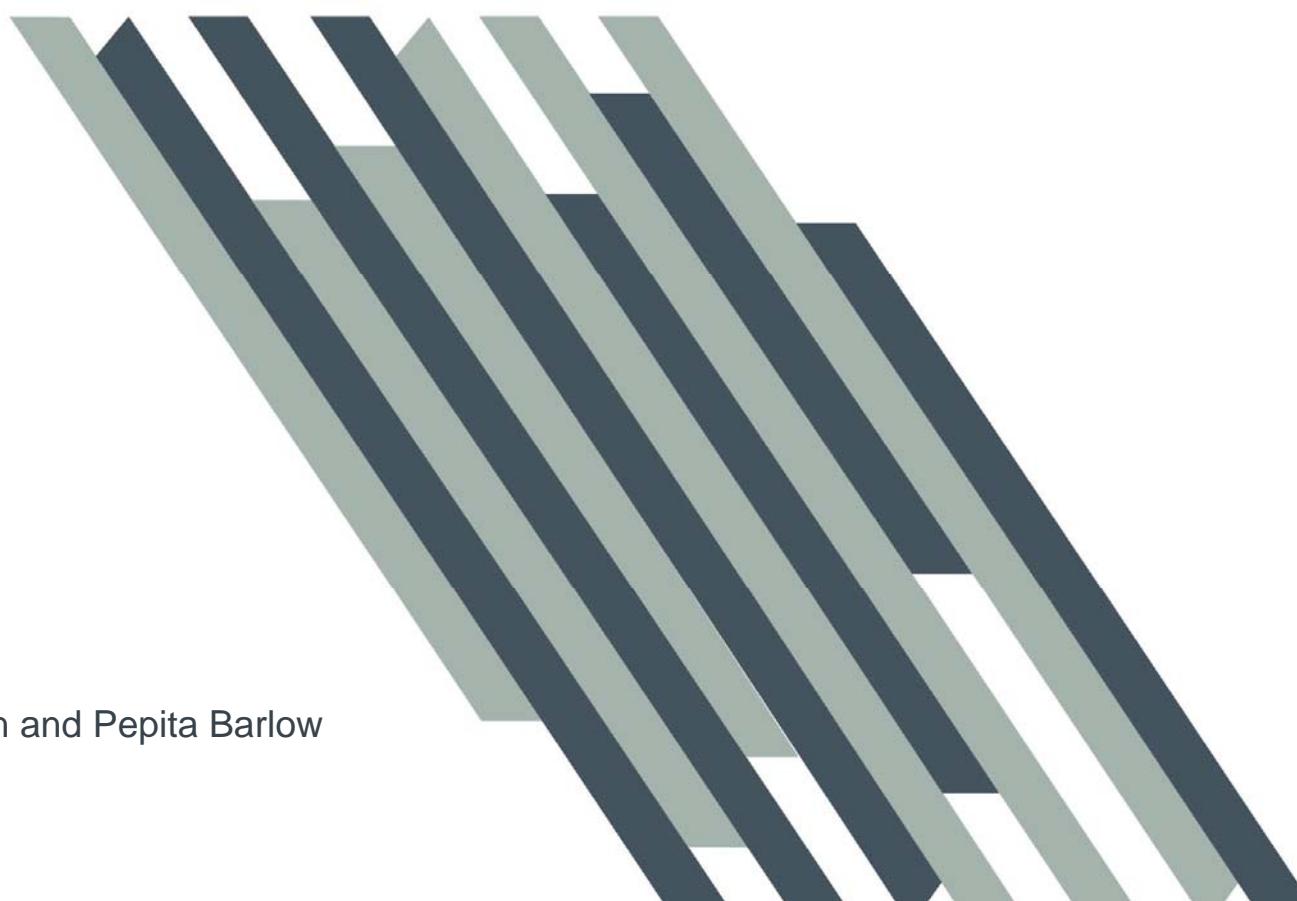


Civil Service Accountability to Parliament



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Any errors or omissions are the responsibility of the authors alone.

Summary

The constitutional convention of ministerial responsibility holds ministers responsible and accountable for their departments' actions and performance. Civil servants are accountable to ministers, not directly to Parliament. So while officials frequently appear before select committees, they do so to speak on behalf of their ministers rather than in their own right, and are restricted in what they can say.

These conventions lead to frustrations on the part of select committees about their ability to get to the heart of operational failings in Whitehall and to hold those responsible to account effectively. One committee chair has described individual ministerial responsibility as 'plain daft' given the scale and complexity of government. Another has spoken of 'a conspiracy', allowing both ministers and officials to escape accountability. Select committees also report unco-operative attitudes in certain departments, further undermining the scrutiny process. And some MPs believe that committees need stronger, perhaps statutory, powers, to compel witnesses to attend and government information to be provided.

As part of its civil service reform agenda, the Government has outlined measures to strengthen civil service accountability to Parliament. There is a specific intention to establish 'a more direct relationship' between Parliament and the senior responsible officers (SROs) of major projects. And there is acceptance that some former officials can be called back to answer for their past performance – a departure from the convention that the current postholder should represent their predecessors. The Osmotherly Rules – the government document that sets out how Whitehall departments interact with select committees – is also under review.

This paper is the Institute for Government's contribution to this debate and forms part of a wider programme of research into accountability arrangements in Whitehall. Based on interviews with MPs, and officials in both Westminster and Whitehall, we examine the state of the relationship between select committees and the government departments they scrutinise. We also consider the nature of select committee powers and consider the case for reform.

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

One issue of concern among MPs is whether committees are able to gain access to the civil servants they wish to question in oral evidence sessions. Our research suggests that departments are on the whole co-operative with select committees and seek to identify the most appropriate official to represent the department. But there are cases when committees encounter unco-operative attitudes, with certain departments operating a more restrictive policy than others in terms of allowing committees access to officials. There are also particular

challenges when committees seek to question officials who have moved post and officials from departments other than the one they are directly responsible for scrutinising.

Yet perhaps the more significant challenge for select committees is not whether they can get the most appropriate civil servants to attend, but what those officials are able to tell the committee under questioning. Committee chairs recognise that officials will not be able to discuss the content of policy advice to ministers. However, they report frustration when officials stick tightly to the ministerial line and give away as little as possible about operational and performance issues, for instance when major projects run into trouble.

Whether the Government's intention to allow SROs for major projects 'to report directly into select committees' has a substantial impact in practice will depend, therefore, on the terms of the new arrangement. A senior Whitehall official we interviewed emphasised that for this reform to be meaningful, SROs should be able to tell 'the whole story' behind any problems, including outlining when ministerial interference or changes of priority lie behind implementation problems and delays.

Another source of friction between committees and departments surrounds access to government information. Some committee chairs feel that their requests for information can carry less weight than a freedom of information (FOI) request. There are also criticisms of Whitehall for failing to keep committees informed about developments even when the department is aware of a relevant inquiry. Yet this is not a uniform picture. Some departments are reported as taking an active approach to engaging with their select committee – for instance inviting the chair and members to meet and be briefed by officials.

There is also debate about the enforceability of committees' formal powers to summon witnesses, compel their veracity and demand access to government documents. The ultimate (and rarely-used) backstop for committees is the House's power to find individuals guilty of contempt of Parliament. Yet it is highly doubtful that the House could now impose a meaningful sanction in the event of contempt, though in previous eras it did impose fines and imprison offenders in the Palace of Westminster.

There are those in Parliament today who favour formalising or even legislating for committee powers. But legislation in particular carries some significant risks, including the possibility of drawing the courts into ruling on parliamentary proceedings, contrary to the 1688 Bill of Rights. Placing the relationship between committees and the executive on a more formal footing could also lead to a more adversarial pattern of interaction, in which civil servants avoid co-operating with committees as far as possible.

Ultimately, the effectiveness of the accountability relationship between committees and departments depends less on formal rules and powers than on attitudes and behaviour on both sides. Our interviews illustrated that some departments are notably averse to parliamentary scrutiny, and others guilty of poor communication with Westminster. Committees are right to draw attention to such behaviour.

The effectiveness of select committee scrutiny is also a function of the behaviour and attitudes of committees themselves. Select committees are widely seen as being more confident in this parliament, partly as a result of the Wright Reforms to how committee chairs and members are elected. An assertive committee system is to be welcomed – close and persistent parliamentary scrutiny makes a positive contribution to the effectiveness of government, if only by keeping officials and ministers on their toes.

Yet assertiveness taken too far can be counterproductive. For instance, the decision of the Public Accounts Committee to put the chief legal adviser to Her Majesty's Revenue and Customs (HMRC) under oath during a 2011 hearing was widely criticised. It was feared that this move would contribute to distrust of committees within Whitehall. The use of the oath is in general an ineffective tool since truthfulness is anyway assumed (and proven dishonesty would amount to contempt even without recourse to the formal oath). More effective questioning of witnesses, as well as the development of stronger relationships between Westminster and Whitehall, is more likely to lead to effective scrutiny.

To achieve this, positive steps should be taken by both sides. Departments (led by their ministers) should be willing to open up more, to actively engage with committees and to see parliamentary scrutiny as a constructive tool to drive their own improvement. And if ministers are keen for individual officials such as SROs to be held to account in person, they must allow them to tell the whole truth about operational and implementation failures. Committees meanwhile should avoid the temptations of political grandstanding, over-aggressive questioning, and the automatic search for scapegoats.

