which refer to harm or prejudice"-
>
> the harm test, which should be used when deciding whether information should not be disclosed-
>
> "the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available."
>
> There are many other amendments and we have tried to ensure that they are in keeping with the report.

The new Code was issued in response to a PQ on 14 January 1997 and will come into effect from 1 February.[72]

III The Osmotherly Rules

Peter Hennessy notes[73] that these rules were first formally issued by E.B.C. Osmotherly, a civil servant in the Machinery of Government Division in the Cabinet Office in May 1980.[74] The rules had first came to public light when the Procedure Committee report of 1977/78 [HC

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71 HC Deb. vol. 287 10/12/96 c.170

72 HC Deb. vol 288, 14.1.97, c.188/9W Dep 4374

73 *Whitehall* (1989) pp 361-363

74 Memorandum of Guidance for Civil Servants Appearing before Select Committees [Dep 8664]. See generally Background Paper 298 Select Committees

588] 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 (paras. 7.12-7.16) 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" (para. 7.12).

The rules, however, quickly came to be seen 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. Hennessey notes that in January 1984 in the newspaper of the Campaign for Freedom of Information,[75] 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. 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[76] and Treasury[77] Committee Reports.[78] 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 the 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 [Dep 3797].

In its evidence to the 1990 Procedure Committee the academic members of the Study of Parliament Group sought significant revision of the Osmotherly Rules:[79]

The "Osmotherly Rules"

> The Cabinet Office's *Memorandum of Guidance for Officials Appearing before Select Committees* (commonly known as the "Osmotherly Rules") has accurately been described by the Liaison Committee as ..a fair statement of a not very satisfactory situation". However, we share the views expressed by the Treasury and Civil Service Committee, in the context of its 1985-86 inquiry into *Civil Servants and Ministers: Duties and Responsibilities,* that conventional constitutional orthodoxies about the roles and duties of civil servants vis-a-vis

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[75] Secrets no 1 January 1984
[76] HC 100 1986/87
[77] HC 62 1986/87
[78] Accountability of Ministers and Civil Servants Cm 78 February 1987
[79] HC 19-II 1989/90 p.204

ministers need to be reconsidered in the light of recent experience. The Osmotherly Rules - which restate such orthodoxies in uncompromising terms, and at daunting length (the March 1988 version consists of 25 pages of single-spaced typescript, and several substantial annexes) - were drafted in circumstances where the relative novelty of investigative select committees gave rise to uncertainty about the position of civil servants appearing before them. That novelty has now worn off and the Rules, in their present form, have a distinctly ponderous and old-fashioned flavour. There is already some evidence that senior civil servants are re-thinking their own conceptions of public accountability. Select committee work - which requires named officials, sometimes relatively junior ones, to appear in public - has become a familiar part of the landscape of Whitehall life.

We are not aware that the Osmotherly Rules have explicitly been invoked by officials asked to give evidence to committees. However, their generally negative tone must, we believe, 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.

Peter Hennessy discussed this further in his oral evidence [ibid, QQ657-672], and Gavin Drewry said that the Osmotherly Rules "really have the sort of baleful impact that the Official Secrets Acts have always had; namely, they are very seldom invoked but they cast a pall of gloom and unnecessary reticence over what should be essentially open proceedings" [Q662].

The Procedure 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.

They did make a number of proposals, e.g. to enshrine more clearly the duty of departmental witnesses to be as helpful as possible to committees [para 158]:

This goes beyond giving direct replies to questions; it is well understood that the literally correct answer may conceal as much information as it imparts. **It should be the aim of Departments to ensure that Select Committees are furnished with any important information which appears to he relevant to their inquiries, without waiting to he asked for it specifically. We recommend accordingly.**

They also thought officials could be more forthcoming about the level at which decisions were taken and the extent of involvement of different departments [para 159] and about

factual information on policy options under consideration i.e. information about the **subjects** rather than the content of officials' advice to Ministers [para 160]:

We therefore urge the Government to review these specific aspects of its approach towards the giving of evidence to Select Committees with the aim of formulating a more constructive and open policy.

The Government produced a very full response to this aspect of the Report:[80]

The Government's commitment to make information available to select committees remains as stated by the Leader of the House when the select committee system was established in its present form on 25 June 1979:

> "The Government will make available to select committees as much information as possible, including confidential information for which, of course, protection may have to be sought by means of the sidelining procedure. There may also from time to time be issues on which a minister does not feel able to give a select committee as much information as it would like. But on these occasions ministers will explain the reasons for which information has to be withheld. There need be no fear that departmental ministers will refuse to attend committees to answer questions about their departments or that they will not make every effort to ensure that the fullest possible information is made available to them." (Official Report, Vol 969, Col 45)

The Memorandum of Guidance for Officials Before Select Committees (March 1988) is consistent with this policy, and in addition defines the distinction position of officials, who give evidence to committees on behalf of their ministers. Paragraph 20 of the Memorandum says:

> "The general principle to be followed is that it is the duty of officials to be is helpful as possible to committees, and that any withholding of information should be limited to reservations that are necessary in the interests of good government or to safeguard national security. Departments should, therefore, be as forthcoming as they can (within the limits set out in this note) when requested to provide information whether in writing or orally."

Paragraph 48 says:

> "The general aim of departments should be to assist committees by disclosing to them whatever official information they may require for the carrying out of their parliamentary functions, providing there are not overriding reasons of security or other grounds for withholding such information."

In specifying certain limitations on the provision of evidence, and identifying matters on which officials should properly refer committees to ministers, the Memorandum follows well-precedented conventions which have been observed by successive administrations. They are summarised for example in a letter from the then Leader of the House to the Chairmen of certain select committees dated May 1967, which is reproduced at Annex C to the Memorandum. Paragraph 28 of the Memorandum says that committees' requests for information should not be met regardless of cost or of diversion of effort from other important matters.

The Committee's request that the Government should review certain specific aspects of its approach towards the giving of evidence has been fulfilled in the context of these conventions. The Government notes also the Committee's finding that there is no evidence that the existence of the rules in the Memorandum of Guidance, or their current working, have placed unacceptable constraints on select committees across the whole range of their scrutinising functions, paragraph 157) and is pleased to note that the majority of committees have described the Government's attitude to the

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[80] Cm 1523, p.8-11

provision of information as helpful and co-operative and very few have reported any specific disagreements (paragraph 153). In addition to helping with specific inquiries, it has become standard practice in most departments to inform the relevant select committee of important developments. The overall result has been a very substantial increase in the flow of information from the Executive to Parliament.

