



HOUSE OF LORDS

Select Committee on the Constitution

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6th Report of Session 2012–13

# The accountability of civil servants

Report

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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References in the footnotes to the report are as follows:

Q refers to a question in oral evidence;

witness names without a question reference refer to written evidence.

## SUMMARY

Ministers are by convention constitutionally responsible to Parliament for all the actions of their civil servants, and civil servants are accountable to ministers. In recent times, however, with the development of new forms of parliamentary scrutiny, select committees have increasingly held civil servants directly to account; and ministers have on occasion tended to distance themselves from failures in government, stating that the errors were made by civil servants.

In this report on the accountability of civil servants, we make the following recommendations—

- The convention of individual ministerial responsibility remains essential for enabling Parliament to hold the executive properly to account. Whilst the convention can be supplemented by other accountability mechanisms, these should not dilute ministers' constitutional responsibility to Parliament.
- The Osmotherly rules, which provide guidance to civil servants on relations with select committees, in no way have the effect of imposing restrictions on the activities of select committees. It is for Parliament to determine how it scrutinises the executive.
- However, in view of the importance of the rules in guiding civil servants in their dealings with select committees, we recommend that future revisions of the rules should be published in draft to enable scrutiny by Parliament and its select committees.
- It is essential that civil servants provide ministers with candid and fearless advice, including on the constitutionality of proposed actions. Ultimately ministers are free to reject that advice; they should accept the political consequences of doing so.
- A select committee should be able to request access to relevant policy advice given by civil servants to ministers, on the rare occasions where it considers it essential to its examination of an issue; ministers should consider such requests on their merits; and the decision on whether to disclose the advice should be taken consistent with the tests in the Freedom of Information Act 2000.
- Where select committees wish to criticise named civil servants, they should be free to do so, though this power should be exercised judiciously; the disciplining of civil servants must remain an internal matter for government departments.
- Where a select committee asks to take evidence from a named civil servant, ministers should only reject the request in exceptional circumstances.
- Any changes to the process for appointing permanent secretaries and temporary civil servants should protect the principle of appointment on merit, on the basis of fair and open competition. The process should also ensure that those appointed as civil servants possess the attributes of integrity, honesty, objectivity and impartiality.
- There should be a presumption that major projects will be led by the same senior civil servant from beginning to end. Many high-profile failings of government in recent years have been on long-term projects or procurement; this change will enhance the ability of Parliament to hold the executive to account for such projects.

- Former post-holders should give evidence to select committees when requested on projects or policies on which they used to work.
- Ministers must not use the existence of an arm's-length body to avoid their constitutional responsibilities to Parliament: the accountability mechanisms of arm's-length bodies are a supplement to, not a replacement for, ministerial responsibility.



# The accountability of civil servants

## CHAPTER 1: INTRODUCTION

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1. Relations between Parliament, the Government and the civil service and, in particular, the accountability of civil servants both to ministers and directly to Parliament, are constitutionally and politically significant. In the light of the Government's plans for reforming the civil service and events such as the recent cancelling of the West Coast Main Line contract, they are also very topical.
2. Parliamentary scrutiny of individual government departments by select committees is now over 30 years old, and the rigorous questioning by select committees of individuals from both the public and private sectors has been long established. Recently, however, new questions have been raised about the personal accountability of civil servants, partly stimulated by the renewed energy of certain parliamentary committees, whose chairs are now directly elected by MPs. These changes can be seen as part of broader moves towards Parliament asserting its authority over the executive. The Constitution Committee therefore decided to undertake a focused inquiry into the accountability of civil servants.<sup>1</sup> In particular, our inquiry was prompted by the following developments—
  - the increasing complexity of government structure and functions;
  - the placing of the civil service on to a statutory footing for the first time;<sup>2</sup>
  - recent controversies surrounding the House of Commons Public Accounts Committee's questioning of civil servants other than Accounting Officers;<sup>3</sup>
  - our own report last session on ministerial responsibility and the National Health Service in England and Wales;<sup>4</sup> and
  - the Government's<sup>5</sup> recently published *Civil Service Reform Plan*.

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<sup>1</sup> A list of witnesses is in appendix 2. We are grateful to all those who gave evidence.

<sup>2</sup> By Part 1 of the Constitutional Reform and Governance Act 2010.

<sup>3</sup> See for example the discussion at: <http://whitehallwatch.org/2012/03/10/is-the-civil-service-accountable-to-parliament-hodge-vs-odonnell-spat-opens-a-can-of-worms/>

<sup>4</sup> Constitution Committee, 22nd report (2010–12): *Health and Social Care Bill: Follow-up* (HL Paper 240).

<sup>5</sup> This report is focused on relations between the UK Government, civil servants and Parliament. We did not seek to examine the situations as regards the devolved governments and legislatures in Northern Ireland, Scotland or Wales.

## CHAPTER 2: MINISTERIAL RESPONSIBILITY FOR THE CIVIL SERVICE

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3. A fundamental principle of the British system of government is that civil servants are fully accountable to ministers; and ministers are fully accountable to Parliament for all their and their departments' actions and omissions.<sup>6</sup> This principle is often referred to as the convention of individual ministerial responsibility.<sup>7</sup> Since the convention effectively contains the principal mechanism of civil service accountability, no examination of the accountability of civil servants is complete without first briefly considering the convention of ministerial responsibility for civil servants to Parliament.
4. Perhaps the best-known statements on the convention of ministerial responsibility for the civil service were made in the “Crichel Down” episode (as set out in box 1).

### BOX 1

#### Crichel Down

In 1954 the Minister of Agriculture, Sir Thomas Dugdale, resigned following an official inquiry about the approach of the Ministry of Agriculture in disposing of land no longer needed by the Air Ministry after the Second World War. In the Commons debate on the inquiry's report the minister said—

“I, as Minister, must accept full responsibility to Parliament for any mistakes and inefficiency of officials in my Department, just as, when my officials bring off any successes on my behalf, I take full credit for them ... any departure from this long-established rule is bound to bring the civil service right into the political arena, and that we should all, on both sides of the House, deprecate most vigorously”.<sup>8</sup>

The Crichel Down episode is perhaps most useful in constitutional terms because of the four categories drawn up by the Home Secretary, Sir David Maxwell Fyfe, to distinguish the degree of accountability of ministers for their civil servants—

- (1) A minister must protect a civil servant who has carried out an explicit order by the minister.
- (2) A minister must protect and defend a civil servant who acts properly in accordance with the policy laid down by the minister.

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<sup>6</sup> This view of the constitutional position of civil servants was encapsulated in a note by the then Cabinet Secretary and Head of the Home Civil Service, Sir Robert Armstrong (now Lord Armstrong of Ilminster), in 1985: see HC Deb, 26 February 1985, cols 130–32W. The convention is also set out in the Civil Service Code (para 2), the Cabinet Manual (1st edition, para 7.1) and the Government's *Civil Service Reform Plan* (p 20).

<sup>7</sup> This is a distinct concept from that of the collective responsibility of the government to Parliament (known as collective ministerial responsibility). The convention of collective ministerial responsibility is not relevant to this report.

<sup>8</sup> HC Deb, 20 July 1954, col 1186. This seemingly unequivocal statement of responsibility was blurred by the attendant circumstances: civil servants were named and criticised in the inquiry's report; the minister had taken a personal part in the transactions relating to the land; and the minister appeared to have lost the confidence of his backbenchers, who were unhappy with the Ministry's policy.

- (3) Where an official makes a mistake or causes some delay, but not on an important issue of policy and not where a claim to individual rights is seriously involved, the minister acknowledges the mistake and accepts the responsibility, although he is not personally involved, and states that he will take appropriate corrective action in the department. The minister would not expose the official to public criticism.
- (4) Where action has been taken by a civil servant of which the minister disapproves and has no prior knowledge, and the conduct of the official is reprehensible, there is no obligation on the part of the minister to endorse what he believes is wrong or to defend what are clearly shown to be errors of his officials. But the minister remains constitutionally responsible to Parliament for the fact that something has gone wrong, and the minister alone can tell Parliament what has occurred.<sup>9</sup>

5. In 1997 both Houses of Parliament agreed resolutions on ministerial accountability, which state that “ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and Executive Agencies ...”<sup>10</sup> The adoption of the resolutions was significant in changing the doctrine of ministerial responsibility to Parliament from an unwritten constitutional convention into a clear parliamentary rule, which can be modified only by Parliament.<sup>11</sup>
6. There are, though, concerns about whether the principle of ministerial responsibility needs re-examining.
7. One concern is that the size and complexity of the state have grown so greatly since the convention was first recognised that it is now unrealistic, even absurd, to expect a minister to be responsible for everything done by a department. Margaret Hodge MP, chair of the House of Commons Public Accounts Committee,<sup>12</sup> told us—

“When Haldane established the constitutional convention that Ministers are accountable to Parliament and civil servants are accountable to Ministers, there were 28 civil servants in the Home Office. Now, despite the changes and the growth of the Ministry of Justice, there are 34,000. The idea that one Cabinet Minister can be accountable for the actions of some 34,000 people is, I think, mistaken.”<sup>13</sup>

<sup>9</sup> *ibid.*, cols 1285–87.