Finally, it is important to recognise that a degree of tension between select committees and the departments they scrutinise is not only inevitable, but a healthy part of our system of government. However, it is important for the interaction between the two sides to operate in an atmosphere of good faith and on the basis of clearly understood conventions.

Introduction

Effective government requires that those responsible for policy-making, implementation and public expenditure are held to account for their actions and performance, and parliamentary scrutiny is a central mechanism for ensuring that this occurs. The principal means through which government departments are held to account by the UK Parliament is through the work of select committees.

According to the convention of ministerial responsibility it is ministers who must account for the performance and decisions of their departments. Civil servants appear before select committees ‘on behalf of their ministers and under their directions’ and to provide factual information rather than to explain or justify policy decisions or departmental performance.¹ Both parliamentarians in Westminster and civil service reformers in Whitehall have come to question whether this traditional framework enables effective accountability of the executive to the legislature.

On one side is a government committed to ‘sharpening’ the accountability of civil servants, including reforms in the relationship between government departments and the select committees that scrutinise them. Meanwhile, there is a view in Westminster – expressed most forcefully by certain select committee chairs – that current conventions prevent Parliament from effectively holding government departments to account. It is widely felt that ministers cannot realistically be held responsible for everything that occurs within large, complex departments, but that the fiction of ministerial responsibility leads, as Bernard Jenkin MP put it, to ministers and officials ‘shuffling off blame’ when things go wrong.²

The Institute for Government has been engaged in a study of accountability arrangements in Whitehall since September 2012, and has already published papers on several aspects of this broad subject, including reform of ministerial private offices, the permanent secretary appointments process, and the role of the accounting officer.³ We will also be publishing our final report on accountability later in 2013.

This briefing note is the latest in this series and addresses the issue of civil service accountability to Parliament. We reflect on the current policy debate, identify the central issues under discussion, and assess the extent to which current conventions and approaches are conducive to effective accountability. Our research is based on interviews with MPs, civil servants and parliamentary officials, and also draws on the Institute’s previous work.

¹ Cabinet Office, *Guidance on Departmental Evidence and Response to Select Committees*, July 2005, p.11-13.

The exception to this general rule is that permanent secretaries (in their capacity as accounting officers) are personally accountable to Parliament for the use of public money, as we discuss further below.

² Bernard Jenkin, Oral Evidence to the Select Committee on Constitution’s inquiry into Accountability of Civil Servants’, 23 May 2012, Q20.

³ Paun, A., *Supporting Ministers to Lead*, Institute for Government, 2013; Paun, A., Harris, J., and Magee, I., *Permanent Secretary Appointments and the Role of Ministers*, Institute for Government, 2013; Harris, J., *Following the Pound: Accounting officers in central government*, Institute for Government, 2013.

The current accountability framework

Accountability is essential to effective governance. In broad terms, accountability refers to the requirement to give an account for individual or organisational performance, decisions or actions to some other body (or individual), which in turn has the ability to act on that information (whether by imposing sanctions/rewards or simply by processing and reporting on information received). The accountability process is also designed to enable the lessons of past mistakes to be learnt, assisting in preventing future failings. Effective accountability helps to assure that those responsible for carrying out certain tasks do so in a considered and responsible manner.

The principal parliamentary mechanism through which the government is held to account is via the work of select committees. This is particularly true for civil servants, who cannot be questioned in the House as ministers are. A central function of the select committee system is to examine the work of government. In the House of Commons, select committees have been organised predominantly on a departmental basis since 1979, with one committee to examine the spending, policies and administration of each department. Select committees' overall aim, as set out by the Liaison Committee (comprising the chairs of House of Commons select committees), is 'to hold ministers and departments to account for their policy and decision making and to support the House in its control of the supply of public money and scrutiny of legislation'.⁴

To carry out their inquiries, select committees make use of oral and written evidence, and, under House of Commons Standing Orders, have the power to 'send for persons, papers and records'.⁵ Select committees can issue a summons to witnesses reluctant to attend, but appear to have few credible follow-up powers in the event that such a summons is ignored. In each department a 'parliamentary liaison officer' or 'parliamentary clerk' is appointed to facilitate the relationship between Parliament and the department at large. Part of their role is to filter and co-ordinate requests from select committees for information or access to particular officials within the department.⁶

The constitutional convention of individual ministerial accountability deems ministers responsible and accountable for their departments. Ministerial responsibility to Parliament was incorporated into the *Ministerial Code* after being formalised in 1997 by a House of Commons resolution on ministerial accountability.⁷ This stated that 'ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and next steps agencies'.⁸

⁴ Liaison Committee, *Select Committee Effectiveness, Resources and Powers*, 8 November 2012, p.8.

⁵ House of Commons, *Standing Orders of the House of Commons: Public Business 2002(2)*, Accessed 25 July 2013 at <http://www.publications.parliament.uk/pa/cm200102/cmstords/27519.htm>

⁶ Cabinet Office, *Guidance on Departmental Evidence and Response to Select Committees*, July 2005, p.11.

⁷ Gay, O., *Individual Ministerial Accountability*, House of Commons Library, 8 November 2012, p.4-5.

⁸ HC Deb, 19 March 1997, cc1046-1047.

As a result, and although they do appear before select committees, civil servants (with the exception of permanent secretaries in their capacity as accounting officers) are not considered by government to be directly accountable to Parliament. Instead, they are deemed to appear before select committees solely as representatives of their ministers. This reflects the traditional view of the Civil Service's status, as expressed by former Cabinet Secretary, Robert Armstrong when he stated that 'the Civil Service has no constitutional personality separate and apart from the government of the day. The duty of the civil servant is first and foremost to the minister of the Crown who is in charge of the department which he or she is serving'.⁹

In practice, of course, the secretary of state cannot personally make all administrative decisions for which he or she is accountable – civil servants carry out many actions on their minister's behalf. According to the Carltona Principle however, ministers remain accountable to Parliament for the actions they have delegated. This principle dates back to a judgment of the Court of Appeal in October 1943, which said that the secretary of state's responsibilities are 'so multifarious that no minister could ever personally attend to them'. According to the Carltona Principle, the power to administer policy can be delegated from the minister to the official – with the caveat that he or she must be satisfied the official is aptly trained and experienced. By virtue of this delegation, a civil servant may carry out certain actions on behalf of their minister, but 'constitutionally, the decisions of such an official is... the decision of the minister', and as such the minister remains accountable.¹⁰

The government document, *Departmental Evidence and Response to Select Committees*, details the guidelines to civil servants appearing before select committees, and sets out the government perspective on several of these issues. Commonly referred to as the Osmotherly Rules – taking their name from the civil servant, EBC Osmotherly, who drafted them before they were first formally issued in May 1980 – the rules were last updated in July 2005, following the Butler Review of Iraq's weapons of mass destruction and the Hutton Inquiry into the circumstances surrounding the death of Dr David Kelly.¹¹

The rules outline 'a number of longstanding conventions that have developed in the relationship between Parliament, in the form of select committees, and successive Governments'.¹² The 'central principle' to be followed by civil servants is that they should 'be as helpful as possible' and 'as forthcoming as they can' when giving evidence to a select committee.

Yet the rules also set out a number of restrictions on civil servants' engagement with select committees. Rooted in the convention of ministerial responsibility, the rules state that since civil servants are not personally accountable to Parliament, their central purpose in appearing before select committees is 'to contribute to the central process of ministerial accountability'. As such,

⁹ 'The Duties and Responsibilities of Civil Servants in Relation to Ministers, Note by the Head of the Home Civil Service – the "Armstrong Memorandum" 1985, as amended on 17 July 1996'. Accessed 20 August 2013 from <http://www.civilservant.org.uk/armstrong.shtml>

¹⁰ Court of Appeal, Carltona vs. Commissioners of Work, 6 October 1943

¹¹ Gay, O., *The Osmotherly Rules*, House of Commons Library, 4 August 2005, p.1-7

¹² Cabinet Office, *Guidance on Departmental Evidence and Response to Select Committees*, July 2005, p.19

civil servants who give evidence appear only on behalf of their ministers, and it is for ministers to decide which officials should represent them, and what information civil servants may disclose to select committees.¹³

In principle, the same applies to civil servants in executive agencies, including their chief executives. Executive agencies (also known as ‘next steps’ agencies) are ‘single-focused, semi-autonomous’ bodies which are constitutionally part of a department, whose purpose is to ‘carry out services or functions with a focus on delivering specific outputs’.¹⁴ Their chief executives are designated accounting officers and are responsible for the expenditure and internal management of the agency, and are therefore seen as more personally accountable than officials sitting directly within government departments in Whitehall. As the Osmotherly Rules put it ‘agency chief executives have managerial authority to the extent set out in their framework documents’. However, the rules go on to state that ‘like other officials they give evidence on behalf of the minister to whom they are accountable and are subject to that minister’s instruction’.¹⁵

The Osmotherly Rules further state that when it comes to discussing policy ‘officials should as far as possible confine their evidence to questions of fact and explanation relating to government policies and actions’. In practice, officials may explain the justification and objectives of policies ‘as the Government sees them’ and may explain how administrative factors may have affected policy choice and implementation. But ‘any comment should be consistent with the principle of civil service impartiality’, officials should avoid discussion of ‘the merits of alternative polices’, and should suggest questioning the relevant minister if they are pressed beyond these limits.¹⁶

As for precisely what information is disclosed to select committees, the decision to withhold any documentation should be made ‘in accordance with the law and care should be taken to ensure that no information is withheld which would not be exempted if a parallel request were made under the FOI Act’.¹⁷ But the rules also state that the release of any information is the minister’s decision: ‘Ministers are ultimately accountable for deciding what information is to be given and for defending those decisions as necessary... their views should be sought if a question arises of withholding information which a committee has asked for.’¹⁸

¹³ Ibid

¹⁴ Gash, T. et al, *Read Before Burning: Arm’s-length government for a new administration*, Institute for Government (2010), p.14-22

¹⁵ Cabinet Office, *Guidance on Departmental Evidence and Response to Select Committees*, July 2005, p.15

¹⁶ Ibid, p.19

¹⁷ Ibid, p.16

¹⁸ Ibid, p.18

The reform debate

The conventional arrangements for the accountability of the Civil Service outlined above have been called into question in recent years by both the Government and Parliament.