Under the direction of ministers, departments will seek to sustain their constructive and helpful approach to the provision of relevant information. Relevance is a subject matter, and many inquiries are wide-ranging in scope. Departments can more readily assist, and make the most effective use of their own resources, if they have a clear view of the focus of committees' interests. Departments are greatly assisted in their preparation of written submissions and oral evidence if committees define the questions they wish to address and the aspects of a topic which interest them as closely as possible.

The 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 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 die 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.

The Committee also observed that it should be possible to tell committees what options are under consideration and their costs. Whether such disclosure is appropriate will depend partly on ministers' wishes in each case as to the extent of parliamentary and public consultation in advance of the decision in question. On some issues ministers will very much welcome committees' views and will be prepared to set out and cost the options under consideration. In other circumstances the decision under review may be sensitive because of political, commercial, market, defence, diplomatic or other considerations, and ministers may not think it right to describe the options under consideration to the committee. In all cases ministers, rather than officials, will have the final decision as to what information is given to committees. This need not preclude committees from conducting inquiries into matters which the Government is simultaneously considering. The Government will continue to be as helpful as possible, but for the reasons explained above, ministers and officials may in some circumstances have difficulty in providing full answers to questions which seek access to departmental consideration of sensitive policy issues in advance of collective ministerial decisions.

The Government therefore believes that its existing policy on disclosure of information to select committees is constructive and open within well-established limitations which can be justified in the interests of good government. It sees no case for departing from it, and repeats the existing undertaking, quoted in paragraph 124 of the Committee's report, to seek to provide time to enable the House to express its view where there is evidence of widespread general concern in the House regarding an alleged ministerial refusal to disclose information to a select committee.

In a Radio 4 *Analysis* programme in 1991[81] 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. "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"[82] received evidence on the Osmotherly rules summarising as follows, without making specific recommendations on its 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 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

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[81] 21.11.91 Transcript pp 16-17

[82] HC 27 Session 1993/94

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.

131. Professor Hennessy saw the Osmotherly Rules as symptomatic of a wider acquiescence of Parliament in the authority over it of the Executive. He vividly characterised Select Committees as "self-gelding capons" and contrasted the powers of Select Committees unfavourably with those of a court. Others argued that Select Committees could be more assertive and effective in deploying the powers they already possessed and in examining policy, expenditure and administration more generally. Mr John Garrett believed that the machinery of Parliament had lagged far behind the machinery of Government. Select Committees were established to scrutinise unitary departments, but were now required to examine departmental headquarters, Executive Agencies, Quangos and contracts. Parliament received a wider range of information than it could effectively monitor: "Parliament today cannot keep track of what is happening in today's fragmented Civil Service". Select Committees required more staff to analyse the information emerging from "today's dismembered Government".

A new issue of the Osmotherly Rules was issued in December 1994 [Dep NS 815] now entitled *Departmental Evidence and Response to Select Committees.*[83] New paragraphs appeared on the position of retired officials (para. 43)[84] and on Agency Chief Executives (para. 42).

The Rules also made reference to the Code of Practice on Access to Government Information "noting that the principles of openness that it enunciates should be taken to apply also to Parliament and its Select Committees. "Departments may therefore find it helpful to consult both the Code and Guidance on Interpretation". (para. 63). The Select Committee on the Parliamentary Commissioner for Administration report on Open Government[85] considered this advice to be "unacceptably casual" (para. 61), and recommended that the Rules be revised to take full account of the provisions of the code (para. 61). The Government accepted this recommendation as follows:[86]

16. Parliament must expect that any answers it receives to requests for information at least meet the standards set down in the Code. We recommend that "Departmental Evidence and Response to Select Committees" be revised to take full account of the provisions of the Code. [Para. 61]

The Government accepts this recommendation.

There has never been any intention that the Government should be any less open with Parliament than with members of the public under the Code of Practice on Access to Government Information. The Government believes that this principle is clearly stated

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[83] It is assumed in this Paper that the 1994 version will continue to be known colloquially as the 'Osmotherly Rules'

[84] 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

[85] HC 84 Session 1995/96

[86] HC 75 Session 1996/97

in "Departmental Evidence and Response to Select Committees" but acknowledges that it may not make absolutely clear that there should be a requirement for any official responding to a Member's question to he aware of the obligations of the Code. It will consider ways of emphasising the point in future editions of this guidance and will, in the meantime, draw the matter to the attention of departments.

A new version of the rules appeared on January 1997 (see below). The Scott Report[87] argued that Ministers should have allowed retired civil servants to appear before the Trade and Industry Select Committee inquiry into Arms for Iraq[88] in 1992 stating "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'" [F4.64].

The Public Service Committee Report published in July 1996[89] reviewed the operation of the Osmotherly Rules, rehearsing earlier clashes between Select Committees and the Government (paras. 72-83). 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 (paras. 113-114). It also recommended a new Resolution for Ministers underlining the obligation to be as open as possible with the House (paras. 55-60) which 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" (para. 82). It further recommended that Ministers accept requests by Committees that individually named civil servants give evidence to them (para. 83), 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[90] accepted the first of the recommendations relating to Chief Executives but not the second. 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.[91]

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87 February 1996 HC 115

88 Exports to Iraq: Project Babylon and Long Range Guns HC 86 1991/92

89 Ministerial Accountability and Responsibility HC 313 Session 1995/96

90 HC 67 Session 1996/97

91 Response to Recommendation 12

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.

The January 1997 version of the Osmotherly Rules[92] omits certain paragraphs in earlier texts dealing with limitations on the provision of information and advises 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 (paras. 37-39) as follows:[93]

SECTION 3: ROLE OF OFFICIALS GIVING EVIDENCE TO SELECT COMMITTEES

General

38. Officials who give evidence to Select Committees do so on behalf of their Ministers and under their directions.

39. This is in accordance with the principle that it is Ministers who are directly accountable to Parliament for both their own policies and for the actions of their Departments. officials are accountable to Ministers and are subject to their instruction; but they are not directly accountable to Parliament in the same way. 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 48-49), or to become involved in what would amount to disciplinary investigations which are for Departments to undertake (see paragraphs 71-75)**

40. This Guidance Note should therefore be seen as representing standing instructions to officials appearing before Select Committees. These instructions may be supplemented by specific Ministerial instructions on specific matters.