<sup>10</sup> HL Deb, 20 March 1997, cols 1055–62; HC Deb, 19 March 1997, cols 1046–47. The resolutions followed a recommendation of the then House of Commons Public Service Committee (Public Service Committee, 2nd report (1995–96): *Ministerial Accountability and Responsibility* (HC 313)), which followed the Scott report into arms to Iraq (HC 115, 1995–96) and the dismissal of Derek Lewis as chief executive of the Prison Service (see Tomkins, *The Constitution after Scott* (Oxford University Press, 1998), pp 45–49 for more details about the Derek Lewis case).

<sup>11</sup> Neither House has modified its resolution since it was passed.

<sup>12</sup> The evidence of Margaret Hodge MP, Sir Alan Beith MP (chair of the House of Commons Justice and Liaison Committees) and Bernard Jenkin MP (chair of the Public Administration Committee) was given in a personal capacity, rather than on behalf of the committees they chaired: see Q 1.

<sup>13</sup> Q 1.

8. A second concern is that ministers have on occasion tended to distance themselves from failures in government, stating that errors were made by civil servants. It is thought odd that a minister has to be responsible for what are clear errors by civil servants—for example, the loss of a disc containing confidential information on 25 million people by junior officials at Her Majesty’s Revenue and Customs.<sup>14</sup>
9. That said, many of our witnesses thought that the convention was still the best means of enabling Parliament to do its job of holding the government to account. Having ministers currently in office answering for all the actions of their departments is the most comprehensive means of Parliament being able to obtain full answers on all issues.<sup>15</sup>
10. The convention, it is said, reflects political reality: when a serious failure occurs in government, the media and the public will inevitably look to the minister for answers—the “*Today* programme test”.<sup>16</sup> It is no bad thing for constitutional convention to match political reality.
11. It is hard to see how any alternative system could work in practice in the Westminster model whereby the government are formed from within Parliament.<sup>17</sup> Although select committees play an increasingly important role in holding the government to account, they are not the only means by which it is done. This is particularly the case for day-to-day scrutiny. Ministers answer oral and written questions, make oral and written statements, respond to debates, and promote bills and secondary legislation in both Houses of Parliament. These ministerial functions in Parliament could not be performed by civil servants. If a minister were able to respond to, say, a parliamentary question by saying he or she did not decide that matter individually and therefore could not answer the question substantively, Parliament would be left uninformed. If ministers were able to avoid constitutional responsibility, they might do so when it was politically advantageous, whilst continuing to take full credit for whatever went well in the department.
12. **We conclude that the convention that ministers are constitutionally responsible for all aspects of their departments’ business is an essential principle underlying the arrangements that enable Parliament properly to perform its function of holding the Government to account. The convention is clear, straightforward and leaves no gaps.**

### Accountability and responsibility

13. Some have attempted to refine the concept of ministerial responsibility by drawing a distinction between accountability and responsibility. Lord Howard of Lympne, Home Secretary from 1993 to 1997 and leader of the Conservative Party from 2003 to 2005, told us—
 

“I think that Ministers should be accountable to Parliament—and Parliament’s select committees, obviously—for everything that is within the remit of their department. However, there will be some things within

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<sup>14</sup> See HC Deb, 20 November 2007, cols 1101–04.

<sup>15</sup> Q 29.

<sup>16</sup> Q 139.

<sup>17</sup> Unlock Democracy, para 6.

the remit of their department for which they are not responsible—accountable to Parliament, yes, but not responsible.”<sup>18</sup>

14. This view holds that two distinct concepts exist: accountability is used to describe answering for a decision and its consequences, whereas responsibility is understood as the praiseworthiness or blameworthiness which attaches to the individual who actually takes the decision in question.
15. A similar distinction may be drawn between the functions of civil servants in providing policy advice to ministers and implementing policies set down by ministers. Some witnesses thought that such a distinction is both possible and desirable;<sup>19</sup> others thought attempting to draw a clear line between policy and implementation was unhelpful, as ministers often get involved in implementation.<sup>20</sup> Where it is possible to separate the two, the distinction may be a valuable means of providing clarity and enhanced accountability, especially of civil servants.
16. Not all of our witnesses agreed with such distinctions. Peter Riddell, Director of the Institute for Government, told us that: “There is a danger of getting too obsessed by the distinction between ministerial accountability and ministerial responsibility ... you can dance round on that and get very confused and not get anything very practical as a result.”<sup>21</sup>
17. We considered this matter in the context of the Health and Social Care Bill last session.<sup>22</sup> In our report we concluded that the concepts of constitutional responsibility, accountability and answerability are all a part of the same thing. **We maintain our view that there is no constitutional difference between the terms responsibility and accountability.**

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<sup>18</sup> Q 27. This distinction was also recognised by Sir Bob Kerslake, the current Head of the Home Civil Service (Q 311), as well as by his predecessors in that office, Lords Wilson of Dinton and Turnbull (QQ 260 and 264), and by Sir Alan Beith MP (Q 20).

<sup>19</sup> For example, Andrew Haldenby, Director of the think tank Reform (Q 113).

<sup>20</sup> QQ 42, 109 and 329.

<sup>21</sup> Q 105.

<sup>22</sup> *op. cit.*, appendix 1.

### CHAPTER 3: ACCOUNTABILITY OF CIVIL SERVANTS TO MINISTERS

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18. The accountability of civil servants to ministers is an area which has generated controversy during the current Parliament. The Prime Minister has described “bureaucrats in government departments” as “enemies of enterprise”.<sup>23</sup> Minister for the Cabinet Office and Paymaster General Francis Maude MP referred in evidence to us to ministers in the current and previous governments being enraged by civil servants not challenging a ministerial proposal but then not implementing it.<sup>24</sup> The permanent secretary of the Department for Transport said that the errors in the handling of the West Coast Main Line franchise bidding process “were clearly the responsibility of officials and not ministers”, and suspended three of them.<sup>25</sup>
19. During our inquiry the Government produced their *Civil Service Reform Plan*, which proposes changes to the relationship between ministers and civil servants. These proposals have formed a significant part of our inquiry, and are examined in this chapter.<sup>26</sup>

#### Appointments of permanent secretaries

20. At present, when a secretary of state is first appointed to a new department, he or she is expected to work with the permanent secretary in post at the time.<sup>27</sup> When a vacancy arises at permanent secretary level, the current arrangements for appointment to the post were set out for us by the Civil Service Commission.<sup>28</sup> There are mechanisms to ensure that the incumbent minister’s needs and priorities are reflected in the final choice of candidate. Ministers are able to agree the job description, the key skills required, and the terms of the advertisement, as well as the composition of the selection panel. Ministers can meet the shortlist of candidates, and can notify the panel of any concerns about the skills and experience of the candidates, which the panel can then explore with the candidates at interview. Finally, the minister has a veto over the panel’s final recommendation, which ensures that he is not faced with the appointment of a permanent secretary with whom he feels unable to work.

#### *The Government’s proposals*

21. The *Civil Service Reform Plan* indicates the Government’s broad intention is to strengthen the role of ministers in the appointments process for departmental permanent secretaries.<sup>29</sup> The Government propose to consult

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<sup>23</sup> Speech by the Prime Minister in Cardiff, 6 March 2011.

<sup>24</sup> Q 344.

<sup>25</sup> “Senior civil servant says sorry for franchise errors”, *The Times*, 12 October 2012.

<sup>26</sup> Oliver Letwin MP, Minister of State at the Cabinet Office, explained the thinking behind the Government’s proposals at a lecture at the Institute for Government on 17 September 2012: <http://www.instituteforgovernment.org.uk/events/why-mandarins-matter-keynote-speech-rt-hon-oliver-letwin-mp>.

Since the plan was published the Government have commissioned the Institute for Public Policy Research to prepare a report on models of accountability for civil servants in other jurisdictions. See: <http://www.cabinetoffice.gov.uk/news/government-first-use-contestable-policy-fund>.

<sup>27</sup> Q 30.

<sup>28</sup> Civil Service Commission, para 9.