The Government's *Civil Service Reform Plan* published in June 2012, and the *One Year On* progress report published a year later, set out a number of measures to 'sharpen' the accountability of the Civil Service. One major element of the reform agenda seeks to strengthen what has been described as the 'internal accountability' of civil servants, meaning the accountability framework within Whitehall.¹⁹ This agenda includes: tougher performance management; greater clarity about personal objectives and required competencies; greater scrutiny of the government's largest projects by the Major Projects Authority; and stronger levers for ministers to control their departments – for instance through the development of 'extended ministerial offices' and a stronger ministerial role in senior appointments.²⁰

Francis Maude MP, Minister for the Cabinet Office and responsible for the overall reform plan, has made the case for the latter reform in these terms. 'You can preserve in all its purity the model of ministers being accountable to Parliament for their department. But it seems to me you cannot do that and at the same time deny ministers, to the extent the system currently endeavours to maintain, the ability to have any serious choice over the people who are responsible for delivering the performance of their department.'²¹

At the same time, the Government is also pushing forward with reforms that strengthen the 'external accountability' of senior officials to Parliament. In its *One Year On* report, the Government committed to revising the Osmotherly Rules in a way that reflects 'a more direct relationship between Parliament, permanent secretaries and SROs'. This revised guidance is expected to be published in autumn 2013, and there have already been discussions between the Cabinet Office and representatives of the House of Commons select committees about possible changes.²²

The Government has also reiterated that former permanent secretaries (in their capacity as accounting officers) should be made available to give evidence to select committees when appropriate (as discussed in the Institute for Government's recent research paper on the accounting officer system).²³

¹⁹ The distinction between 'internal accountability' and 'external accountability' is set out in Lodge, G., *Accountability and Responsiveness in the Senior Civil Service: Lessons from overseas*, Institute for Public Policy Research (2013), p.13 and p.79.

²⁰ HM Government, *The Civil Service Reform Plan*, UK Civil Service website, June 2012, p.18-21, accessed 25 July 2013 from www.civilservice.gov.uk/wp-content/uploads/2012/06/Civil-Service-Reform-Plan-acc-final.pdf

²¹ Rt Hon Francis Maude MP quoted in Patrick Wintour, 'Ministers to be given say in civil service appraisals', *The Guardian*, 5 August 2012, accessed 25 July 2013 from www.guardian.co.uk/politics/2012/aug/05/ministers-formal-role-civil-service-appraisals

²² Cabinet Office, *The Civil Service Reform Plan: One Year On Report*, Cabinet Office Website, June 2012, p.31, accessed 25 July 2013 from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211506/CSR_OYO_LOW_RES_PDF.pdf

²³ Cabinet Office, *The Civil Service Reform Plan: One Year On Report*, Cabinet Office Website, June 2012, p.21, accessed 25 July 2013 from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211506/CSR_OYO_LOW_RES_PDF.pdf.

Meanwhile in Westminster, there is a widespread view – especially among select committee chairs and members – that continued adherence to the doctrine of ministerial responsibility in an age of increasing government complexity undermines the accountability process. Margaret Hodge MP, Chair of the Public Accounts Committee, has argued that the convention ‘isn’t fit for the 21st century’, since government departments are so large and complex that ‘expecting ministers to accept responsibility for the actions of 34,000 people is plain daft’.²⁴

And in practice, ministers rarely do accept responsibility for operational failings about which they had no knowledge – at least not in terms of accepting the ultimate sanction of losing their job. This leads critics to conclude that when things go wrong in Whitehall, ministers and officials can hide behind one another in front of select committees, with neither side held effectively to account. Bernard Jenkin MP, Chair of the Public Administration Select Committee, has called this ‘a conspiracy between ministers and the Civil Service: the ministers quietly shuffling off blame for what they can and cannot do on their officials, and then officials hiding behind ministerial responsibility so that they are not accountable either’.²⁵

For similar reasons, the Public Accounts Committee (PAC) has also expressed frustration with its inability to hold individuals personally to account. In its report on ‘FiReControl’ (a project aimed at replacing the control room functions of 46 local Fire and Rescue Services in England with nine regional centres), the committee concluded that ‘despite the scale of failure and waste, no one in the department has been held accountable’. The committee called for Government to ‘embed a culture which accepts personal responsibility and accountability for major projects’.²⁶

There is also debate in Westminster about whether the Osmotherly Rules should be revised or replaced; whether select committees have the requisite powers to hold government to account; whether Whitehall departments are sufficiently open to scrutiny; and whether committees themselves need to raise their game to facilitate a more productive relationship with government departments. The remainder of this paper seeks to shed light on each of these main issues, analysing the different views on each and evaluating the case for reform.

The Osmotherly Rules

The Liaison Committee, in its 2012 report, *Select Committee Effectiveness, Resources, and Powers*, rejected the Osmotherly Rules outright. The report stated: ‘We do not accept that the

For the Institute for Government’s report on the accounting-officer system, see: Harris, J., *Following the Pound: Accounting officers in central government*, Institute for Government (2013).

²⁴ Margaret Hodge MP speaking at Policy Exchange, *Accountability in Today’s Public Services*, 15 March 2012. Transcript available at UK Parliament website, accessed 7 May 2013 from <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news/policy-exchange-speech/>

²⁵ Bernard Jenkin, Oral Evidence to the Select Committee on Constitution inquiry into the Accountability of Civil Servants, 23 May 2012, Q18.

²⁶ Committee of Public Accounts, *The Failure of the FiReControl Project*, 14 September 2011, p.3-6.

Osmotherly Rules should have any bearing on whom a select committee should choose to summon as a witness. The Osmotherly Rules are merely internal for government.²⁷

Bernard Jenkin MP has argued that the Osmotherly Rules are ‘a fiction created by the executive to try to create excuses for not putting the right people in front of select committees. They have no legal standing whatever and, if Parliament wishes, it can ignore them, and it probably should’.²⁸ The Liaison Committee added that in its view ‘it cannot be a breach of the principle of ministerial responsibility for an official to give a truthful answer to a select committee question’.²⁹

The Osmotherly Rules have never been formally accepted by Parliament. As the House of Lords Constitution Committee’s report, *The Accountability of Civil Servants* explained, to do so would be to accept restrictions on the information Parliament may be provided. In turn, this could undermine the doctrine of ‘exclusive cognisance’ – the right of both Houses to determine their own proceedings.³⁰ Indeed, the Osmotherly Rules themselves state that ‘although select committees will be familiar with its contents, it has no formal Parliamentary standing or approval, nor does it claim to have’.³¹

In place of the Osmotherly rules, the Liaison Committee has recommended a joint review, with the Government, of the relationship between government and select committees, with the aim of producing joint guidelines for departments and committees.³² However, the Government’s approach with its current review of the rules has been to consult with the Liaison Committee, but not to formally agree to a negotiated concordat. Sir Alan Beith, chairman of the Liaison and Justice Committees, has speculated: ‘It may be that we can’t reach agreement – they have their rules which they tell their people, we say we don’t agree with them, and we continue to abide by what we see as the conventions of the relationship between Parliament and the executive’.³³

In any case, it is questionable how central a role the rules play in providing guidance to civil servants who deal with select committees. One senior civil servant we interviewed stated that she had never consulted the rules, despite appearing before a select committee on numerous occasions. She knew the rules existed but said: ‘I’ve never been in a situation where I’ve felt so uncomfortable I’ve had to look at the Civil Service Code or the Osmotherly Rules’.³⁴

²⁷ Liaison Committee, *Select Committee Effectiveness, Resources and Powers*, 8 November 2012, p.40.

²⁸ Bernard Jenkin, Oral Evidence to the Select Committee on Constitution inquiry into the Accountability of Civil Servants, 23 May 2012, Q20.

²⁹ Liaison Committee, *Select Committee Effectiveness, Resources and Powers*, 8 November 2012, p.40.

³⁰ House of Lords Committee on the Constitution, *Accountability of Civil Servants*, 20 November 2012, p.24.

³¹ Cabinet Office, *Guidance on departmental evidence and response to select committees*, July 2005, p.4.

³² Liaison Committee, *Select committee effectiveness, resources and powers*, 8 November 2012, p.41.

³³ Interview with Sir Alan Beith, June 2013.

³⁴ Interview #5, June 2013.