The paragraphs on the summoning of named officials has also been rephrased, noting that where a committee insists on a particular official appearing before them, that official would remain subject to Ministerial instruction under the terms of the Rules and Code of Practice on Access to Government Information.

The paragraphs on agency chief executives and the position of retired officials were rephrased[94], but without substantial change to the meaning of the guidance. They now read as follows:

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[92] Departmental Evidence and Response to Select Committees Dep 4375

[93] Departmental Evidence and Response to Select Committees - final draft December 1996. Shaded text indicates additions. In the final version of 1997 these paragraphs are renumbered as para 37-39

[94] references to the duty of confidentiality in respect of retired officials is now omitted

Agency Chief Executives

43. Where a Select Committee wishes to take evidence on matters assigned to an Agency in its Framework Document, Ministers will normally wish to nominate the Chief Executive I as being the official best placed to represent them. While Agency Chief Executives have managerial authority to the extent set out in their Framework Documents, like other officials they give evidence on behalf of the Minister to whom they are accountable and are subject to that Minister's instruction.

Position of Retired Officials

44. Given the above, it is extremely rare, but not unprecedented, for Committees to request evidence from officials who have retired. A Committee could, again, issue an order for attendance if it chose. However, retired officials cannot be said to represent the Minister and hence cannot contribute directly to his 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.

Section 4B[95] has been substantially rewritten, with more explicit reference to the Code of Practice on Access to Government Information which is described as 'the authoritative instruction from Ministers to officials on the provision of information to Parliament and the public. It should be taken as superseding the instructions on provision of information by officials to Select Committees in previous editions of the Guidance'.[96] The paragraphs on internal discussion and advice (paras 70-71) and on internal organisation of government (paras 73-74) have been omitted, together with Cabinet and Cabinet Committee business, advice given by Law Officers and other legal advice (paras 75-77).[97] The paragraphs on international relations and commercial and economic information and personal information (paras 81-83) have also been omitted together with internal reports commissioned by Departments (paras 88-90). Paragraphs on the conduct of individual officials have been rephrased with additions warning that 'disciplinary and employment matters are a matter of confidence and trust (extending in law beyond the end of employment). In such circumstances, the public disclosure may damage an individual reputation without that individual having the 'natural justice' right of response which is recognised by other forms of tribunal or inquiry '.[98]

Paragraph 45 states the central principle behind the provision of evidence:

4A. PROVISION OF EVIDENCE BY OFFICIALS: CENTRAL PRINCIPLES

General

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[95] formerly *Limitations on the provision of information* now titled *provision of information*

[96] para. 63, January 1997 edition

[97] references are to the December 1994 edition

[98] para 72 January 1997 edition

46. The central principle to be followed is that it is the duty of officials to be as helpful as possible to Select Committees. The Government's wider policies on openness to Parliament and the public are set out in the Code of Practice on Access to Government Information (Annex A). Officials should be as forthcoming as they can in providing information under the terms of the Code, whether in writing or in oral evidence, relevant to a Select Committee's field of inquiry. 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.

IV "Guidance on answering Parliamentary Questions: basic do's and dont's"

This government guidance to civil servants has come into being as a direct result of the Public Service Committee Report.[99] It is designed as clear and practical guidance on how the conventions on providing information to Parliament should be applied by civil servants drafting answers to Parliamentary Questions. A first draft of the guidance was submitted to the Committee by the Government, which the Committee subsequently printed in its report as Annex 3. The report noted "The proposed guidance is clearly influenced by comments in the Scott report, particularly on the nature of "answers which are literally true but likely to give rise to misleading inferences" (para. 50). The Committee was critical of the use of the term 'established Parliamentary Convention which it noted was meaningless. What was meant was the practice of Ministers in answering Parliamentary Questions, and the only points of reference should be the law and the Code of Practice on Access to Government Information (para. 50).

The Government response[100] accepted the Committee's points, and provided re-drafted guidance as follows:

ANNEX C

GUIDANCE TO OFFICIALS ON DRAFTING ANSWERS TO PARLIAMENTARY QUESTIONS

1. Never forget Ministers' obligations to Parliament which are set out in *"Questions of Procedure for Ministers":*

   "Ministers must not knowingly mislead Parliament and the public and should correct any inadvertent errors at the earliest opportunity. They must be as open as possible with Parliament and the public, withholding 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."*

   "Ministers .... have a duty .... to give Parliament .... and the public as full information as possible about the policies, decisions and actions of the Government, and not to deceive or mislead Parliament and the public."

2. It is a civil servant's responsibility to Ministers to help them fulfil those obligations. It is the Minister's right and responsibility to decide how to do so. Ministers want to explain and present Government policy and actions in a positive light. They will rightly expect a draft answer that does full justice to the Government's position.

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[99] HC 313 1995/96
[100] HC 671 1996/97

3. Approach every question predisposed to give relevant information fully, as concisely as possible and in accordance with guidance on disproportionate cost. If there appears to be a conflict between the requirement to be as open as possible and the requirement to protect information whose disclosure would not be in the public interest, you should check to see whether it should be omitted in accordance with statute (which takes precedence) or the *Code of Practice on Access to Government Information*, about which you should consult your departmental openness liaison officer if necessary.

4. Do not omit information sought merely because disclosure could lead to political embarrassment or administrative inconvenience.

5. Where there is a particularly fine balance between openness and non-disclosure, and when the draft answer takes the latter course, this should be explicitly drawn to the Minister's attention. Similarly, if it is proposed to reveal information of a sort which is not normally disclosed, this should be explicitly drawn to Ministers' attention.

6. If you conclude that material information must be withheld and the PQ cannot be fully answered as a result, draft an answer which makes this clear and which explains the reasons in equivalent terms to those in the Code of Practice, or because of disproportionate cost or the information not being available. Take care to avoid draft answers which are literally true but likely to give rise to misleading inferences.