<sup>29</sup> *Civil Service Reform Plan*, p 21.

the Civil Service Commission on the best way in which this strengthening could take place.<sup>30</sup>

22. This intention was clarified by Francis Maude MP in his evidence to us: “the process should be that a panel, properly constituted and invigilated by the Civil Service Commission, should put forward a choice of candidates, both of whom, or all of whom if it is more than two, are totally validated as not being political, not capable of being a political choice.”<sup>31</sup> The minister concerned would then be entitled to choose which of the candidates should be appointed.
23. Mr Maude explained the rationale behind this revised process as being that, if the convention of individual ministerial responsibility to Parliament is to remain, then ministers must not be denied a choice over the principal civil servants who carry out their decisions.<sup>32</sup> This view was shared by Margaret Hodge MP: “If ministers were really accountable for everything their civil servants do, they ought to be able to hire and fire, and yet to maintain civil service independence, they cannot do so. To me that feels like an uncomfortable set of principles.”<sup>33</sup> Peter Riddell, Director of the Institute for Government, also supported the proposal: he indicated that, as long as all of the candidates presented to the minister were “above the line”, no real issue arises.<sup>34</sup> He told us that in practice secretaries of state were often in effect presented with a shortlist anyway.<sup>35</sup>

#### *Objections to the proposed reform*

24. Most of the criticisms of the Government’s proposals focused on the risk of politicising the civil service. Dr Andrew Blick, Senior Research Fellow, Centre for Political and Constitutional Studies, King’s College London, thought that—

“[politicisation] would be a very likely consequence [of the proposed reforms], because you would have people who were clearly handpicked by a particular minister as permanent secretary. What happens if there is a change at the top ... and a new Secretary of State comes in, and this person is seen as being very closely linked to the previous minister? ... it can be a real problem if a permanent, supposedly impartial civil servant is seen as being a particular minister’s woman or man, and I think that will happen now.”<sup>36</sup>

25. The Civil Service Commission also had reservations about the degree of ministerial involvement—

“Handing over the final choice [of who to appoint] to one individual, whether a minister or a civil servant, is unlikely to further the merit

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<sup>30</sup> *ibid.*, p. 21.

<sup>31</sup> Q 340.

<sup>32</sup> Q 340.

<sup>33</sup> Q 1. David Blunkett MP, a Cabinet minister from 1997 to 2005, also supported the proposal (Q 55).

<sup>34</sup> Lord Turnbull, Cabinet Secretary from 2002 to 2005, made a similar point (Q 276).

<sup>35</sup> Q 115. Alexandra Runswick, of Unlock Democracy, agreed with Mr Riddell’s view (Q 115).

<sup>36</sup> Q 151. Colin Talbot, Professor of Government and Public Administration, Manchester Business School, agreed; and David Penman, General Secretary of the First Division Association (the professional association and trade union for senior civil servants), thought the idea of a permanent secretary being closely associated with a particular minister caused concern (Q 237).

principle and may lead to favouritism. Where the choice is put in the hands of a minister, there may be a perception—and sometimes the reality—of politicisation which could eventually undermine the ability of the civil service to serve successive administrations.”<sup>37</sup>

26. Lord Turnbull expressed concern that ministers might seek to install as their permanent secretary individuals known to them from previous civil service posts or other contexts.<sup>38</sup> Under the Government’s proposal this could happen if a minister insisted that a specific candidate be put on the shortlist.
27. Lord Wilson of Dinton, Cabinet Secretary from 1998 to 2002, told us that—
- “Parliament, only two years ago, passed [the Constitutional Reform and Governance Act 2010] that finally implemented the Northcote–Trevelyan report. I think it would be odd to start trying to undo it. There has always been a tension in politics between patronage and merit; it is an old battle ... Merit ultimately won, but the patronage virus is never dead and constantly needs to be beaten back.”<sup>39</sup>

*The principles that should underlie reform*

28. We recognise the importance of an impartial, objective civil service, appointed on merit, and able to serve the government of the day whilst retaining the capacity to serve future governments of differing political complexions with equal commitment. The ability of the civil service to perform this function is one of the major strengths of the UK constitution, enabling the smooth transition from one government to another in accordance with the wishes of the electorate, whilst maintaining stability and continuity. The civil service attributes of integrity, honesty, objectivity and impartiality form the bedrock upon which the permanent civil service is built. Whilst these values were not enshrined in statute until the Constitutional Reform and Governance Act 2010, the civil service has been firmly based on them for at least the last 160 years, since the Northcote–Trevelyan report. We fully support these principles, both as constitutional norms and as statute law.
29. We acknowledge, however, that the civil service attributes are broadly based, and that it may be possible to alter aspects of the appointments process in accordance with the qualities which the 2010 Act now enshrines. We are also conscious that the Government’s proposed reforms to the appointments process are in some respects the formalisation of practices which already occur. As such, the practical implications of the reforms may not be as significant as they appear to be in purely theoretical terms. **However the existing appointments process for permanent secretaries may be modified, it must continue to conform fully with the constitutional principles of integrity, honesty, objectivity and impartiality. In particular, any modified process should protect the principle of appointment on merit, on the basis of fair and open competition.**

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<sup>37</sup> Civil Service Commission, para 9. Lord Hennessy of Nympsfield, Attlee Professor of Contemporary British History, Queen Mary University of London, made a similar point about the impression that would be created (Q 151).

<sup>38</sup> Q 276.

<sup>39</sup> Q 257. Lord O’Donnell, Cabinet Secretary from 2005 to the beginning of 2012, also questioned the need for the reforms (Q 288).

### Temporary appointments of senior civil servants

30. A further element of the Government's proposals to strengthen ministerial involvement in civil service appointments is that, in some circumstances, ministers should be empowered to ask their permanent secretaries to appoint named individuals to fixed-term civil service roles, without the requirement for an open recruitment process. The *Civil Service Reform Plan* sets out the proposal—
- “Normally new appointments will be made from within the permanent Civil Service or by open recruitment. But, as now, where the expertise does not exist in the Department, and it is not practicable to run a full open competition, Ministers should be able to ask their Permanent Secretaries to appoint a very limited number of senior officials, for specified and time-limited executive/management roles. In such cases the Civil Service Commission's approval would be required and they would need to be satisfied that the individuals concerned have the appropriate skills and that they are appointed for their abilities and knowledge rather than for any party political background. These appointees would be subject to the Civil Service Code, and thus politically restricted.”<sup>40</sup>
31. Witnesses who were opposed to the proposal were generally concerned about the potential for temporary appointments gradually to erode the impartiality and permanence of the senior civil service. Lord Hennessy of Nympsfield told us—
- “I am worried about creeping politicisation ... the danger will be those senior officials brought in on a temporary contract. That is where the temptation will lie. The great gift of the 19th century to the 20th, and it has survived into the 21st, is that we have a notion of career Crown service, so that you increase the chances of people speaking truth unto power, of telling Secretaries of State what they need to know rather than what they wish to hear. ... I am worried about that bit in the civil service reform plan, because it could be the beginning of the gradual undoing of Northcote–Trevelyan.”<sup>41</sup>
32. Professor Talbot shared Lord Hennessy's concern that the ability of civil servants to say, when necessary, “no minister” would be undermined if the civil servant in question was appointed by, and beholden to, the minister.<sup>42</sup>
33. Sir Bob Kerslake did not feel that there was a risk that temporary appointments would be used to create a class of “super-special advisers” within departments. He explained that: “it is clear ... that for senior appointments coming through this route they will be approved by the Commission. I think there are very good safeguards that allow us to bring in people quickly when they are needed in expert areas—this already happens”.<sup>43</sup>
34. We recognise the benefits that temporary appointments can bring to effective governance and executive project management, particularly when they are

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<sup>40</sup> *op. cit.*, p 21.

<sup>41</sup> Q 151.

<sup>42</sup> Q 153.

<sup>43</sup> Q 336. Sir Jeremy Heywood, Cabinet Secretary, made a similar point (Q 335).

used a means of securing specialist expertise at short notice. However, we are concerned that temporary civil servants appointed in this manner may not feel able to speak truth unto power, particularly if there is an expectation that temporary appointments may be extended or made permanent at the conclusion of the fixed term. There is a risk that such appointments may be used as a means of increasing the political element of the civil service by the back door, or lead to cronyism. This is particularly so where the minister is able to specify the named individual to be appointed. We recognise the importance of due process in the making of appointments, both to guarantee appointment on merit and to protect against improper interference by ministers.