This sentiment was reiterated by another official, who said: ‘I’m not sure that I particularly use them. I know that they’re there and we read them and we’re aware of them. The time we’d tend to use them is when we have particularly difficult issues that might be asked about.’³⁵

The evidence from our interviews illustrates that that the Osmotherly Rules are not a prescriptive and binding set of procedures that all civil servants must follow in dealing with select committees. Rather, they set out some central principles of civil service interaction with Parliament, and describe existing conventions and established practice. A focus on the precise wording of the rules therefore seems misplaced, but the current review of the Osmotherly Rules nonetheless provides a useful opportunity to assess the state of the Whitehall-Westminster relationship, and to consider whether current conventions are conducive to effective accountability. In the following sections of this paper we consider a number of the specific aspects of this relationship where some degree of frustration or tension can be observed.

Accessing officials

Some committees have expressed frustration with their ability to gain access to the specific officials they wish to question for their inquiries. For instance, James Arbuthnot MP, Chair of the Defence Committee stated:

We are only permitted access to those civil servants, under the Osmotherly Rules, that the ministers consider it proper for us to have access to. And that is something which we sometimes find frustrating – sometimes we say we would like to see a particular civil servant who would have been in charge of a particular issue and we are told ‘no’ – either the minister considers that a different civil servant would be appropriate, or the minister will come along and answer the questions himself or herself.³⁶

Arbuthnot also referred to one case highlighted in the Liaison Committee’s report which had caused particular difficulty for the committee: they were told that the witness they sought was not the appropriate person, only to be told by his replacement and the minister at the evidence session in question that they were surprised he was not there.³⁷ The Ministry of Defence seems particularly averse to scrutiny, but other committees have also reported difficulties in gaining access to relevant officials. For example, Dame Anne Begg referred to instances where ministers had decided to represent the department themselves, but from the committee’s perspective it would have been more useful to speak to officials, since their responses might be ‘more detailed’ and ‘less political’.³⁸ Other interviewees, however, emphasised that it is rare for committees to encounter an outright lack of co-operation from departments when they seek to take evidence from specific officials.

³⁵ Interview #4, June 2013.

³⁶ Interview with James Arbuthnot, July 2013.

³⁷ Liaison Committee, *Select Committee Effectiveness, Resources and Powers*, 8 November 2012, p.40.

³⁸ Interview with Dame Anne Begg, June 2013.

However, one specific difficulty which some select committees have faced is with access to officials who have moved post or retired. The convention is that former officials cannot be said to represent the minister currently responsible for a department, and so cannot contribute to his or her accountability. Furthermore, they may not have access to up-to-date information and thinking. For those reasons, the currently serving officials or minister are expected to answer for actions carried out by officials who served formerly.³⁹

The House of Lords Constitution Committee has argued that this position ‘is too stark’ as, in certain cases, previous office holders will often be well placed to give the full picture.⁴⁰ Margaret Hodge MP, Chair of the Public Accounts Committee (PAC), has also challenged the convention that currently serving officials should account for the executive action of former post-holders before select committees. And indeed, there have already been occasions where former officials have given evidence to select committees. In PAC’s investigation into the Rural Payments Agency, the committee wished to question Dame Helen Ghosh, who had been the Permanent Secretary at the Department for Environment, Food and Rural Affairs for five years but, at the time of the Committee’s inquiry, had moved on to the Home Office. As Margaret Hodge stated, ‘she had been responsible and therefore, we felt, should be accountable’.

The committee requested her attendance and she rejected several invitations to appear. Eventually, she did appear before the committee after it pressed for her attendance. Dame Helen made the point in the hearing that her appearance was counter to established tradition. She also argued in favour of greater clarity around this issue, suggesting that there should be a wider discussion leading to formal agreement between the committee and the Cabinet Secretary on the recall of former accounting officers ‘so that we don’t have to go through this process every time’.⁴¹

The Communities and Local Government Committee also recently highlighted the issues with the traditional convention. The committee stated that they:

...found it unsatisfactory that neither those officials in post at the time a matter giving rise to concern arose and who have moved on or retired, nor those currently in post can respond directly to a select committee asking questions about past administrative failures. In the Committee’s view, this blunted both accountability and the committee’s effectiveness.⁴²

It should be noted that in other instances the Committee did not face such problems. For example, when conducting its investigation into regional fire control centres, the Committee invited Peter Housden, former Permanent Secretary at the Department for Communities and Local Government, to give oral evidence and were able to secure his attendance.⁴³

³⁹ Cabinet Office, *Guidance on Departmental Evidence and Response to Select Committees*, July 2005, p.14.

⁴⁰ House of Lords Committee on the Constitution, *Accountability of Civil Servants*, 20 November 2012, p.27.

⁴¹ Margaret Hodge, Oral Evidence to the Select Committee on Constitution inquiry into the Accountability of Civil Servants, 23 May 2012, Q9, accessed 25 July 2013 from <http://www.parliament.uk/documents/lords-committees/constitution/CivilServ/ACSEvidenceFINAL.pdf>

⁴² Liaison Committee, *Select Committee Effectiveness, Resources and Powers: Additional evidence*, 8 November 2012, Ev w8.

⁴³ Interview with Clive Betts, June 2013.

Reflecting the emerging consensus that in certain cases former officials should give oral evidence, the *Civil Service Reform Plan* published in June 2012 set out the expectation that 'former accounting officers will return to give evidence to select committees on major projects and policies where there is a clear rationale to do so, and within a reasonable time period'.⁴⁴

Our interviews also suggested that committees may have more difficulty in gaining access to officials in departments beyond their specified remit. Clive Betts MP, Chair of the Communities and Local Government Committee, referred to this issue, speaking of an instance in the last Parliament where the committee had requested a Treasury official during an inquiry into local government finance. Apparently this was a more difficult process than gaining access to officials from the Department for Communities and Local Government (DCLG) although the committee 'got them in the end'.⁴⁵ This impression is further supported by the Whitehall perspective: one official commented that they tended to 'bat away' requests from committees that they felt were beyond their duty to comply with.⁴⁶ It should be noted that this was by no means a unanimous standpoint within Whitehall: another official commented that their department dealt with most select committees as and when they made requests.⁴⁷ The officials' differing perspectives also highlights how the process for dealing with select committees' requests varies within Whitehall.

Our interviews also revealed that the individuals whom committees request could sometimes seem inappropriate from a department's perspective. Some officials we spoke to felt that the department had good reason to negotiate over a committee's requests for specific individuals, as the committee might not be aware who the most relevant official was. For example, one official referred to an occasion when a committee had requested a specific civil servant by taking the name of a caseworker whose name went at the bottom of some information letters. The official was relatively junior, and not seen by the department as the appropriate person for the committee to question. As it happened, when the liaison officer relayed this to the committee they were perfectly understanding, and accepted the liaison officer's suggested alternative.⁴⁸ Another official stated that because of his department's structure, junior officials would often be more 'in the know', and therefore the most appropriate person to give evidence. However, because the committee wasn't aware of this, they often requested more senior officials who don't have sufficient detail of the matter in question. As a consequence, the department sometimes felt it was more pertinent to send a different official to the one requested by the committee.⁴⁹

Therefore, what may appear to a committee to be a department's lack of co-operation can sometimes –from a Whitehall perspective – be a reasonable response. As illustrated above, the department may have more supportive intentions than a committee perceives when it suggests

⁴⁴ HM Government, *The Civil Service Reform Plan*, UK Civil Service website, June 2012, p.21, accessed 25 July 2013 from www.civilservice.gov.uk/wp-content/uploads/2012/06/Civil-Service-Reform-Plan-acc-final.pdf

⁴⁵ Interview with Clive Betts, June 2013.

⁴⁶ Interview #3, May 2013.

⁴⁷ Interview #4, June 2013.

⁴⁸ Interview #4, June 2013.

⁴⁹ Interview #3, June 2013.

an alternative official to the one the committee requested. One official explained: ‘We tend to make pragmatic decisions about who is best placed to appear... it’s about ensuring that you can give the best service to the Committee in terms of what they want to hear about.’⁵⁰

This is not to say that committees do not suffer frustration from time to time trying to gain access to officials they are keen to scrutinise. Some departments seem to guard their right to decide which civil servants should appear more than others and they may, on occasion, use this power to undermine the scrutiny process. Other departments simply fail to communicate effectively with select committees, leading to misunderstanding about the department’s intentions.

Questioning officials

Ensuring that the right officials appear before a committee is only the first step in the accountability process. The information those officials provide once they appear for questioning is at least as important. On this point, there was some acknowledgement among our interviewees that it may be reasonable for civil servants not to answer certain questions. Sir Alan Beith outlined the types of questions he felt it appropriate for civil servants to answer, with some understanding that there were limits to what a civil servant might disclose. He reflected: ‘If we were asking “Was the course of action the one recommended by civil servants?” then civil servants would tend not to answer that question, which is quite right.’

However, Sir Alan also felt there were questions which it was more reasonable to expect a response to. For example: [Asking] “Did the minister have the full range of information on the results of A, B, C?” That’s a perfectly reasonable question.’ His concern was that ‘ministers encourage civil servants to be evasive, or that senior people in departments or the Cabinet Office do so’.⁵¹ Several other chairs also felt frustrated with their scrutiny of civil servants, particularly where civil servants took the ‘ministerial line’. Clive Betts, Chair of the Communities and Local Government Committee, commented: ‘You do get the feeling when you get into policy areas that civil servants are going to tell you precisely what ministers would tell you if they were there. And... you’ve got to push them, and get a bit more traction when things have gone wrong.’⁵²

Dame Anne Begg, Chair of the Work and Pensions Committee, echoed this view, highlighting the drawbacks of this approach. ‘When the official gives evidence, what you get is the official ministerial line – you don’t get their views. I think if you’re going to do proper scrutiny, you want stuff that’s stripped away from all the political rhetoric, which you still get, because it’s all channelled through the minister.’⁵³

⁵⁰ Interview #5, June 2013.