V Civil Service Code of Conduct

The campaign for a civil service code of conduct or code of ethics seems to have gained momentum following the Ponting case, where Clive Ponting was acquitted of breaking S.2. of the *Official Secrets Act 1911* in leaking information on the Belgrano affair to Tam Dalyell. Sir Robert Armstrong, head of the Home Civil Service issued a note "The Duties and Responsibilities of Civil Servants in relation to Ministers".[101] It stated 'Civil Servants are servants of the Crown - For all practical purposes the Crown in this context means and is represented by the Government of the day' (para. 2). Civil Servants who felt that a fundamental issue of conscience was involved were told to consult a superior officer or the Permanent Secretary who could consult the head of the Home Civil Service. (para. 11)

The note drew on an unpublished document written in the 1950s by Sir Edward Bridges, and a memorandum prepared by Sir Warren Fisher head of the Home Civil Service from 1919-1939 for a Parliamentary Committee.[102]

The then FDA General Secretary, John Ward, had noted in 1985 that Civil Servants had no clear code on ethical matters quoting the text of Civil Service Establishment Officers Guide as follows: "nor has it ever been thought necessary to lay down a precise code of conduct because civil servants jealously maintain their professional standards. In practice, the distinctive character of the British Civil Service depends largely on the existence and maintenance of a general code of conduct which, although to some extent, intangible and unwritten, is of very real importance."[103] The FDA argued for a Code of Ethics for Civil Servants and produced a draft discussed at its 1986 Conference. Following Ponting the Treasury and Civil Service Committee undertook an inquiry into the duties and responsibilities of civil servants. Interest was further heightened by the Westland affair where there was controversy over publicity given to the actions of individual civil servants.

The TCSC report[104] commented on the Armstrong Memorandum:

> 3.2. While it is not our intention to engage ourselves in the pursuit of such a definition, it also appears the Crown is perceived largely as a symbol for the nation, something to which civil servants and others may owe a loyalty higher and more lasting than that which they owe to the government of the day. This may have been a consideration in the minds of those civil servants who passed information to Winston Churchill when he was in opposition at the time of appeasement. Certainly for some, the Crown serves as a permanent and potent symbol. Those whose prime

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[101] reproduced in Dep NS 1391 25/5/85 and HC Deb 26/2/85 c.128-30

[102] *Times* 27/2/85 "Civil Servants' duty is to Ministers"

[103] "The Civil Service and the State"*Catalyst* Winter 1985

[104] HC 92 Session 1985/86

loyalty is to the government of the day look to the Crown as a more enduring expression of their position within the constitution.

The possibility of an appeal to the head of the Home Civil Service was introduced into a revised version of the memorandum issued in 1987 following the acceptance of a recommendation on this point by the Treasury and Civil Service Committee Report.[105] The FDA had argued for an independent body for appeals. The revised memorandum was issued[106] following comments from the Treasury and Civil Service Committee, the Defence Select Committee, and the Civil Service unions. It was prefaced by a paragraph setting out Ministers' own responsibilities, which was published in the Government's reply to the Seventh Report from the Treasury and Civil Service Committee[107]. Paragraph 4 of the 1987 note greatly expanded the concept of ministerial accountability to Parliament, and quoted directly from the Government's response to the fourth report of the Defence Committee of 1985/86.[108] A new requirement was that authority should be sought for any disclosure whatsoever, and that unauthorised disclosure might result in civil action for breach of confidence.

The *Official Secrets Act 1989* repealed s.2 of the 1911 Act and made it a criminal offence to disclose official information without lawful authority in six specified categories. Other official information remained protected by the Civil Service Discipline Code (now incorporated into the Management Code). A revised code was issued which sets out a range of disciplinary penalties if confidentiality is breached. In addition staff were not to "seek to frustrate the policies of decisions of Ministers by the use or disclosure outside Government of any information to which they have had access as Civil Servants."[109]

Following a further recommendation by the Treasury and Civil Service Committee[110] the Armstrong memorandum was incorporated into the Civil Service Management Code. The Treasury and Civil Service Committee report in November 1994[111] summarised contemporary thinking on the status of the Armstrong Memorandum:

88. The most important guide to civil servants on their conduct in relation to Ministers is in Relation to Ministers is the Note first issued by the then Head of the Home Civil Service in 1985 entitled "The Duties and Responsibilities of Civil Servants in Relation to Ministers" known after it author as the Armstrong Memorandum. It was prepared by Sir Robert Armstrong with the consent of the

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[105] para. 4.16 HC 92 1985/86

[106] HC Deb 2/12/87 c.572-575W

[107] Cmnd 9841

[108] Cmnd 8916 (This report had commented on the Westland affair, considering that Ministers had not made themselves fully accountable to Parliament, and as a result the conduct of civil servants had been called into question) para. 235 HC 519 1985/86

[109] para. 4.2.6 Management Code

[110] The Civil Service Pay and Conditions of Service Code HC 260 1989/90

[111] HC 27 Session 1993/94

Prime Minister in consultation with Permanent Secretaries in charge of Departments and issued with their agreements It appears to have no authority beyond that of the Cabinet Secretary of the time, a matter which has caused concern to the FDA. It was first issued in the wake of the trial of Mr Clive Ponting. The Government stated that it was not intended to break new ground, instead seeking to restate long-standing principles. The Armstrong Memorandum was the focus of an inquiry by our predecessors in 1985 and 1986. The Report of the then Treasury and Civil Service Committee reflected the widespread view expressed in evidence that the Armstrong Memorandum was a correct statement of the constitutional position as it had been understood throughout this century and even earlier, but the Committee questioned its adequacy as an appreciation of existing political and constitutional realities. The Committee did not endorse the Armstrong Memorandum, nor do we believe it accepted its adequacy to the extent that the Government has subsequently implied.

89. The purpose of the Armstrong Memorandum was to make clear to civil servants who might have dealings with Ministers how they should respond in certain situations they might face. Accordingly, it was intended principally for senior civil servants. Sir Robin Butler thought the Armstrong Memorandum had "stood the test of time very well"; he was not conscious of any inadequacies or defects which might necessitate amendments. Mr Waldegrave also saw it as "a pretty good statement of what the ethical situation is and should be", considering it "a powerful document". This view was shared by others.