35. **The Government should set out, in detail, the nature of the temporary appointments scheme they envisage. They should put in place safeguards to ensure that those civil servants on fixed-term contracts possess the civil service attributes set out in the Constitutional Reform and Governance Act 2010: integrity, honesty, objectivity and impartiality. Ministers should be limited to requesting the category of expertise which they consider is required; the decision on which individual to appoint should rest with the relevant departmental permanent secretary, with the approval of the Civil Service Commission.**

#### **Discipline, dismissal and appraisal of civil servants**

36. At present, with the exception of some very narrowly defined cases, ministers are not formally involved in disciplinary matters for civil servants in their departments.<sup>44</sup> We heard, however, that ministers may exercise informal influence over such matters. David Blunkett MP told us: “Generally there should be very clear and open disciplinary procedures, and that should not, other than the permanent secretary and the principal private secretary, involve secretaries of state or ministers. However, in practice, if you thought that someone was useless, they usually got moved.”<sup>45</sup> Lord Howard of Lympne agreed that ministers should not have a formal role.<sup>46</sup> He added that, whilst ministers could make representations to their permanent secretaries about disciplinary matters, the responsibility for making the decision itself should rest elsewhere.<sup>47</sup>
37. In addition to these informal roles, the Government intend to enable ministers to be formally involved in the appraisal of civil servants “whose work ministers see and the civil servants who are running the projects and programmes for which ministers are accountable”<sup>48</sup>.
38. Amongst those witnesses who commented on ministerial involvement in the discipline and performance management of civil servants there was general agreement that the formal, final decision on such issues should not rest with the minister. Lord Fowler, a Cabinet minister from 1981 to 1990, was “extremely sceptical about the proposal that politicians should play any part

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<sup>44</sup> Ministers currently possess formal powers to request the reassignment (though not the dismissal) of the civil servants in their private offices.

<sup>45</sup> Q 63.

<sup>46</sup> Q 34.

<sup>47</sup> Q 35.

<sup>48</sup> Q 341.

in the discipline of the civil service. Frankly, I think that would begin to politicise it in a very difficult way.”<sup>49</sup> He added: “I think it is extremely difficult to see how ministers with months of experience can get involved in disciplinary hearings and decisions when they are supposed to be judging a man who has been there for 10 or 20 years.”<sup>50</sup>

39. **It would be entirely inappropriate for ministers to be formally empowered to make disciplinary decisions about civil servants in their departments. We recognise, however, that ministers have an important and legitimate consultative role in the performance management of civil servants. Accordingly, we support the Government’s proposal to allow ministers to contribute to the appraisal of certain civil servants.**

### **Project management and long-term policy implementation**

40. One of the most fraught aspects of civil service accountability arises in the context of long-term project management. Large government projects, including those in the fields of IT and procurement, often span several years. Problems with such projects may not emerge until the ministers and officials responsible for designing the project have moved on to other roles or retired. Some projects can begin under one administration and not conclude until another administration has entered office. The list of big government projects which have gone significantly over budget and over time is distressing. For example, the project to create regional control centres for fire and rescue services was abandoned in December 2010 at a cost of around £469 million, following serious deficiencies in the policy, design and implementation plans for the new centres. In the field of procurement, serious concerns have arisen over the NHS’s IT database, the Ministry of Defence’s procurement of aircraft carriers and the IT system for the Rural Payments Agency’s Single Payment Scheme.
41. The ability of Parliament, and the public, to hold government accountable for long-term projects is especially challenging, yet such accountability is important for ensuring that the taxpayer receives value for money.
42. A number of our witnesses identified the high turnover of civil servants on project teams as a major cause of the accountability problem with such projects. Peter Riddell told us—
- “The real frustrations for ministers are when you have a constant turnover of officials doing big projects, particularly when you are talking about big IT projects, which will on average last the time of three secretaries of state, and officials will often also change a lot ... If someone is clearly responsible for running a big project for several years, and the incentive structure is there and they do not always seek to get promoted out of the job, that is ... important”.<sup>51</sup>
43. The *Civil Service Reform Plan* also recognised the problem: “Senior Responsible Officers often move too frequently, leaving mid-way through a project. Sometimes, this can enable skill sets to be aligned with project requirements but more frequently it causes delay and instability and disrupts

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<sup>49</sup> Q 58.

<sup>50</sup> Q 60.

<sup>51</sup> Q 111.

effective implementation.”<sup>52</sup> The obvious solution to the problem is greater continuity in the civil servants leading projects, though promotions, retirements and sideways moves etc. will mean that is not always possible.

44. **We recommend that there should be a presumption that a single senior civil servant will lead the implementation of a major project from beginning to end. This will enhance the ability of Parliament, through its select committees, to hold the executive to account for the success or failure of such projects.**

#### **The civil service as a constitutional check**

45. The civil service possesses a number of means by which it can help to ensure the constitutional propriety of government actions. Ministers cannot require civil servants to act in a manner which is illegal. Similarly, the Ministerial Code contains a requirement that ministers must not ask civil servants to act in any way which would conflict with the Civil Service Code or the requirements of the Constitutional Reform and Governance Act 2010.<sup>53</sup> The Ministerial Code places a duty on ministers to give fair consideration and due weight to informed and impartial advice from civil servants, and civil servants in turn are under an obligation to provide ministers with impartial, honest and objective advice, including on matters of constitutional propriety.<sup>54</sup>
46. Where a minister declines to follow civil service advice, and decides to proceed in an unconstitutional manner (which, under the UK’s uncodified constitution, may not necessarily amount to an illegal manner), the position was set out by Lord Wilson of Dinton—
- “If [civil servants] think the Minister is behaving in an unconstitutional manner, it is their job to make very clear what they believe the constitutional position is ... If ... they do not get an answer that they think is the proper answer or that is defensible, it is their job to go to the head of the civil service, who would take it up with the Prime Minister if necessary ... If a Minister, in the end, rejects the advice, and if the Prime Minister rejects the advice and insists on going ahead, then in grey areas it is the job of Ministers to decide where the line should be, and there is a limit to how far the civil service can enforce the constitution, except in the ultimate, nuclear deterrent of resigning.”<sup>55</sup>
47. Therefore, under the current arrangement civil servants are ultimately unable to prevent ministers from breaching constitutional norms. Indeed, an attempt by civil servants to resist enacting a ministerial decision which they considered to be unconstitutional, but which was taken after following the correct process, would be a breach of the Civil Service Code.<sup>56</sup>
48. Some witnesses drew an analogy with the ability of civil servants to control the actions of ministers through the Accounting Officer role. In ministerial departments, the Accounting Officer is usually the department’s permanent

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<sup>52</sup> *op. cit.*, p 19.

<sup>53</sup> Ministerial Code, para 5.1.

<sup>54</sup> Ministerial Code, para 5.2; Civil Service Code.

<sup>55</sup> Q 251.

<sup>56</sup> Civil Service Code, para 11.

secretary. The roles and responsibilities of Accounting Officers are summarised in box 2.<sup>57</sup>

## BOX 2

### Roles and responsibilities of Accounting Officers

Accounting Officers are those civil servants whom Parliament holds directly to account for the stewardship of resources within his department's control. Accounting Officers are personally responsible for ensuring that their departments meet high ethical standards so as to achieve value for money. They are also expected to ensure that their departments meet certain standards of governance, decision making (including providing ministers with clear, well-reasoned, timely and impartial advice) and financial management.

Accounting Officers must personally sign off a number of official departmental documents, including its accounts, annual report and governance statement.

Accounting Officers are also personally responsible for—

- The regularity and propriety of departmental expenditure
- The appraisal of programmes and projects
- Affordability and sustainability
- Value for money
- The management of opportunity and risk
- Ensuring that departments learn from experience
- Accounting accurately for the department's financial position and transactions.

If an Accounting Officer receives a ministerial proposal which conflicts with his duties, he must bring this to the minister's attention. If the minister wishes the Accounting Officer to proceed with the proposal nevertheless, the Accounting Officer should seek a formal, written direction from the minister. If such a written direction is given, the Accounting Officer must copy it to the Comptroller and Auditor General, who will usually forward it to the House of Commons Public Accounts Committee. The Accounting Officer must then follow the direction without further ado.

49. Ultimately, a minister can, by way of a ministerial direction, compel an Accounting Officer to act in a manner contrary to the Accounting Officer's personal responsibilities. However, the public nature of formal ministerial directions is in contrast to advice provided on constitutional propriety, which at present is provided to the minister confidentially. **The power to seek a ministerial direction is therefore a significant one, and its very existence no doubt prevents impropriety in some cases.**

#### *Suggested reform*

50. A suggestion has been made for strengthening the ability of the civil service to act as a constitutional check upon ministers. This is that the role of the

<sup>57</sup> They are set out in full in chapter 3 of the HM Treasury publication *Managing Public Money*.