⁵¹ Interview with Sir Alan Beith, June 2013.

⁵³ Interview with Dame Anne Begg, June 2013.

⁵³ Interview with Dame Anne Begg, June 2013.

By convention, civil servants do not answer questions about the content of policy advice and the process of ministerial decision making. But what committees find more frustrating is obfuscation when their objective is to identify the reasons behind poor performance and operational problems. To rectify committees' concerns, Bernard Jenkin MP, Chair of the Public Administration Select Committee, has called for a change in the way civil servants respond to questions which they feel they ought not to answer, by saying 'with the greatest of respect, Mr Chairman, I do feel that that is a matter of policy which should be addressed to the minister and not to me'.⁵⁴

In practice, however, it may not be particularly straightforward to draw such a clear-cut line between a minister's responsibilities and an official's responsibilities. One senior official explained: 'I'm not sure you can divorce policy from delivery... I'm not sure that there's a point where you'd say 'well, that's down to the minister, and that's down to the senior civil servant', I think inevitably you're bound together in your joint accountability'.⁵⁵

Another senior official commented 'It is crying to the moon to say that's political and that's official'.⁵⁶ But while the delineation between policy and delivery may not always be clear cut, it is clear that the current convention on how civil servants give evidence causes genuine frustration for committees. The central concern seems to be that they are not given the full picture, and that the scrutiny process is therefore undermined by 'not knowing what you don't know', as one parliamentary official put it.⁵⁷

There is at present particular concern about the accountability of senior responsible officers (SROs) who are responsible for the delivery of 200 or so major government projects. *The Civil Service Reform Plan: One Year On* report outlined the Government's intention to strengthen the accountability of SROs to Parliament.⁵⁸ While the specific details of this arrangement weren't set out in the report, Sir Bob Kerslake, Head of the Civil Service, stated at a seminar at the Institute for Government that the change would 'allow SROs for projects to report directly into select committees'.⁵⁹ Prior to the Government's announcement, the Public Accounts Committee had stated that SROs 'should be held accountable to Parliament, alongside the departmental accounting officer, for delivering projects within an agreed budget and the time agreed'.⁶⁰

James Arbuthnot noted that the proposed change would help his committee paint a more accurate and complete portrayal of events.

⁵⁴ Bernard Jenkin, Oral Evidence to the Select Committee on Constitution inquiry into the Accountability of Civil Servants, 23 May 2012, Q10, accessed 25 July 2013 from <http://www.parliament.uk/documents/lords-committees/constitution/CivilServ/ACSEvidenceFINAL.pdf>

⁵⁵ Interview #5, June 2013.

⁵⁶ Interview #8, July 2013.

⁵⁷ Interview #1, April 2013.

⁵⁸ Cabinet Office, *The Civil Service Reform Plan: One Year On Report*, Cabinet Office Website, June 2012, p.31, accessed 25 July 2013 from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211506/CSR_OYO_LOW_RES_PDF.pdf

⁵⁹ Sir Bob Kerslake quoted in Joshua Chambers, *Project Managers to be Directly Accountable to Parliament*, Civil Service World, accessed 25 July 2013 from <http://www.civilserviceworld.com/project-managers-to-be-directly-accountable-to-parliament/>

⁶⁰ Public Accounts Committee, *Accountability for Public Money*, 5 April 2011, p14.

We would like to be able to ask questions of the people who are in charge of the relevant decisions because they would be more likely to give us the real answers than those who haven't been involved. But it would cause concerns within the various chains of commands as to whether the government was being shown in the best light. Those I think are concerns that ought to be set aside because I think in the long run it would lead to better government.

Also commenting on the Government's proposal, Sir Alan Beith thought those in charge of major projects needed to feel responsible and answer for them.

Where you've got major projects, the person in charge of them has got to answer for them. That's the Government's position as well. They are trying to make civil servants take responsibility for what they're doing rather than become part of some amorphous structure in which nobody is responsible for anything, except theoretically the minister, and everyone tends to agree 'it's not really his fault' if it was a delivery issue.

It may be that such a change would make little difference in practice to who was sent. One senior official commented that most 'sensible' permanent secretaries would take along whoever was responsible for the matter in question.⁶¹ Dame Anne Begg, Chair of the Work and Pensions Committee, commented that she expected that SROs 'would be the ones that are sent anyway'.⁶²

However, Colin Talbot, Professor of Government at the University of Manchester, has argued that, if properly carried through, the process of making civil servants properly and openly accountable would be a 'revolutionary step'.⁶³ But whether such a change has a substantial impact in practice – and whether it helps select committees obtain a more accurate and complete understanding of policy implementation – depends on the specific terms of the new arrangement. One senior official commented that it was crucial to ensure that accountability is matched by power to make a difference to the outcome when defining the terms on which SROs report to Parliament. 'Absolutely, this would be splendid, as long as SROs could tell the whole story, warts and all, and/or if they controlled all the givens – if they could decide on a budget, scope, timetable, and so on.'

If an SRO is to appear, the official argued, they should be able to talk openly about the constraints on their position, including the impact of ministers' interference.⁶⁴

Creating new accountability arrangements for SROs also demands clarity about the implications for permanent secretaries' personal accountability to Parliament in their capacity as accounting officers, responsible to PAC for the use of public money. Since 2011 this has included the explicit responsibility for ensuring that projects are 'feasible' as well as offering good 'value for

⁶¹ Interview #8, July 2013.

⁶² Interview with Dame Anne Begg, June 2013.

⁶³ Colin Talbot, *Ministers and Mandarins: Time for change?*, Whitehall Watch, accessed on 02/08/2013 from <http://whitehallwatch.org/2013/06/17/ministers-and-mandarins-time-for-change/>

⁶⁴ Interview #8, July 2013.

money'. There is, therefore, scope for direct SRO accountability to Parliament to become confused with accounting officer accountability for the financial implications of project success or failure. One senior official commented that while it is reasonable for SROs to report to Parliament, ultimate accountability to Parliament for the use of public money should still run through the accounting officer, as the accounting-officer system is widely supported and understood in Whitehall and generally works well.

The senior official felt that the primary mechanisms for holding SROs to account should remain within the department, as part of normal appraisal and performance management processes. In their view, SROs should answer to Parliament but without taking on accounting officer-style responsibilities, since 'the more you undermine it [the accounting-officer system], the more risk you're introducing'.⁶⁵

In other words, while it is sensible for SROs to answer to select committees about progress and problems in the projects they oversee, the purpose of such appearances should be to provide information to assist committees in their scrutiny role. Committees should seek to identify the causes of poor performance in implementing projects, and where officials rather than ministers are to blame it is legitimate to identify and publicise this fact. But SROs should not be sent before committees to be placed in the firing line for implementation problems if many of the key variables were out of their control. So long as ministers retain the prerogative to take decisions on project timelines, budgets and objectives, then they also retain overall responsibility for those projects.

Accessing documentation

Accessing departmental documentation has been a further frustration for some select committees. For example, in the Liaison Committee's report *Select Committee Effectiveness, Resources, and Powers*, the Defence Committee stated that the Ministry of Defence tended to:

...cite security considerations in order to deprive us of the information we need. We were, for instance, refused access to the Chief of Staff Minutes for 2006, to which a number of our witnesses referred. We cannot think that access by us to these five-year-old documents could in any way endanger security and we hope that in future the department will be more forthcoming.⁶⁶

The Ministry of Defence may be at the extreme end of this tendency to restrict access to information – one parliamentary official described the process of getting information from the department as 'like getting blood from a stone'.⁶⁷ Even more colourfully, James Arbuthnot recalls becoming aware that 'the enemy was not the Russians, it was the Defence Select

⁶⁵ Interview #7, July 2013.

⁶⁶ Liaison Committee, *Select Committee Effectiveness, Resources and Powers: Additional evidence*, 8 November 2012, Ev w11.

⁶⁷ Interview #1, April 2013.

Committee' when he was Parliamentary Private Secretary in the Ministry of Defence in 1989. He further suggested that this attitude 'remains the case'.⁶⁸

Yet the Defence Committee was not alone in its frustrations. The International Development Committee also expressed disappointment with the Department for International Development's 'refusal ...to share with us the ministerial advice given in relation to the decision to close the bilateral Burundi programme' which they felt hindered their investigation in this area.⁶⁹ Furthermore, Sir Alan Beith referred to one issue that arose during the Justice Committee's inquiry into the contracting out by Ministry of Justice of interpreting and translation services. When the new interpreting arrangements were brought into place the committee observed a 'substantial decline in the quality of service to the courts'.⁷⁰ As part of its inquiry into these new arrangements the committee set up an online forum that enabled people to give direct feedback on the new arrangements. However, the Ministry of Justice issued a circular within the department that discouraged staff participation. Sir Alan noted that on other reports the committee had used such surveys and it had been effective for understanding how prison officers saw their role.⁷¹

There is also an ambiguity surrounding a committee's ability to access documents in comparison to the rights of the public under freedom of information (FOI) requests, as the House of Lords Constitution Committee highlighted in its report *The Accountability of Civil Servants*. The Committee concluded that if the Osmotherly Rules are followed, select committees could, in some circumstances, have weaker rights of access to civil service documentation – particularly policy advice – than a member of the public submitting a freedom of information request.