90. The Armstrong Memorandum is forthright in describing the nature and position of the British Civil Service:

> "Civil servants are servants of the Crown. For all practical purposes the Crown in this context means and is represented by the Government of the day ... The Civil Service as such has no constitutional personality or responsibility separate from the duly constituted Government of the day ... The British Civil Service is a non-political and professional career service subject to a code of rules and disciplines."
>
> It is common ground that the Civil Service defies an easy universally applicable definition and a civil servant has no specific legal status as is the case in France, but the statement that "the Crown in this context means and is represented by the Government of the day" has given rise to some controversy. The FDA expressed a separate concern that the statement that *"For all practical purposes* the Crown in this context means and is represented by the Government of the day" was too sweeping. The FDA contended that civil servants had duties other than their duties to the Government of the day, such as their duty to obey the law, specific duties imposed by law and duties as members of professions, which, by their nature, had to qualify loyalty to the Government. The Government has responded to the FDA's concern in the following terms:
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> "The Armstrong Memorandum cannot be given the interpretation that a civil servant has no duties *except* to the Government of the day. As well as having the normal obligation of any employee to give honest and faithful service, to obey the lawful orders of his employer and to act in a manner consistent with the bond of trust and confidence between employer and employee, civil servants have a number of duties including, like any other citizen, a general duty to obey the law and to deal honestly. They may also have specific professional duties, for

example as doctors or lawyers. Equally they may have dictates of conscience which are individual to them. The Armstrong Memorandum fully recognises that all these exist and is indeed designed to give guidance on what to do if civil servants feel that they are being given instructions which conflict with them. None of this is inconsistent with saying that civil servants are subservient to Ministers as the representatives of the Crown in Parliament ..."

We believe this response by the Government to the FDA's points is very clear. Indeed, in clarity it exceeds the Armstrong Memorandum itself.

The Committee also examined the Civil Service Management Code, which is the most recent version in a series of codes issued by the Minister for the Civil Service under powers granted by successive Civil Service Orders in Council.[112] It was introduced in 1993 and is mandatory.

(v) The existing framework.. conclusions

101. The Government believes that the documents we have described and the procedures for monitoring and upholding their contents provide a satisfactory framework for maintaining the essential values of the Civil Service: "the Government and its predecessors have consistently taken the view that, within our constitutional arrangements, the standards and ethics essential to the operation of the Civil Service, described in these documents, are well founded and well understood". **We do not agree with this sanguine verdict. None of the documents examined states the essential values of the Civil Service with sufficient clarity. Each document is directed to a particular audience: the Armstrong Memorandum to civil servants dealing with Ministers; The Civil Service Management Code to managers in the Civil Service; Questions of Procedure for Ministers to Ministers. None communicates a clear and simple message to all civil servants and to the wider public about the standards to he upheld. The Armstrong Memorandum appears increasingly dated. We do not believe it can be viewed as an authoritative summary of the constitutional position and role of the Civil Service. We welcome the publication of Questions of Procedure for Ministers, but are not convinced of the adequacy of its instructions relating to Ministers' dealings with civil servants.**

102. **We have similar doubts about the existing mechanisms for upholding the standards enunciated in these documents. In the last century Mr William Gladstone remarked that the British Constitution "presumes more boldly than any other the good faith of those who work it". This remains true today, and it need be no reflection upon the good faith of the current generation of Ministers and senior civil servants to suggest that public trust in such a system is diminishing and is likely to diminish further. The system for upward referral within Government of issues of propriety and illegality is necessary but not sufficient. We believe that there is convincing evidence that the existing procedures do not command the confidence of all civil servants. The preservation of the principles and values of the Civil Service is too important to be left to Ministers and civil servants alone.**

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[112] Civil Service Order in Council 1991 Section 6(a)

It recommended the establishment of a civil service code of ethics (para. 103-107) and an independent appeals procedure based on a strengthened Civil Service Commissioner body (paras. 108-112). It also called for a Civil Service Act to provide statutory backing to maintain the essential values of the Civil Service (para. 116).

The Treasury and Civil Service Committee included a draft Code at Annex 1 of its report, upon which it invited detailed comments from the Government.

The Government response published in The Civil Service: Taking Forward Continuity and Change[113] accepted the proposal for a new Civil Service Code, and provided a revised version of the Committee's draft as an Annex. However, it did not accept that the Armstrong Memorandum or the *Questions of Procedure for Ministers* were inadequate.

The Government response also provided a useful commentary on the amendments proposed, and the antecedents of the Code.[114] Probably the most controversial amendment was the addition of 'knowingly' to the Committee draft paragraph 3.[115] This had rephrased the Questions of Procedure for Ministers, noting that Ministers should not deceive or mislead Parliament and the public. 'Knowingly' was also inserted into draft paragraph 5 with respect to misleading Ministers, Parliament and the public. The addition was justified as consistent with the Government response to recommendation 17 of the Committee's report:

> **17. We consider that any Minister who has been found to have knowingly misled Parliament should resign (paragraph 134).**
>
> As the Prime Minister made clear in his letter to the Chairman of the Sub-Committee of 5 April 1994:
>
> > "It is clearly of paramount importance that Ministers give accurate and truthful information to the House. If they knowingly fail to do this, then they should relinquish their positions except in the quite exceptional circumstances of which a devaluation or time of war or other danger to national security have been quoted as examples."

This wording remains in the final text of the Code.

The Government also accepted their recommendations for an independent appeals procedure and did not reject the possibility of a Civil Service Act noting as follows:

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[113] Cm 2748 January 1995

[114] This was mainly drawn from Questions of Procedure for Ministers and the Civil Service Management Code

[115] See Annex for the text of the Code

Legislation on the Civil Service

2.15 It is possible for the Government to consult on and introduce a new Civil Service Code without legislation, and to confer new functions on the Civil Service Commissioners as proposed. in this Command Paper without legislation, by Prerogative action and Order in Council. The independence of the Commissioners has been sustained on this basis for more then 100 years. The Royal Prerogative denotes the constitutional authority which rests with the Crown, as opposed to the Courts or Parliament. The management of the Civil Service is one of the aspects of the Prerogative which is exercised by Ministers on behalf of the Crown. It follows that it is for Ministers alone to issue instructions concerning the management of the Civil Service, and that they do not require Parliamentary authority to do so. The Prerogative in this context resembles the power of other employers to employ without special legislative authority. Special legislation relating to terms and conditions of employment in the Civil Service might obscure the fact that the basis of employment of civil servants is contractual. A new Code could also be promulgated as soon as it had been agreed, without waiting for a legislative opportunity.