Accounting Officer could be extended into areas of constitutionality and ethics. This would mean that, where a permanent secretary believes a ministerial proposal does not conform to standards of constitutional propriety, the permanent secretary can require a formal ministerial direction, which would then have to be followed. If this proposal was implemented, arrangements could be put in place for publishing the ministerial direction and notifying Parliament of it, in a similar way to ministerial directions about financial proposals.<sup>58</sup>

51. Several of our witnesses were concerned, however, that a formalisation of the relationship between ministers and civil servants in this manner would lead to a breakdown in trust between ministers and civil servants. Lord Hennessy of Nympsfield told us—

“I am very reluctant, as Peter Riddell and your previous witnesses were, to over-codify these relationships. There is a school of thought among older civil servants ... that our need to write down so much ... shows that it is too late. The relationship has already broken down to some extent if you have to write it down. If you over-codify it, it can produce all sorts of suspicions and tensions ... these relationships are human ones, above all, and if they break down on a human level, there is no scrap of paper that can save them.”<sup>59</sup>

52. A major difficulty with extending the Accounting Officer principle is that of definition. If such a reform was to take place, it would need to be within carefully defined areas, and the nature of the UK’s constitution is such that no such clear definition is currently possible. There are unclear boundaries between what are constitutional laws, conventions, practices and norms. It is not certain that the civil service is better placed to rule definitively on these boundaries than anyone else.
53. Whilst we recognise that some benefits may flow from extending and strengthening the constitutional custodianship role of the civil service, such an extension would present serious challenges: the trust between the parties to the relationship may be eroded, definitional issues will arise, and the convention of individual ministerial responsibility contains no alternative mechanism for holding civil servants accountable for any powers they may exercise over ministers. Therefore, **we do not recommend any additional powers for the civil service to act as a check on the constitutionality of ministerial actions. However, we would expect ministers to treat advice that they may be acting unconstitutionally with the utmost seriousness.**

### Ministerial responsibility for special advisers

54. Special advisers occupy an unusual place in the civil service. Technically they are temporary civil servants<sup>60</sup> who are exempt from the general requirement that civil servants are appointed on merit and behave with impartiality and objectivity so that they may retain the confidence of future governments of a

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<sup>58</sup> This proposal was supported by Unlock Democracy (written evidence, paras 29–31; Q 118). Peter Riddell was in favour of extending the accounting officer role into policy-making matters, and accepted that it could also be extended into such ethical areas (Q 119).

<sup>59</sup> Q 143.

<sup>60</sup> Appointed under article 3 of the Civil Service Order in Council 1995.

different political complexion.<sup>61</sup> As such they are appointed to provide ministers with advice and support with regard to the political (including party political) aspects of government. Special advisers are appointed by the minister whom they serve, with the consent of the Prime Minister, and hold office until the end of the administration which they serve or the departure of their appointing minister. In general, Cabinet ministers may each appoint up to two special advisers. In addition to personally appointing their special advisers, ministers are also responsible for their management and conduct, including discipline.<sup>62</sup> Special advisers can be dismissed by the Prime Minister at any time.

55. Special advisers are subject to the Code of Conduct for Special Advisers.<sup>63</sup> This sets out the work special advisers may do and provides guidance on propriety and ethics. It also deals with relations with the permanent civil service, including a prohibition on special advisers authorising the expenditure of public funds, exercising any power over the management of the civil service or otherwise exercising any statutory or prerogative power.<sup>64</sup>
56. Recent high-profile developments have raised the issue of ministers' responsibility for their special advisers. There was debate about the extent to which the then Culture, Media and Sport Secretary, Jeremy Hunt MP, was responsible for the actions of his special adviser, Adam Smith, in corresponding with a representative of News Corporation when the latter's bid for BSkyB was being considered by the Secretary of State in a quasi-judicial process. Mr Smith resigned when the communications were revealed to the Leveson Inquiry in April 2012. Mr Hunt said that the "volume and tone" of Mr Smith's communications with News Corporation's "were clearly not appropriate".<sup>65</sup> Although he "did not know about or authorise that contact", he "accepted full responsibility for it by making a statement to the House the day after the contact became apparent."<sup>66</sup> In 2009 Prime Minister Gordon Brown's special adviser Damian McBride resigned after it was revealed that he had sent emails from his Downing Street email address to a political website making allegations about the personal lives of Conservative MPs and their spouses. The Prime Minister apologised personally to those against whom the accusations were made.<sup>67</sup>
57. Peter Riddell thought that special advisers operate in an "accountability limbo, in theory governed by their code but, in practice, by what their minister is willing to approve."<sup>68</sup> Dr Andrew Blick thought there may be

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<sup>61</sup> Code of Conduct for Special Advisers, para 4.

<sup>62</sup> Ministerial Code, para 3.3; Code of Conduct for Special Advisers, para 4.

<sup>63</sup> Section 8(1) of the Constitutional Reform and Governance Act 2010 requires the Minister for the Civil Service (by convention the Prime Minister) to publish a special advisers code. Subsection (5) sets out what the code must prohibit special advisers from doing.

<sup>64</sup> Prior to the enactment of the Constitutional Reform and Governance Act 2010, special advisers were subject to a succession of non-statutory codes of conduct, the first of which was promulgated in 2001 following a recommendation by the Committee on Standards in Public Life. For further information on the history of codes of conduct for special advisers see the House of Commons Library note: Special advisers (SN/PC/03813; 7 August 2012), part 3.

<sup>65</sup> HC Deb, 25 April 2012, col 955.

<sup>66</sup> HC Deb, 13 June 2012, col 347.

<sup>67</sup> HC Deb, 22 April 2009, col 233. Further examples of the conduct of special advisers are cited by the Public Administration Committee in its recent report *Special advisers in the thick of it* (6th report, 2012–13 HC 134).

<sup>68</sup> Riddell, para 20.

slight confusion as to whether the minister or Prime Minister is responsible for special advisers.<sup>69</sup>

58. On the other hand, Unlock Democracy thought it appropriate for ministers to be directly accountable for the actions of their special advisers.<sup>70</sup> Charles Clarke, a Cabinet Minister from 2001 to 2006, told us that the special adviser is “the servant of, almost the slave of, the minister and Secretary of State” and that they “do not exist other than as the voice of their principal.”<sup>71</sup> Therefore he thought the minister should be held accountable for what they do. The two former special advisers that we heard from agreed that they were clearly accountable to their secretary of state, and through him or her to Parliament.<sup>72</sup>
59. **In our view, the constitutional position as regards special advisers is clear: ministers are responsible for the actions of their special advisers. Ministers have a duty to ensure their special advisers abide by the Code of Conduct for Special Advisers at all times.**

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<sup>69</sup> Blick, paras 34–36. Bernard Jenkin MP thought likewise (Q 23).

<sup>70</sup> Unlock Democracy, para 40.

<sup>71</sup> Q 46.

<sup>72</sup> Q 84.

## CHAPTER 4: ACCOUNTABILITY OF CIVIL SERVANTS TO PARLIAMENT

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60. The principle that ministers are constitutionally responsible for their civil servants forms the primary mechanism by which civil servants are held to account. However, Parliament also scrutinises some civil servants directly. This helps to give effect to the constitutional principle of proper parliamentary scrutiny of the executive. The introduction of the system of House of Commons departmental select committees in 1979, and their growth in influence and public profile since then, has significantly changed the way in which Parliament performs this function. Select committees now regularly take evidence from civil servants. The House of Commons Public Accounts Committee has sought consistently to hold civil servants directly to account for administrative failures,<sup>73</sup> with their style of doing so attracting opposition from Lord O'Donnell, the former Cabinet Secretary.<sup>74</sup> These developments have brought a renewed focus on the accountability of civil servants to Parliament, which we explore in this chapter.<sup>75</sup>

### The Osmotherly rules

61. The Government guidance *Departmental evidence and response to select committees*, widely known as the Osmotherly rules,<sup>76</sup> gives guidance to civil servants on the role of officials appearing before committees in both Houses. Various versions have existed since they were first drawn up in 1980. The current edition was issued in July 2005. In their written evidence the Government told us the Cabinet Office will shortly begin a review of the guidance.<sup>77</sup>
62. The section of the Osmotherly rules providing guidance on the provision of evidence by officials states: “The central principle to be followed is that it is the duty of officials to be as helpful as possible to select committees. Officials should be as forthcoming as they can in providing information, whether in writing or in oral evidence, to a select committee.”<sup>78</sup>
63. The status of the rules is described as follows—
- “In providing guidance, the memorandum attempts to summarise a number of longstanding conventions that have developed in the relationship between Parliament, in the form of its select committees, and successive governments. As a matter of practice, Parliament has generally recognised these conventions. It is important to note, however, that this memorandum is a Government document. Although select

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<sup>73</sup> See, for example, “Accountability in today’s public services”, speech to Policy Exchange by Margaret Hodge MP, 15 March 2012.