The Osmotherly Rules state that 'care should be taken to ensure that no information is withheld which would not be exempted if a parallel request were made under the FOI Act'. At the same time, however, the rules restrict civil servants to disclosing only 'fact and information', and leave it to ministers to decide what information to present committees with.⁷² As such, it is unclear what takes precedence in the Osmotherly Rules: the commitment not to withhold anything that wouldn't be withheld under freedom of information requests, or the minister's right to decide what is disclosed and civil servants' duty to disclose only 'fact and information'.

Moreover, the Freedom of Information Act (2000) classes policy advice as exempt from disclosure if it is a) against the public interest to disclose it, and b) detailing this advice would hamper the provision of 'free and frank advice' in future.⁷³ As one parliamentary official noted,

⁶⁸ Interview with James Arbuthnot, July 2013.

⁶⁹ Liaison Committee, *Select Committee Effectiveness, Resources and Powers: Additional evidence*, 8 November 2012, Ev w36.

⁷⁰ Beith, A., 'Beith: MPs want a new relationship with government', *Civil Service World*, 3 April 2012, accessed 25 July 2013 from <http://www.civilserviceworld.com/beith-mps-want-a-new-relationship-with-government/>

⁷¹ Beith, A., 'Beith: MPs want a new relationship with government', *Civil Service World*, 3 April 2012, accessed 25 July 2013 from <http://www.civilserviceworld.com/beith-mps-want-a-new-relationship-with-government/> and interview with Sir Alan Beith, June 2013.

⁷² Cabinet Office, *Guidance on Departmental Evidence and Response to Select Committees*, July 2005, p.16.

⁷³ Freedom of Information Act (2000), Section 35 and Section 36, accessed 25 July 2013 from <http://www.legislation.gov.uk/ukpga/2000/36/contents>

ministers – who exercise discretion over disclosure of information subject to Freedom of Information requests and in the Osmotherly rules – can then ‘class anything as advice’ to get around freedom of information requests.⁷⁴

However, such issues with accessing departmental documentation are by no means universal. Clive Betts, Chair of the Communities and Local Government Committee, saw the process of accessing departmental evidence as relatively straightforward, commenting that ‘ministers provide it, and that’s it’.⁷⁵ An official in one department also described their department’s desire to proactively share information with the committee, rather than simply wait for requests.⁷⁶

Select committee powers

The frustrations above, which select committees have faced, stem largely from the traditional conventions that govern departments’ interaction with select committees, as described in the Osmotherly Rules, and the way these rules have been applied. Yet select committees are not bound by these rules, and could, if they had the political will to do so, exercise their powers to override these conventions. Select committees possess powers to issue a summons to witnesses reluctant to attend (civil servants included), and a failure to comply could be regarded as a contempt of the House. Committees may also put witnesses providing oral evidence under oath. While their power to summon papers is limited in the case of government departments, they could, in theory at least, ask the House to order their provision.

However, several select committees have expressed doubt over the enforceability of their formal powers – particularly the House’s ability to punish for contempt. This uncertainty was highlighted during the Culture, Media and Sport Committee’s investigation ‘News International and Phone Hacking’, which sought to determine whether the Committee had been misled by any witnesses during its previous work on this scandal. During the course of its investigations, Rupert Murdoch of News Corporation initially declined the Committee’s request to attend an oral evidence session.⁷⁷ He did eventually comply with the Committee’s request but only after a summons had been issued. In the intervening period there was doubt and media speculation as to whether the committee would be able to compel him to attend should he continue to refuse.⁷⁸

In another instance, the Business Innovation and Skills Committee wished to take evidence from the Chief Executive of Kraft, Irene Rosenfield. She refused to attend, but as a foreign national living in the United States the committee had no powers to summon her to give evidence. Even had she been in the UK, the committee noted, it was ‘unclear what sanctions would have been at our disposal had a summons been issued and Ms Rosenfield not attended’.

⁷⁴ Interview #1, April 2013.

⁷⁵ Interview with Clive Betts, June 2013.

⁷⁶ Interview #4, June 2013.

⁷⁷ Culture Media and Sports Committee, *News International and Phone Hacking*, April 2012, p.5.

⁷⁸ For example, see Gosden, E., ‘Phone hacking: Rebekah Brooks to face MPs, Rupert and James Murdoch summonsed’, *The Telegraph Online*, accessed 25 March 13 from, <http://www.telegraph.co.uk/news/uknews/phone-hacking/8637428/Phone-hacking-Rebekah-Brooks-to-face-MPs-Rupert-and-James-Murdoch-summonsed.html>

The committee called for ‘greater clarity on the powers and sanctions of Committees in this respect’.⁷⁹

Senior parliamentary officials also doubt whether committees have the power to compel witnesses to attend or punish for contempt, and this position would apply to civil servants who refuse to attend as well as to non-civil servants as in the examples above. As Sir Robert Rogers, Clerk of the House of Commons, pointed out in his evidence to the Liaison Committee’s report, *Select Committee Effectiveness, Resources and Powers*, that the last time any sanction was imposed in response to contempt was in 1880 (in the form of imprisonment).⁸⁰ Sir Robert also points out that were a sanction imposed in response to contempt, the United Kingdom could be taken to the European Court of Human Rights as the trial conducted by the House could breach requirements of fairness in a procedure. The reputational risk of a human rights challenge may be sufficient to deter a sanction in the first place. Alternatively, if a sanction was imposed, it could later be overturned by the Court.⁸¹

Several people we interviewed echoed this sentiment of uncertainty over select committees powers. One parliamentary official referred to summoning individuals and requesting evidence as a ‘game of bluff’.⁸² Moreover Clive Betts MP, Chair of the Communities and Local Government Committee, mentioned that this would come to light if a committee’s request was refused. He speculated: ‘What happens if someone says no? What on earth would we do?’ Betts also thought this needed to change, stating: ‘I don’t think the current position is tenable, because, at some point some committee will say “Yes, we are going to push this”.’⁸³

In response to the uncertainty surrounding the enforceability of select committees’ powers, the government’s Green Paper on Parliamentary Privilege, published in April 2012, suggested that Parliament could pursue two options. First, Parliament could give committees enforceable powers by codifying their existing ones. Secondly, Parliament could create criminal offences for committing contempts in order to allow Parliament’s powers to be enforced through the courts.⁸⁴ Similarly, Sir Robert set out three options for addressing the perceived inability of the two Houses to enforce their powers: do nothing, legislate, or strengthen internal measures – such as amending standing orders – in effect a parliamentary reassertion of existing powers.⁸⁵

The Joint Committee on Parliamentary Privilege recently published a report which discussed the penal powers of the House, and assessed each of Sir Robert’s options. The Committee concluded that the third option – strengthening internal measures – was most favourable,

⁷⁹ Liaison Committee, *Select Committee Effectiveness, Resources and Powers: Additional evidence*, 8 November 2012, Ev w4.

⁸⁰ Rogers, R., *Written Evidence to the Liaison Committee Inquiry on Select Committee Effectiveness, Resources and Powers*, accessed 25 July 2013 from <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmliaison/697/697we36.htm>

⁸¹ Rogers, R., *Written Evidence to the Liaison Committee Inquiry on Select Committee Effectiveness, Resources and Powers*, accessed 25 July 2013 from <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmliaison/697/697we36.htm>

⁸² Interview #2, April 2013.

⁸³ Interview with Clive Betts, June 2013.

⁸⁴ HM Government, *Parliamentary Privilege*, April 2012, p.8.

⁸⁵ Rogers, R., *Written Evidence to the Liaison Committee Inquiry on Select Committee Effectiveness, Resources and Powers*, accessed 25 July 2013 from <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmliaison/697/697we36.htm>

stating: ‘The first and most important challenge is to assert the continuing existence of each House’s jurisdiction over contempt... The second challenge is to ensure that the process for using those powers is fair.’⁸⁶

The committee concluded that its report in itself constituted the beginning of the process of reasserting Parliament’s penal powers. The committee also recommended ‘that the two Houses should build on our work to set out clearly the powers they reserve the right to exercise, what is expected of witnesses, and the means by which they will consider allegations of contempt, including procedural safeguards to ensure that witnesses are treated fairly’.⁸⁷

Several of our interviewees emphasised the disadvantages of formalising select committees powers by, for example, introducing legislation. One powerful argument against legislation is that this would potentially draw the courts into ruling on parliamentary proceedings contrary to the 1688 Bill of Rights. The effect of legislation would also of course depend on precisely what was put into statute. As James Arbuthnot commented: ‘The more you define in statute the powers of a select committee, the more you expose what powers a select committee does not have.’ Arbuthnot also felt that the current ambiguity of select committees’ powers could work in committees’ favour, stating:

You want the response to be not ‘if you say no, we’ll have to go in front of Parliament and have you hauled up to the bar of the House of Commons’, which has not happened for decades, and ‘you could then be sent to prison’, which again has not happened for decades... instead of going through that sort of rigmarole it might be better to have the response ‘well if you don’t co-operate things could be very difficult’, and that sort of vague, unspecified menace may be more effective...