2.16 Nevertheless, the Government retains an open mind about the case, advanced by the Select Committee and others, for giving statutory backing to the rules in connection with the terms and conditions of employment of civil servants, including the new Code. It acknowledges the view that additional authority would be conferred on the proposed Civil Service Code, including the new role envisaged for the Commissioners, by a statutory approach and that such legislation if based on cross-party consensus could be an effective means of expressing and entrenching general agreement on the nonpolitical nature of the Civil Service; and it recognises that the Select Committee recommended narrowly-based legislation on these lines on the basis that ic could command wide support. The Government would welcome further discussion of such an approach.

2.17 The Government is, however, cautious about the prospect of opening up the possibility of change in the constitutional position of the Civil Service, and thereby risking its politicisation. It would not introduce or support legislation which ran such risks or specified in detail the employment rights of the civil servants, conferring on them privileges or disadvantages relative to other employees, or inhibiting effective and efficient management. Before introducing a Civil Service Bill the Government would, therefore, need to be satisfied that there was a broad measure of agreement on legislation which sustained rather than altered the existing constitutional position of the Civil Service, retained the flexibility of the existing arrangements for regulating the terms and conditions of civil servants, and did not change the position of civil servants under general employment law.

The Government response noted that only one case had been formally referred to the Head of the Home Civil Service in the past 8 years under the existing appeals procedure (para. 2.9). The new role envisaged for the Civil Service Commissioners was set out in paras. 2.13-14. Briefly, the First Commissioner is to have an important role in considering whether posts in the senior civil service should go to open competition, and in reviewing Ministerial decisions which in his view departed from the principle of selection on merit. The Commissioners as a whole are to be responsible for ensuring the interpretation of the principles of fair and open competition on merit for all Civil Service recruitment.

The Nolan Committee also examined the text of the proposed code, and the planned independent appeal mechanism. Nolan was concerned to ensure that the Code covered circumstances which might loosely be described as 'whistle-blowing' i.e. where a civil servant became aware of a wrongdoing or maladministration by others. It also recommended that departments nominate an official to investigate staff concerns raised confidentially.[116] It recommended that the Civil Service code be introduced without waiting for legislation.

The Government Response[117] accepted the whistleblowing recommendations, while rephrasing the terms to reflect a duty to report evidence of criminal or unlawful activity.[118] Staff would not be required to use the confidential channel proposed but officials would be nominated, and guidance incorporated into the Civil Service Management Code. It rejected however recommendations from Nolan for the Civil Service Commissioner to give detailed information about appeals made before them; leaving the nature and extent of reporting up to the Commissioners to decide.[119] The Government response invited further comments on its draft of the Code.[120]

Derek Foster, the Opposition spokesperson, noted that he still had some reservations about the text of the Code:[121]

I have a few reservations about the code. It is arguable that it does not fully address the relationship between civil servants and Parliament, especially parliamentary Select Committees. Secondly, the code does not adequately deal with a civil servant's relationship with the public. It is possible, for example, that Scott will argue that civil servants have a duty to the public interest over and above the duty that they have to Ministers.

Finally, the Chancellor of the Duchy will agree that the acid test of the code's effectiveness will be how it is implemented and received in the civil service. He will know that the Council of Civil Service Unions

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[116] Chapter 3 paras. 53-54 Cm2850 First Report of the Committee on Standards in Public Life
[117] Cm 2931 July 1995
[118] Response to Recommendation 23
[119] Response to Recommendation 24
[120] Response to Recommendation 26
[121] c.462

argues with some force that central Departments in the civil service should issue detailed advice and guidance to departments on a wide range of issues.
Robert Maclennan, for the Liberal Democrats commented:[122]

The code has two main merits. First, it sets out clearly and in one place the responsibilities and duties of civil servants, and the responsibilities and duties of Ministers in relation to civil servants. That has not been done before. Secondly, it provides for the first time an independent appeals system for aggrieved civil servants, protecting them against misuse of their services by Ministers.

I cannot pretend that it was merely the merits of our arguments that won the day. We have all described the Scott inquiry as hovering over Parliament, Government and the civil service like a cloud or a sword of Damocles. I think that the Government felt the need for a response to be prepared beforehand, which was very sensible of them. They therefore changed their mind about the code. After spending about 18 months arguing against us, and sending the head of the civil service to argue against us, they suddenly said, 'Well, actually we have changed our mind and we accept your position.' I do not criticise the Government for that; in fact, I congratulate them on such sensible action.

The new code came into force from 1 January 1996.[123] The Armstrong memorandum has therefore been superseded by the Code which has been incorporated into the *Civil Service Management Code* which was re-issued in April 1996.[124] However, in evidence to the Public Service Committee the Cabinet Office advised that "the Memorandum remains a valuable Statement of Constitutional principles, and the Chancellor of the Duchy of Lancaster indicated his intention to issue a revision in due course. Such a document would have the status of standing guidance, and take account of, and be consistent with, the Civil Service Code. This revision is still in the course of preparation".[125]

Civil Service Code

1. The constitutional and practical role of the Civil Service is, with integrity, honesty, impartiality and objectivity, to assist the duly constituted Government, of whatever political complexion, in formulating policies of the Government, carrying out decisions of the Government and in administering public services for which the Government is responsible.

2. Civil servants are servants of the Crown. Constitutionally, the Crown acts on the advice of Ministers and, subject to the provisions of this Code, civil servants owe their loyalty to the duly constituted Government.