<sup>74</sup> See, for example, “Public accounts committee ‘theatrical exercise in public humiliation’”, *The Guardian*, 9 March 2012.

<sup>75</sup> Although the recommendations in this chapter apply to select committees of both Houses, we recognise that they may have more day-to-day relevance to the work of House of Commons select committees in scrutinising the work and expenditure of government departments.

<sup>76</sup> The rules are named after Edward (later Sir Edward) Osmotherly, the civil servant in the Machinery of Government Division when the Cabinet Office first issued them (QQ 130–131).

<sup>77</sup> Cabinet Office, para 9.

<sup>78</sup> *Departmental evidence and response to select committees*, para 53.

committees will be familiar with its contents, it has no formal parliamentary standing or approval, nor does it claim to have.”<sup>79</sup>

64. *Erskine May* comments that although “select committees have from time to time commented on [the rules’] provisions, they have never formally agreed to them.”<sup>80</sup> One reason for this is that by endorsing them select committees would be endorsing the limitations on what information may be provided to committees, and who they may call to give evidence. This might be seen as compromising the rights of committees to ask whatever questions they want of whomever they want, and to request whatever papers they want. These rights flow from the right of each House to determine its own proceedings (known as exclusive cognisance).
65. The more restrictive aspects of the Osmotherly rules have been said to be honoured more in the breach than the observance. In 1990 the House of Commons Procedure Committee said it was “conscious of the danger ... that a wholesale review [of the rules] 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.”<sup>81</sup>
66. Given the importance of the rules, several witnesses thought that Parliament should be involved in revising them or approving revisions. Unlock Democracy thought it “curious” that Parliament had never approved the rules and recommended that future editions should be considered in draft by Parliament, which would then decide whether or not to accept the finalised reissue.<sup>82</sup> David Penman thought that a wider review of the rules should incorporate the views of various interested parties; although it might be ambitious to seek agreement on them there should be some attempt “so that all sides feel some comfort in the rules of the game when giving evidence.”<sup>83</sup>
67. Others were sceptical as to whether Parliament should have a formal role in future revisions. Bernard Jenkin MP, chair of the Public Administration Select Committee, thought Parliament should “ignore” them as they have no legal standing; instead Parliament should maintain its absolute discretion to summon persons and papers.<sup>84</sup>
68. Sir Jeremy Heywood suggested there would be a dialogue with parliamentarians on revisions of the rules, though there was no specific process in mind.<sup>85</sup> Francis Maude MP told us he was open to suggestions as to how Parliament could be involved in the review of the Osmotherly rules, remarking “It would be a rich irony if revisions to the rules on accountability to Parliament were to exclude Parliament from their consideration.”<sup>86</sup>
69. The approach taken to consulting on the draft Cabinet Manual may be a useful template for future revisions of the Osmotherly rules. The Government’s draft Cabinet Manual was published to enable a public consultation and for Parliament to comment on it. Three select committees

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<sup>79</sup> *ibid.*, para 3.

<sup>80</sup> 24th edition, p 822.

<sup>81</sup> Session 1989–90, HC 19.

<sup>82</sup> Unlock Democracy, para 38.

<sup>83</sup> Q 215.

<sup>84</sup> Q 9. Lord Butler of Brockwell, Cabinet Secretary from 1988 to 1998, made a similar point (Q 302).

<sup>85</sup> Q 323.

<sup>86</sup> Q 352.

scrutinised it; two of them were clear that, whilst Parliament may have a role in scrutinising the draft and future revisions, it should not formally endorse them—the document was for internal Government use and so should not have Parliament’s imprimatur.<sup>87</sup>

70. **The Osmotherly rules are an executive document offering guidance to civil servants—and no more. They in no way have the effect of imposing restrictions on the activities of select committees. It is for Parliament to determine how it scrutinises the executive.**
71. **However, in view of the importance of the Osmotherly rules in guiding civil servants in their dealings with select committees, we recommend that future revisions of the rules should be published in draft to enable scrutiny by Parliament and its select committees. Whatever the outcome of that scrutiny, the rules will remain an executive document and should not be taken to have the formal approval of Parliament.**
72. The recommendation above relates to future revisions of the Osmotherly rules as a whole. The remainder of this chapter considers particular suggestions for altering the practice applying to civil servants giving evidence to select committees. If such changes in practice are agreed they would necessitate changes to the Osmotherly rules.

### Which civil servants should give evidence to select committees?

73. Select committees in both Houses which take evidence are usually granted the power “to send for persons, papers and evidence”. Although witnesses in person almost always give evidence in response to invitations, committees possess a formal power to summon individuals. That power is unqualified, save that a committee cannot usually itself summon a member of either House or someone who is overseas.<sup>88</sup> There is no formal restriction on select committees inviting, or in the last resort summoning, a named civil servant to give evidence.
74. The Osmotherly rules state that civil servants give evidence to select committees “on behalf of their ministers and under their directions”.<sup>89</sup> They state that this is in keeping with the principle of ministerial responsibility to Parliament.
75. In seeking evidence from the Government select committees will usually approach the department or minister concerned. *Erskine May* describes it as “customary for Ministers to decide which official should represent them”,<sup>90</sup> saying that the “usual practice [is] for a committee to invite witnesses from the department generally, rather than to name specific individuals.”<sup>91</sup> Nonetheless, on occasion a select committee will want to question a

<sup>87</sup> See Constitution Committee, 12th report (2010–12): *The Cabinet Manual* (HL Paper 107), paras 8 and 40; and Public Administration Select Committee, 8th report (2010–12): *Cabinet Manual* (HC 900), paras 53 and 54. The Political and Constitutional Reform Committee thought that the decision on whether the Cabinet Manual should be open to amendment and endorsement by Parliament would depend on how the status of it evolves. See 6th report (2010–12): *Constitutional implications of the Cabinet Manual* (HC 734), paras 40 and 41.

<sup>88</sup> See *Erskine May*, 24th edition, pp 820, 824–825 and 896.

<sup>89</sup> *op. cit.*, para 40.

<sup>90</sup> 24th edition, p 822.

<sup>91</sup> *ibid.*, p 896.

particular civil servant, usually a senior civil servant. The Osmotherly rules say that where that is the case—

“the presumption should be that Ministers will agree to meet such a request. However, the final decision on who is best able to represent the Minister rests with the Minister concerned and it remains the right of a Minister to suggest an alternative civil servant to that named by the committee if he or she feels that the former is better placed to represent them. In the unlikely event of there being no agreement about which official should most appropriately give evidence, it is open to the Minister to offer to appear personally before the committee.”<sup>92</sup>

76. The rules go on to acknowledge that a committee can summon a named civil servant contrary to the minister’s wishes, but in such an event the individual would remain subject to ministerial instruction.<sup>93</sup>
77. Some witnesses thought that the rules on taking evidence from named civil servants should be reformed. Sir Alan Beith MP, chair of the House of Commons Justice and Liaison Committees, told us that the position as regards the ability of a minister to refuse the attendance of a named civil servant was unclear,<sup>94</sup> whilst Bernard Jenkin MP described the Osmotherly rules as “a fiction created by the executive to try to create excuses for not putting the right people in front of select committees.”<sup>95</sup> He added that, “The idea that [civil servants] are unfortunate, beleaguered public servants who cannot speak for themselves is of an era that has passed. They are being held, certainly by the public, to be more directly accountable and it would seem odd if Parliament did not do the same.”<sup>96</sup> Lord Fowler thought it should be made clear that select committees have the right to call named civil servants, though the power should be used cautiously and selectively.<sup>97</sup>
78. The formal power of select committees to summon witnesses is seldom exercised, and almost never in relation to civil servants. Select committees are usually prepared to accept the recommendation of a department as to which official is best placed to appear—after all, it is in the committee’s interest to hear from the official who is best informed. It is common for senior civil servants to appear alongside ministers, a practice that has developed since the current select committee system was instituted 30 years ago, and which we welcome.<sup>98</sup> When there is disagreement between a minister and a committee on taking evidence from a particular individual an accommodation is usually reached. However, the evidence we received suggests that the balance might be tilted more in favour of the right of committees to request attendance of specific individuals.
79. **We recommend that where a select committee requests evidence from a named senior civil servant the Government should accede to that request unless there are exceptional reasons not to do so. Taking evidence from civil servants is complementary to, not a replacement**

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<sup>92</sup> *op. cit.*, para 44.

<sup>93</sup> *op. cit.*, para 47.

<sup>94</sup> Q 8.

<sup>95</sup> Q 9.

<sup>96</sup> Q 11.