Several other chairs also felt that there may not be a need to formalise select committees’ powers, arguing that select committees could place ‘reputational pressure’ on civil servants to comply with their requests through the potential threat of reputational damage should they fail to do so. For example, committees are able to publicly mention any denial contrary to committees’ requests in their reports. One official felt that the ‘moral pressure to turn up’ was currently sufficient, and so there was no ‘overwhelming need’ to formalise committees’ powers.⁸⁸ James Arbuthnot, Chair of the Defence Committee, felt that the committee’s ‘power really lies in the strength of embarrassment’.⁸⁹ Placing the relationship between committees and the executive on a more formal footing could also lead to a more adversarial pattern of interaction, in which civil servants avoid co-operating with committees as far as possible.

However, several chairs also commented that the ‘reputational pressure’ select committees could apply may not always be effective. Dame Anne Begg commented: ‘We hope that the reputational damage of somebody saying “no” is enough to make them turn up, but for some

⁸⁶ Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, 03 July 2013, p.23-24.

⁸⁷ Ibid, p.27.

⁸⁸ Interview #6, June 2013.

⁸⁹ Interview with Sir Alan Beith, June 2013, and interview with James Arbuthnot, July 2013.

people that doesn't work – they think that their reputation will be more damaged by turning up and saying the wrong things.⁹⁰

Indeed, one parliamentary official also pointed out that there was an increasing risk of this, arguing now that select committees' powers were under question, people could start to say no more frequently.⁹¹

The relationship between committees and government departments

The above discussion relates to the formal procedures for holding civil servants to account. Yet the relationship between select committees and government departments is influenced by more than formal codes of procedures alone. Select committees' interaction with civil servants, and their effectiveness in holding them to account, is also determined by the attitudes and internally defined processes for Parliamentary co-operation within government departments, and by the relationship between departments and their respective committees.

Consequently, calls for change within Parliament also concern Whitehall's culture. For example, the Liaison Committee's Chair, Sir Alan Beith, argues that 'a modest revision of the Osmotherly Rules' – as is underway at present – is insufficient. He has called, instead, for 'a different attitude from departments to parliamentary scrutiny'. In an article published in Civil Service World in April 2013, Sir Alan complained of an 'unhelpful approach to Parliament and select committees – or perhaps just a failure to understand how we work' which is 'widespread within Whitehall'.⁹² In a later conversation with us, Sir Alan felt there was an 'anxiety towards criticism' in the Ministry of Justice, for example, where he perceived a particular sensitivity towards criticism for the major changes currently under way in the department.⁹³ The position taken by the Liaison Committee as a whole is that a change of culture in Whitehall is required: for departments to be not only truthful, but open.

What became apparent from our interviews with civil servants, parliamentary officials, and committee chairs, was that perspectives on the attitudes and relationship between Westminster and Whitehall vary both between select committees within Parliament, and between Westminster and Whitehall as a whole. One official who had worked with a number of select committees commented: 'Some departments have better relationships than others with the select committees.'⁹⁴ Furthermore, Sir Alan Beith himself stated that the issues which arose

⁹⁰ Interview with Dame Anne Begg, June 2013.

⁹¹ Interview #1, April 2013.

⁹² Beith, A., 'Beith: MPs want a new relationship with government', *Civil Service World*, 3 April 2012, accessed 25 July 2013 from <http://www.civilserviceworld.com/beith-mps-want-a-new-relationship-with-government/>

⁹³ Interview with Sir Alan Beith, June 2013

⁹⁴ Interview #6, June 2013.

between committees and their departments were ‘not common, and it would be a mistake to give the impression that they are … most of the time, evidence is willingly given and truthfully given’.⁹⁵

Indeed, while in the Liaison Committee’s report *Select Committee Effectiveness, Resources and Powers* several committees expressed frustration with their ability to scrutinise their departments, some chairs we spoke to indicated a comfortable degree of openness with their departments. For example, Clive Betts MP, Chair of the Communities and Local Government Committee, spoke of an occasion on which ministers within the department had communicated openly with the chair.

The government had real problems at one point with regional fire control centres, and the committee had taken an interest in that and was pushing very hard in some aspects. Ministers wanted to, off the record, brief me about their difficulties and the contractual basis of taking action before they’d gone through a certain process. They invited me into the department to talk me through what the legal and accounting difficulties were – which was very helpful – so I could go back to the committee and say look, ministers aren’t putting this off because it’s a difficulty for them, there actually is a real concern that we could blunder in and make matters worse here.⁹⁶

Betts went on to describe two further instances in which he had spoken directly with officials in the department.⁹⁷ Dame Anne Begg, Chair of the Work and Pensions Committee, spoke of a similar example. The committee had visited the job centre that was piloting Universal Credit, and spoke to the officials implementing the policy. While Dame Anne was aware that ‘much of it was scripted’, she saw this as inevitable as some of the officials were relatively junior and meeting a Parliamentary delegation could be intimidating for them. Dame Anne remarked on the value this visit added to the committee’s scrutiny. ‘What we’re looking at is how the Government delivers its work and benefits policy, so how it benefits the lives of ordinary people. So if we don’t speak to the front line staff, we don’t get the full picture, all we’re getting is policy, and aspiration and things, but we need real people to be telling us what their real experience is...’⁹⁸

In some instances, however, committees’ relationships with their departments caused concern for committee chairs. Sir Alan Beith described the difficulties felt by the Justice Committee, in their scrutiny of the Ministry of Justice, as tending to be of a ‘minor and irritating kind’. One such example was with Youth Justice Report: the day before the Justice Committee were to release this report, the department ‘rushed out’ their own statement on Youth Justice without getting a message to Sir Alan beforehand.⁹⁹

James Arbuthnot, Chair of the Defence Committee, similarly expressed disappointment at the time taken for the Ministry of Defence (MoD) to respond to the Committee’s requests. He commented that time delays were ‘one of the greatest factors on the side of the Ministry of

⁹⁵ Interview with Sir Alan Beith, June 2013.

⁹⁶ Interview with Clive Betts, June 2013.

⁹⁷ Interview with Clive Betts, June 2013.

⁹⁸ Interview with Dame Anne Begg, June 2013.

⁹⁹ Interview with Sir Alan Beith, June 2013.

Defence to reduce the amount of scrutiny that it is under'.¹⁰⁰ Arbuthnot was, in particular, referring to the internal procedures in place at the Ministry of Defence for liaising with the committee.

The way we are required to interact with the Ministry of Defence is that there is a Parliamentary Liaison officer at the Ministry of Defence through whom we are expected – and required in fact – to have all communication with the Ministry of Defence. So we request a witness by contacting that Parliamentary Liaison officer. That Parliamentary Liaison officer then passes that request up the chain of command, eventually getting to the Secretary of State. The Secretary of State, if it gets that high, will send back a ‘yes’ or a ‘no’ ... this process can take weeks, and the entire inquiry becomes irrelevant and out of date unless we can get on with it.¹⁰¹

Arbuthnot commented that the committee’s preference would be to have direct contact with the relevant desk officer or the relevant person responsible, but that the Secretary of State had said that no civil servant or member of the military may have any conversation with any politician without his own prior authorisation. Arbuthnot sees the process as an ‘extraordinary clamp down’, which is ‘absurd, counter-productive, and an outrage’.¹⁰²

Arbuthnot also observed that the specific procedures the Defence Committee was required to follow were not common. Different departments adopt different approaches to working with Parliament depending on ministerial decisions, as in the MoD case, but also depending on how parliamentary liaison officers themselves choose to carry out their role. For example, we were told how the liaison officer in one department sometimes left it to relevant policy officials to liaise directly with a particular select committee as long as the liaison officer was kept in the loop. The previous liaison officer, however, had been more restrictive, requiring all contact to be routed through them.¹⁰³ Similarly, another official thought that every department was slightly different in how they dealt with select committees, and that while there was ostensibly a ‘network’ of liaison officers, they had never got together as a group.¹⁰⁴

Another interviewee who commented on the frustrations of liaising with Whitehall was one parliamentary official who felt that ‘the government does not want to be held to account’.¹⁰⁵ Indeed, this official commented that departmental responses to committee reports incited a ‘feeling that the recommendations have not been taken seriously’, with the department failing to explain where they did not agree.¹⁰⁶

The official also perceived a wider lack of understanding within Whitehall about how Parliament works. For example, a select committee visit to a department had been cancelled at late notice due to a three line whip being put in place in the Commons, but the senior department officials

¹⁰⁰ Interview with James Arbuthnot, July 2013.

¹⁰¹ Interview with James Arbuthnot, July 2013.

¹⁰² Interview with James Arbuthnot, July 2013.

¹⁰³ Interview #3, May 2013.

¹⁰⁴ Interview #4, June 2013.

¹⁰⁵ Interview #2, April 2013.

¹⁰⁶ Interview #2, April 2013.