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[122] c.468

[123] Cabinet Office News Release 28/12/95 'New Civil Service Code comes into force'

[124] Paragraph 11 of the Armstrong Memorandum which deals with an instruction which would give rise to a clear breach of the law has been preserved at para. 7.7.6 of the Management Code

[125] Extract from a letter to the Clerk of the Committee 17/7/96 HC 313 II p.198

3. This Code should be seen in the context of the duties and responsibilities of Ministers set out in Questions of Procedure for Ministers which include:

- accountability to Parliament;
- the duty to give Parliament and the public as full information as possible about the policies, decisions and actions of the Government, and not to deceive or knowingly mislead Parliament and the public;
- the duty not to use public resources for party political purposes, to uphold the political impartiality of the Civil Service, and not to ask civil servants to act in any way which would conflict with the Civil Service Code;
- the duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching decisions; and
- the duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice;

together with the duty to familiarise themselves with the contents of this Code.

4. Civil servants should serve the duly constituted Government in accordance with the principles set out in this Code and recognising:

- the accountability of civil servants to the Minister or, as the case may be, the office holder in charge of their department;
- the duty of all public officers to discharge public functions reasonably and according to the law;
- the duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice; and
- ethical standards governing particular professions.

5. Civil servants should conduct themselves with integrity, impartiality and honesty. They should give honest and impartial advice to Ministers, without fear or favour and make all information relevant to a decision available to Ministers. They should not deceive or knowingly mislead Ministers, Parliament or the public.

6. Civil servants should endeavour to deal with the affairs of the public sympathetically, efficiently, promptly and without bias or maladministration.

7. Civil servants should endeavour to ensure the proper, effective and efficient use of public money.

8. Civil servants should not misuse their official position or information acquired in the course of their official duties to further their private interests or those of others. They should not receive benefits of any kind from a third party which might reasonably be seen to compromise their personal judgment or integrity.

9. Civil servants should conduct themselves in such a way as to deserve and retain the confidence of Ministers and to be able to establish the same relationship with those whom they may be required to serve in some future Administration. They should comply with restrictions on their political activities. The conduct of civil servants should be such that Ministers and potential future Ministers can be sure that confidence can he freely given, and that the Civil Service will conscientiously fulfil its duties and obligations to, and impartially assist, advise and carry out the policies of the duly constituted Government.

10. Civil servants should not without authority disclose official information which has been communicated in confidence within Government, or received in confidence from others. Nothing in the Code should be taken as overriding existing statutory or common law obligations to keep confidential, or to disclose, certain information. They should not seek to frustrate or influence the policies, decisions or actions of Government by the unauthorised. improper or premature disclosure outside the Government of any information to which they have had access as civil servants.

11. Where a civil servant believes he or she is being required to act in a way which:

- is illegal, improper, or unethical;
- is in breach of constitutional convention or a professional code;
- may involve possible maladministration; or
- is otherwise inconsistent with this Code;

he or she should report the matter in accordance with procedures laid down in departmental guidance or rules of conduct. A civil servant should also report to the appropriate authorities evidence of criminal or unlawful activity by others and may also report in accordance with departmental procedures if he or she becomes aware of other breaches of this Code or is required to act in a way which, for him or her, raises a fundamental issue of conscience.

12. Where a civil servant has reported a matter covered in paragraph 11 in accordance with procedures laid down in departmental guidance or rules of conduct and

believes that the response does not represent a reasonable response to the grounds of his or her concern, he or she may report the matter in writing to the Civil Service Commissioners.

13. Civil servants should not seek to frustrate the policies, decisions or actions of Government by declining to take, or abstaining from, action which flows from ministerial decisions. Where a matter cannot be resolved by the procedures set out in paragraphs 11 and 12 above, on a basis which the civil servant concerned is able to accept, he or she should either carry out his or her instructions, or resign from the Civil Service. Civil servants should continue to observe their duties of confidentiality after they have left Crown employment.

VI The Code of Conduct for Members of Parliament

This Code of Conduct has been approved in a Resolution of the House on 19 July 1995. It has been implemented following a recommendation from the first report of the Nolan Committee and the background is covered in recent Library Papers[126]

The Code itself is widely drawn, covering not only financial integrity, but also conduct which might bring the House into disrepute. It incorporates the seven general principles of public life set out by Nolan. The Code applies to all Members and the accompanying Guide to the Rules relating to the Conduct of Members[127] notes 'Ministers of the Crown who are Members of the House of Commons are subject to the rules of registration, declaration and advocacy in the same way as all other Members. In addition, Ministers are subject to further guidelines and requirements laid down by successive Prime Ministers in order to ensure that no conflict arises, nor appears to arise, between their private interests and their public duties (Questions of Procedure for Ministers'). These requirements are not enforced by the House of Commons and so are beyond the scope of the Guide' (para. 7). This paragraph does not, however, directly address whether Ministers are bound by the Code of Conduct for Members in their Ministerial Capacity *as well as* their capacity as Members. It also predates the proposed resolution on accountability, and the critical comments by the Public Service Select Committee on the undesirability of standards on accountability to Parliament being set by the Prime Minister alone.

The Code of Conduct for Members of Parliament

Prepared pursuant to the Resolution of the House of 19th July 1995

I. Purpose of the Code

The purpose of the Code of Conduct is to assist Members in the discharge of their obligations to the House, their constituents and the public at large.

II. Public duty

By virtue of the oath, or affirmation, of allegiance taken by all Members when they are elected to the House, Members have a duty to he faithful and bear true allegiance to Her Majesty the Queen, her heirs and successors, according to law.

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[126] Library Research Paper 95/60, *Aspects of Nolan - Members Financial Interests*, 95/109, *Aspects of Nolan -The proposals for Parliament*, 95/118 *The Nolan Resolutions*. This Paper does not deal with the issue of Members' financial interests

[127] HC 688 Session 1995/96

Members have a duty to uphold the law and to act on all occasions in accordance with the public trust placed in them.

Members have a general duty to act in the interests of the nation as a whole; and a special duty to their constituents.

III. Personal conduct

Members shall observe the general principles of conduct identified by the Committee on Standards in Public Life' as applying to holders of public office:-

> ***"Selflessness***
> *Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.*
>
> ***Integrity***
> *Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.*
>
> ***Objectivity***
> *In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.*
>
> ***Accountability***
> *Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.*
>
> ***Openness***
> *Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information on only when the wider public interest clearly demands.*
>
> ***Honesty***
> *Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.*
>
> ***Leadership***
> *Holders of public office should promote and support these principles by leadership and example.*"

Members shall base their conduct on a consideration of the public interest, avoid conflict between personal interest and the public interest and resolve any conflict between the two, at once, and in favour of the public interest.