<sup>97</sup> QQ 66–67.

<sup>98</sup> Q 123.

**for, the accountability of ministers. We recommend that the revised Osmotherly rules incorporate this change in emphasis.**

80. A related issue arises with the use of consultants by governments.<sup>99</sup> They are not employed as civil servants, and so are not accountable to ministers and Parliament in the way civil servants are, yet they can exercise significant influence over policy. It has been suggested that consultants should appear before select committees where they are relevant to scrutiny of a government project. There have also been concerns about consultants refusing to disclose information to Parliament on the ground of commercial confidentiality.<sup>100</sup> Although we did not examine these issues in detail there appears to be scope for further study of them.

**Evidence from former office holders**

81. Sometimes a select committee will want to take evidence from an individual who used to hold a particular post in the civil service, but who has since changed post or retired. An example is the Public Accounts Committee inviting Dame Helen Ghosh, a former DEFRA permanent secretary, to give evidence on the rural payments scheme even though she had since become permanent secretary at the Home Office.<sup>101</sup>
82. The Osmotherly rules state that “it is extremely rare, but not unprecedented, for committees to request evidence from officials who have retired.” They go on to say that retired officials cannot be said to represent the minister and so cannot contribute to his or her accountability, and they may not have access to up-to-date information and thinking. For those reasons, “Ministers would expect evidence on Government matters to be given by themselves or by serving officials who report to them.”<sup>102</sup>
83. The evidence we have received suggests that the position set out in the Osmotherly rules is too stark, and does not reflect current (or best) practice. Whilst officials currently in post are normally best placed to comment on their departments’ business, in the case of past or long-term policies or projects previous office holders will often be well placed to give the full picture.<sup>103</sup> This is especially so if officials change jobs frequently, as is common in the senior civil service.
84. The *Civil Service Reform Plan* proposes 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.”<sup>104</sup> The majority of our witnesses agreed with the proposal in the Government’s paper,<sup>105</sup> with some suggesting that it should not be confined to former Accounting Officers.<sup>106</sup> Lord Turnbull, however, questioned the utility of taking evidence from former post holders, as it was often not

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<sup>99</sup> QQ 284, 334–335 and 346.

<sup>100</sup> “Ministers hide behind civil servants who cannot be called to account. This must change”, article by Margaret Hodge MP in *The Times*, 9 October 2012.

<sup>101</sup> Q 9.

<sup>102</sup> *op. cit.*, para 48.

<sup>103</sup> Q 20.

<sup>104</sup> *op. cit.*, p 21.

<sup>105</sup> For example, QQ 157 and 297.

<sup>106</sup> Q 52; *Unlock Democracy* para 33.

possible to identify a single individual who was responsible for a long-standing project that has gone wrong.<sup>107</sup>

85. **We agree with the proposal in the *Civil Service Reform Plan* to allow former Accounting Officers to give evidence to select committees on major projects and policies on which they had formerly worked. We recommend that this principle should be extended so that, where select committees request evidence from other former senior civil service post holders (whether or not they are still in the civil service) on policies or projects on which they used to work, the expectation is that such requests will be acceded to.**

#### **What should select committees ask civil servants?**

86. The objective of select committees in inviting civil servants to give evidence is normally to seek factual information about government policies and administration, and sometimes to explore the rationale behind them. In general, policy advice given by civil servants to ministers is not disclosed to select committees or anyone else. This is said to be because disclosure would hinder the giving of free and frank advice in future. More importantly, it is in keeping with the general principle of ministerial responsibility. Civil servants give full and candid advice to ministers, but it is for ministers to follow or disregard that advice as they choose. However, different considerations may apply in respect of advice given by certain types of civil servant, such as lawyers (where legal professional privilege is also relevant) and scientists (where scientists have on occasion freely disclosed their scientific advice to select committees).
87. This position is reflected in the Osmotherly rules—
- “Officials should as far as possible confine their evidence to questions of fact and explanation relating to government policies and actions. They should be ready to explain what those policies are; the justification and objectives of those policies as the Government sees them; the extent to which those objectives have been met; and also to explain how administrative factors may have affected both the choice of policy measures and the manner of their implementation. Any comment by officials on government policies and actions should always be consistent with the principle of civil service political impartiality. Officials should as far as possible avoid being drawn into discussion of the merits of alternative policies where this is politically contentious. If official witnesses are pressed by the committee to go beyond these limits, they should suggest that the questioning should be referred to Ministers.”<sup>108</sup>
88. Under the Freedom of Information Act 2000 advice given by civil servants to ministers may be disclosed if (i) in all the circumstances, the public interest in disclosing the information is judged to outweigh the public interest in not disclosing it and (ii) its disclosure would not inhibit the provision of free and frank advice.<sup>109</sup> Therefore, if the Osmotherly rules are followed strictly, select committees may in some circumstances have weaker rights of access to civil

<sup>107</sup> Q 265.

<sup>108</sup> *op. cit.*, para 55.

<sup>109</sup> See sections 2, 35 and 36. These provisions were analysed recently by the House of Commons Justice Committee: 1st report (2010–12): *Post-legislative scrutiny of the Freedom of Information Act 2000* (HC 96), paras 141 to 201.

service advice than members of the public submitting a freedom of information request.

89. Adherence to the Osmotherly rules may on occasion hinder select committees from being able fully to examine an issue. Some witnesses have therefore suggested that the rules could be developed to allow for disclosure of policy advice where the public interest clearly demands it. Bernard Jenkin MP told us that a civil servant's first duty is to his or her minister, but it is not the only duty; an expectation could be created of what select committees should be told.<sup>110</sup> Lord Butler of Brockwell told us that it would be "perfectly proper" to ask a minister to disclose what advice he or she received, but that the question should be put to the minister and not a civil servant.<sup>111</sup> He thought it reasonable for a civil servant to reply that the question should be asked of his or her minister.<sup>112</sup> Margaret Hodge MP agreed.<sup>113</sup>
90. Other witnesses, however, thought that policy advice should not be disclosed.<sup>114</sup> Lord Wilson of Dinton thought it "improper" for a select committee to ask civil servants what advice they gave.<sup>115</sup> He and Lord Turnbull told us that the confidentiality of policy advice to ministers was part of the fabric of the relationship between ministers, the civil service and Parliament, and that it was not possible to unpick parts of it without other parts being disturbed.<sup>116</sup> Lord Hennessy of Nympsfield thought it unrealistic that civil servants would reveal confidential advice.<sup>117</sup> Sir Bob Kerslake, Sir Jeremy Heywood and Francis Maude MP stressed the need for advice to remain confidential and thus not be disclosed to committees.<sup>118</sup> However, they favoured releasing more information and evidence on which policies are based.
91. There may be occasions when the advice given to ministers is factually wrong, and that has led to poor decision making.<sup>119</sup> On other occasions a minister might have received good advice from civil servants, but followed another course (for example by following conflicting advice from a special adviser), leading to bad policy. In such instances disclosure of advice may be necessary for a committee to be able to understand what went wrong. In many cases it may show that the advice was good and that the minister followed it—reflecting well on both. It can also be unclear where the boundary lies between advice and background or factual information.<sup>120</sup>
92. **We do not think it satisfactory that select committees are deemed by the Osmotherly rules to have weaker rights of access to civil service policy advice than those making a request under the Freedom of**

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<sup>110</sup> Q 20.

<sup>111</sup> Q 299.

<sup>112</sup> Q 305.

<sup>113</sup> Q 16.

<sup>114</sup> Q 137.

<sup>115</sup> Q 252.

<sup>116</sup> QQ 254 and 268.

<sup>117</sup> Q 139.

<sup>118</sup> QQ 315–319 and 341–342.

<sup>119</sup> Q 139.

<sup>120</sup> This was at the heart of the debate over the release of the risk register on the Health and Social Care Bill: see HL Deb, 19 March 2012, cols 634–57; and HL Deb, 10 May 2012, cols 62–74.