'simply could not understand what this meant'.¹⁰⁷ Clive Betts, Chair of the Communities and Local Government Committee, also touched on such a lack of understanding between Whitehall and Westminster. He commented on a recent visit to the department in which the committee spoke with the officials providing documents to them. 'What you find out at these things is that there are many staff who do things for committees, such as writing responses for us... but they don't know how we deal with it. They don't know how we operate. They didn't know that what they were sending to us was worthwhile and valuable.'¹⁰⁸

Finally, the parliamentary official also observed that there was a variation in departments' attitudes towards Parliament, with some departments taking Parliament more seriously than others. Indeed, over the course of our interviews with Whitehall officials it became apparent that some departments certainly do take committees seriously, and see the value of select committees' work. One senior official commented that when appearing before a select committee, 'You need to be absolutely on top of your brief', pointing out: 'You can't afford to get something wrong, because that brings into question the credibility of you and your department'.¹⁰⁹

Another official commented on their department's endeavours to proactively share information with the committee 'rather than wait for the question and see how we can answer it... let's get on the front foot, you know, we've got nothing to hide'.¹¹⁰

Our interviews with Whitehall officials also revealed how perspectives on a particular issue could vary between Whitehall and Westminster. One official referred to a senior civil servant within the department as a 'master' at dealing with select committee questioning.¹¹¹ Separately, and unprompted, another interviewee named the same official as unpopular among select committee members for what was seen as a patronising attitude. Clearly what is seen as effective from a Whitehall perspective can take on a different complexion in Westminster.¹¹²

Another Whitehall official we spoke to referred to a committee chair who 'asks for something and puts it [the request] straight into the public domain'. Frustrated with what they saw as an unnecessary move on the chair's behalf, the official said: 'If you want to ask for stuff, don't just up the ante, we'll give it anyway'.¹¹³ As such, what may be perceived from the parliamentary side as the necessary pressure to assure departments' compliance with their requests, from the Whitehall side, could come across as needless impatience or political grandstanding.

Finally, one interviewee pointed out that a degree of tension between parliamentary select committees and government was inevitable. One official referred to the relationship between his

¹⁰⁷ Interview #2, April 2013.

¹⁰⁸ Interview #2, April 2013.

¹⁰⁹ Interview #5, June 2013.

¹¹⁰ Interview #4, June 2013.

¹¹¹ Interview #5, June 2013.

¹¹² Interview #2, April 2013.

¹¹³ Interview #3, May 2013.

department and the Select Committee clerks as a negotiation – remarking that the liaison officer's job was to 'mediate this tension'.¹¹⁴

Select committee behaviour and skills

Formal procedures and departmental attitudes aside, the effectiveness of select committee scrutiny is also a function of the behaviour and attitudes committees themselves adopt. As one senior official commented, some committees seem to want to just 'have a bit of a political show', but high-quality, forensic discussion is essential to creating an honest conversation between Parliament and government.¹¹⁵

Select committees – particularly their chairs – are widely seen as behaving more assertively as a result of the Wright Reforms, following which committee chairs are elected by the House rather than selected by party whips. One parliamentary official we spoke to felt that, specifically, committees' sense of expectations and entitlement had changed in this Parliament. This official linked this not only to the implementation of the Wright Reforms, but also to the influx of new members, the desire to move beyond the expenses scandal era, and the context of coalition.¹¹⁶ A senior Whitehall official we spoke to felt that committees' behaviour was internally determined, commenting that this was a function of the chair's personality and the committee's experience. 'If the committee is inexperienced, or if people around the table want to make an overtly political point either from the chair or as a participant, it can become quite tricky.'¹¹⁷

Another civil servant commented: 'There's a sense that some chairs work pretty independently and get the acquiescence or absence of complaint from their committees, and use their perceived authority and what have you to throw their weight around a bit more.'¹¹⁸

One specific element of select committees' behaviour which has come under question is the use of oath – specifically, whether it is both appropriate and effective. Select committees have the power to put witnesses providing oral evidence under oath. In practice, however, this power has rarely been exercised – particularly on civil servants. For example, the Scottish Affairs Committee put witnesses under oath in their investigation into the blacklisting of workers in the construction industry for supposed political or union affiliations. The Parliamentary Commission on Banking Standards also used the oath when questioning its witnesses. In both instances, however, the witnesses being put under oath were not civil servants. In fact, there has only been one recent instance when this happened. In November 2011 the Public Accounts Committee put Anthony Inglesi, Chief Legal Adviser to HMRC, under oath. Inglesi had refused to answer certain questions about his advice to HMRC on the basis of his duty to keep confidences as a lawyer. In addition, his request to take 'a minute's time out' was refused by the

¹¹⁴ Interview #3, May 2013.

¹¹⁵ Interview #8, July 2013.

¹¹⁶ Interview #1, April 2013.

¹¹⁷ Interview #5, June 2013.

¹¹⁸ Interview #6, June 2013.

chair.¹¹⁹ This episode was widely criticised in Whitehall. The former Cabinet Secretary, Sir Gus (now Lord) O'Donnell reportedly wrote personally to Margaret Hodge to express his dismay at the way the Committee treated Mr Inglese.¹²⁰

Several of our interviewees commented that the use of oath might not be particularly effective at encouraging honesty in a witness's response. Firstly, they felt that truth was already assumed. One official commented: 'If you're giving evidence to a committee of the House you're expected to tell the truth whether you're under oath or not, and if you don't then potentially it's a contempt of the House.'¹²¹ Another official, who had appeared before a select committee on numerous occasions, stated: 'I'm not sure that it makes anything any different, it wouldn't make me feel "oh I should be a bit more honest". It doesn't make an iota of difference to me.'¹²²

Moreover, several chairs felt that it wouldn't make a witness less likely to lie, if that's what they already intended to do. Clive Betts MP stated: 'If people want to avoid answering questions they can probably do that in some ways whether they're under oath or not.'¹²³ James Arbuthnot made a similar comment. 'I would be surprised if somebody who was prepared to lie to a select committee would be put off lying by an oath.'¹²⁴

In addition, Sir Alan Beith felt that the regular use of oath 'would undermine the fact that the vast majority of our witnesses give evidence very willingly and are happy to tell us the whole story'.¹²⁵ He commented that he wouldn't want its use to be the norm. Several of our interviewees also felt that the use of oath could worsen the relationship between the committee and the witness, which can already 'sometimes seem like a bit of a bear pit', as one official described PAC hearings.¹²⁶

More important than whether witnesses are put on oath is committees' ability to question effectively, in order to elicit a valuable response. As one official put it:

Having seen some committees in action and being aware of the amount of ammunition that they have, and them just either failing to use it or mucking up... they would get much more respect if they went about their job a bit more professionally, and didn't grandstand... they're not always seen in as high regard as they regard themselves, because of the haphazard and unprofessional way they go about their questioning.¹²⁷

¹¹⁹ Corrected transcript of oral evidence HC 1531-ii, Q304

¹²⁰ Sue Cameron, 'Gus O'Donnell's anger reflects a growing rift between mandarins and MPs', *The Telegraph Online*, accessed 20 July 2013 from www.telegraph.co.uk/news/politics/9054719/Gus-O'Donnells-anger-reflects-a-growing-rift-between-mandarins-and-MPs.html

¹²¹ Interview #3, May 2013.

¹²² Interview #5, June 2013.

¹²³ Interview with Clive Betts, June 2013.

¹²⁴ Interview with James Arbuthnot, July 2013.

¹²⁵ Interview with Sir Alan Beith, June 2013.

¹²⁶ Interview #2, April 2013.

¹²⁷ Interview #6, June 2013.

This person also felt that not all members were as equally committed to committees as the chair, observing that some members will ‘turn up, and they’ll say “oh what are we doing today” and “I’ll do question nine and question 11”… and that’s it’.¹²⁸ The Liaison Committee has itself identified the need to improve committee members’ questioning techniques, and a number of committees have now undergone training on this.

How committees are seen to behave within Whitehall can also affect departments’ attitudes and incentives for co-operating with them. The Liaison Committee’s report stated:

Members of Parliament are used to an environment in which we are quite rude to each other without taking personal offence; witnesses may not be. It was clear from our [private] meeting at the Institute for Government that some civil servants have felt unfairly treated by select committees, unable to defend themselves because of the confidentiality of advice to ministers.¹²⁹

This is an important point. Select committees may run the risk of undermining their own effectiveness by failing to consider the impact of their behaviour on those they scrutinise in Whitehall. At a seminar held at the Institute for Government, one official felt that committees needed to avoid creating a ‘bear-pit’ atmosphere during their hearings.¹³⁰ Another official speculated on the consequences this impression would have within the Civil Service. In his view, committees’ apparent search for ‘scapegoats’ is injurious to good government as it deters high-calibre candidates from applying for top positions, since the role of senior civil servants now seems to be a ‘locus of public criticism’.¹³¹ The risk of public embarrassment also creates incentives for civil servants to say as little as possible in front of committees, and to view an oral evidence session as an ordeal to survive, rather than a forum for constructive dialogue about how to improve government performance. It is therefore encouraging that the chairs of select committees have recognised this issue.

Clearly then, building a stronger and more co-operative relationship between government departments and select committees of the House of Commons may require positive steps to be taken on both sides, perhaps including greater use of seminars and other types of informal dialogue between departments and committees. Yet it would be a mistake to aspire to fully harmonious relations in what is, at heart, a scrutiny relationship, in which the executive is publicly held to account for its actions. A degree of tension between departments and committees is not only inevitable; it is a healthy and necessary part of our democratic process – so long as both sides approach their interaction in good faith, and according to clearly understood conventions. Aggressive questioning, grandstanding or lack of preparation by committee members is not conducive to good government, but neither is a Whitehall mind-set that treats select committees as an irritant to be tolerated, rather than a partner for improving the quality of government.

¹²⁸ Interview #6, June 2013.

¹²⁹ Liaison Committee, *Select Committee Effectiveness, Resources and Powers*, 8 November 2012, p.98.

¹³⁰ Institute for Government seminar, ‘Following the pound: Is the accounting officer role in need of reform?’, 26 March 2013.

¹³¹ Institute for Government seminar, ‘Following the pound: Is the accounting officer role in need of reform?’, 26 March 2013.