Members shall at all times conduct themselves in a manner which will tend to maintain and strengthen the public's trust and confidence in the integrity of Parliament and never undertake any action which would bring the House of Commons, or its Members generally, into disrepute.

The acceptance by a Member of a bribe to influence his or her conduct as a Member, including any fee, compensation or reward in connection with the promotion of or opposition to, any Bill, Motion, or other matter submitted, or intended to be submitted to the House, or to any Committee of the House, is contrary to the law of Parliament.

Members shall fulfil conscientiously the requirements of the House in respect of the registration of interests in the Register of Members' Interests and shall always draw attention to any relevant interest in any proceeding of the House or its Committees, or in any communications with Ministers, Government Departments or Executive Agencies.

In any activities with, or on behalf of an organisation with which a Member has a financial relationship, including activities which may not be a matter of public record such as informal meetings and functions, he or she must always bear in mind the need to be open and frank with Ministers, Members and officials.

No Member shall act as a paid advocate in any proceeding of the House.

No improper use shall be made of any payment or allowance made to Members for public purposes and the administrative rules which apply to such payments and allowances must be strictly observed.

Members must bear in mind that information which they receive in confidence in the course of their parliamentary duties should be used only in connection with those duties, and that such information must never be used for the purpose of financial gain.

VII Proposed Resolution on Accountability

The Public Service Committee Report[128] recommended a resolution on accountability:

A Parliamentary Resolution on the duties of Ministers

53. We have made a number of proposals relating to the text of *Questions of Procedure for Ministers;* and we believe that it is right that the Prime Minister should set out the standards that he expects Ministers to live up to. Yet it seems extraordinary to us that the only explicit statement of how Ministers are expected to discharge their obligations to Parliament appears not in a Parliamentary document, but in a document issued by the Prime Minister which deals (amongst other things) with the travelling expenses of their spouses and the acceptance of decorations from foreign governments. Professor Peter Hennessy has referred to the document as "a mix of immutable principles with housekeeping practicalities". Not only does this ensure that *Questions of Procedure for Ministers* is rarely read as a statement of the principles that Ministers ought to follow; it also contributes to an illusion that the obligations on Ministers in relation to Parliament are derived from the instructions of the Prime Minister, and not from Parliament itself.

54. The convention that Ministers should not mislead the House is in fact derived ultimately from the concept of a 'contempt' of Parliament. Contempt is defined in Erskine May thus: 'Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence"". Erskine May also notes that the Commons "may treat the making of a deliberately misleading statement as a contempt". Although it is not explicitly stated in these terms, a refusal to provide information upon request might be construed as a contempt as well.

55. We recommend that the House underlines the obligations on Ministers to be open with the House, and not to mislead it, by passing a Resolution which would state the obligation, how it is derived, and how far it extends. The House has agreed on a number of occasions to Resolutions which have stated or imposed particular obligations on Members, for example the Resolution of 15 July 1947, as amended on 6th November 1995, and the other Resolutions of 6th November, relating to contractual arrangements which tend to limit Members' freedom of action in Parliament, or the Resolution of 22nd May 1974 relating to the Declaration of Interests by Members, and subsequent Resolutions amplifying and interpreting that Resolution. We note also that the Committee on Standards and Privileges has recently published its own Report with a specific proposal for a Code of Conduct for Members of Parliament'.

56. It might be objected that introducing such a statement could lead to a danger that the existing wide and (if used) powerful law of contempt would, in practice, be lessened. It might also be feared that by imposing what appears to be a heavier burden of accountability on Ministers than on other Members or other witnesses before Committees the House might imply that not all were bound equally by the law of contempt. The basic obligation that exists at

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[128] HC 313 Session 1995/96

present, to avoid misleading the House, is one that affects all Members (indeed, all witnesses as well). Introducing a separate standard of truthfulness for Ministers, rather than Members as a whole, might have the danger of implying less exacting standards for other Members and witnesses. We recognise these concerns, but we believe that it is possible to draft a Resolution which is sensitive to them.

The text of the proposed Resolution is as follows:

60. We recommend that the Resolution on accountability be in the following terms:

> **All Members of this House and all witnesses who come before it are obliged not to obstruct or impede it in the performance of its functions nor to obstruct or impede Members or Officers of the House in the discharge of their duty.**
>
> **This applies to Ministers, and to civil servants giving evidence in Parliament, just as it applies to any other person; and because Ministers have a duty to account to Parliament for the policies, decisions and actions of their departments and agencies, the House will regard breaches by them of the obligation described above as particularly serious.**
>
> **Ministers must take special care, therefore, to provide information that is full and accurate to Parliament, and must, in their dealings with Parliament, conduct themselves frankly and with candour. The House recognises that Ministers may need, upon occasions, to withhold information, but believes they should do so only exceptionally. They must not knowingly mislead Parliament and they should correct any inadvertent errors at the earliest opportunity. The House will expect Ministers who do knowingly mislead it to resign. Both Ministers and civil servants should be as cooperative as possible with Parliament and its Committees, and ensure that Committees and individual Members of Parliament receive the information and help they require from their**

The committee considered the problem of enforceability, noting the Clerk of the House's evidence proceedings for contempt based on a refusal to answer were extremely rare. It concluded that the Parliamentary Commissioner for Administration should receive complaints directly from Member under the *Code of Practice on Government Information* about withholding information (see above for further details), and that the Table Office provide a memorandum each session listing Questions where Ministers had refused to give information (para. 68). It also recommended that the Government make it a standard practice when withholding information in answer to a Parliamentary Question to explain the grounds on which information has been withheld (para.70).

The Government response to the Public Service Committee Report[129] acknowledged the value of the House making explicit how it expects Ministers to discharge their responsibilities to Parliament but objected to the proposed wording 'because it has the effect of weakening the line of accountability from civil servants to Ministers and from Ministers to Parliament'.[130]

Mr Freeman appeared before the Public Service Committee on 22 January 1997, and reported that all party talks in the text of the proposed Resolution were continuing; problems remained with the wording relating to civil servants (including Chief Executives).[131]

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[129] HC 67 1996/97

[130] Response to Recommendation 12

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