**Information Act 2000. We recommend that a select committee should be able to request access to relevant policy advice given by civil servants to ministers, on the rare occasions where it considers it essential to its examination of an issue. The decision on whether to disclose policy advice should be taken by a minister, consistent with the tests in the Freedom of Information Act 2000. The minister may decide to disclose a summary or relevant extracts rather than the whole of the advice. Select committees should be judicious in requesting such advice; in return, the Government should consider each request on its merits and not reject them out of hand.**

93. **For the avoidance of doubt, civil servants themselves should not, and should not be invited to, disclose the policy advice they give to ministers: it is for ministers, not civil servants, to waive the confidentiality of such advice.**

### **What should select committees say about civil servants?**

94. The process of holding the Government to account means that when there has been a failure in Government a select committee will seek to identify what went wrong, and sometimes who was to blame. Committees have occasionally reached conclusions about the conduct of particular individuals (inside or outside government),<sup>121</sup> though it is recognised that the findings of select committees are essentially political (rather than judicial), and there is no formal right of reply.
95. The Osmotherly rules provide that where select committee questioning is directed to the conduct of individual officials with the implication of allocating criticism or blame it is for the minister to look into the matter and if necessary institute a formal inquiry. Such an inquiry—
- “is properly carried out within the department according to established procedures designed and agreed for the purpose, and with appropriate safeguards for the individual. It is then the Minister’s responsibility to inform the committee of what has happened, and of what has been done to put the matter right and to prevent a recurrence.”<sup>122</sup>
96. Select committees have agreed that it is not their task to act as disciplinary tribunals.<sup>123</sup> The Osmotherly rules state that if a committee discovers evidence that calls into question the conduct of an official they should be asked not to pursue their own investigation, but to take the matter up with the minister.<sup>124</sup>
97. David Penman strongly defended the position as set out in the Osmotherly rules. He referred to “a degree of concern about the operation of committees and the tone and nature of the scrutiny [civil servants] are under”,<sup>125</sup> saying that the quest to pin blame on individuals “creates an atmosphere of

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<sup>121</sup> See, for example, the conclusions about Rupert Murdoch and others in the Culture, Media and Sport Committee’s report on phone hacking: 11th report (2010–12): *News International and Phone-hacking* (HC 903).

<sup>122</sup> *op. cit.*, para 74.

<sup>123</sup> *Erskine May*, 24th edition, p 822.

<sup>124</sup> *op. cit.*, para 76.

<sup>125</sup> Q 213.

defensiveness from civil servants.”<sup>126</sup> He thought that public criticism by a committee might prejudice any disciplinary process, and that select committees may not have access to all relevant information. A civil servant has rights in a disciplinary process which they do not have vis-à-vis select committees<sup>127</sup>—in particular, there is no formal right of reply to the findings of a select committee.<sup>128</sup>

98. On the other hand, the Whitehall journalists we took evidence from thought that select committees should be able to criticise particular officials.<sup>129</sup> Lord Butler of Brockwell did not see a difficulty “provided that the committees go through a sufficiently rigorous process to ensure that the criticism is fair.” He thought a committee could recommend that a civil servant be subject to disciplinary procedures, but that the procedures should be conducted by the official’s employer.<sup>130</sup>
99. **We are conscious that select committees are not disciplinary tribunals and do not contain the safeguards that employees are entitled to in a disciplinary process. However, when the evidence a committee receives leads it to conclude that a particular civil servant has been at fault, that committee should not be precluded from expressing criticism and, in extreme cases, recommending that the department consider appropriate disciplinary procedures.**
100. **Select committees should only take such action where there are strong grounds for doing so. The decision on all such disciplinary matters should remain within the relevant department.**

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<sup>126</sup> Q 219.

<sup>127</sup> QQ 223–234 and 244–247.

<sup>128</sup> House of Lords select committees are encouraged actively to consider on a case-by-case basis whether it would be desirable to give notice to an individual if the committee is minded to make criticisms of them of a personal nature. See Procedure Committee, 4th report (2010–12, HL Paper 127).

<sup>129</sup> QQ 167–168.

<sup>130</sup> Q 296.

## CHAPTER 5: ARM'S-LENGTH BODIES

101. Arm's-length bodies (ALBs) have been a common feature of the UK executive, especially since the introduction of “next steps agencies” in the 1980s. Several hundred such bodies exist,<sup>131</sup> and there are questions about their constitutional accountability. A factor which prompted our inquiry was the controversy which arose from the House of Commons Public Accounts Committee's questioning of senior HMRC officials.<sup>132</sup> Some of the more notable features of that dispute from a constitutional perspective stemmed from HMRC's status as an ALB. Another dispute about the accountability of officials in an ALB arose in November 2011, when Brodie Clark, the head of the UK Border Force (part of the UK Border Agency, an executive agency of the Home Office), was suspended over the relaxation of border controls for certain non-EU citizens. The Home Secretary said the decision had been taken without her knowledge.<sup>133</sup>

### Overview of arm's-length bodies

102. Throughout this chapter we use the term ALB to denote a public body other than a department of state under the direct leadership of a Cabinet minister. ALBs include a vast range of public bodies, of varying degrees of removal from ministerial control, and subject to a range of internal and external accountability mechanisms. Three broad categories are identified in box 3.
103. There are common features to the accountability arrangements of all ALBs. All such bodies will have a sponsoring minister, who is constitutionally responsible to Parliament for the body's work. All ALBs have Accounting Officers (usually the ALB's chief executive), who are directly accountable to Parliament (via the House of Commons Public Accounts Committee) in the same way as the Accounting Officer of a standard ministerial department. ALBs have boards, containing non-executive and executive directors, to whom the chief executive is also accountable.<sup>134</sup> Both the chairs and the chief executives of ALBs can be called to give evidence to parliamentary select committees; in terms of accountability this is a significant benefit of ALBs.

### BOX 3

#### Types of arm's-length bodies

- (1) Non-ministerial departments are not led directly by a minister; rather, they are led by a chief executive and by a board consisting of executive and non-executive directors. Examples include HM Revenue and Customs, and the Office of Fair Trading.
- (2) Executive agencies are: “created to enable executive functions within government to be carried out by a well-defined business unit with a clear

<sup>131</sup> This is after some were abolished under the Public Bodies Act 2011.

<sup>132</sup> See Public Accounts Committee, 61st report (2010–12): *HM Revenue & Customs 2010–11 Accounts: tax disputes* (HC 1531).

<sup>133</sup> See HC Deb, 7 November 2011, cols 44–46. Mr Clark later resigned, claiming comments made by the Home Secretary amounted to constructive dismissal.

<sup>134</sup> Q 191.

focus on delivering specified outputs within a framework of accountability to ministers.”<sup>135</sup> Executive agencies are governed by framework agreements, which set out in detail the division of responsibilities between the agency and the sponsoring central government department. They do not determine policy: rather, they implement the policies set by their sponsoring departments. Examples include the UK Border Agency and the Met Office.<sup>136</sup>

- (3) Non-departmental public bodies are not government departments; rather, they have distinct legal personalities separate from the Crown, and their employees are not civil servants. As with executive agencies, non-departmental public bodies operate within strategic frameworks set by ministers.<sup>137</sup> Examples include the Health and Safety Executive and English Heritage.

104. A wide range of bodies fall within each of the three categories, and the accountability arrangements of such bodies can vary greatly. We heard evidence that the number of different types of ALBs, together with the complexity of other government structures, leads to confusion amongst those trying to understand how government works. Moreover, it can cloud what otherwise might be clear lines of accountability.<sup>138</sup>
105. The solution identified by some witnesses was for the Government to produce a map of the state. Lord Hennessy of Nympsfield believed that the production of such a document would be: “a great service to every select committee.”<sup>139</sup> Professor Talbot agreed, pointing out that it is done in most other OECD countries and that in Australia a map of the institutions of the central government is contained on two sides of A4.<sup>140</sup>
106. **We recommend that the Government publish, maintain and make available to Parliament a full diagram of the central state, similar to an organisational chart.**

### Distancing ministers from decisions

107. A common reason for creating an ALB is that the nature of the decisions taken makes it inappropriate for ministers to be directly involved in the oversight of those decisions. ALBs set up in such cases are often designed to support statutory office-holders, to whom the decision-making power is delegated by law. A classic example of this is individual tax decisions. Mike Clasper, non-executive chairman of HM Revenue and Customs, explained—
- “in an individual tax situation, the commissioners of HMRC, of which the accounting officer is one, are charged with interpreting the policy and the law in that particular case as to what is the right tax due and

<sup>135</sup> *Executive Agencies: A Guide for Departments* (Cabinet Office), p 1.

<sup>136</sup> To add to the complexity, executive agencies can be sponsored by another ALB: for example, the Valuation Office Agency is an executive agency of HM Revenue and Customs (a non-ministerial department), and the Office of Nuclear Regulation is an executive agency of the Health and Safety Executive (a non-departmental public body).

<sup>137</sup> *Machinery of Government Changes: Best Practice Handbook* (Cabinet Office), p 9.

<sup>138</sup> QQ 135–136; Talbot.

<sup>139</sup> Q 135.

<sup>140</sup> Q 136.

then to collect the tax ... that separation is quite important, because it means that the actual affairs of individuals and companies are not politicised through the tax system.”<sup>141</sup>

108. A similar situation occurs in relation to individual prosecution decisions in criminal matters, and to regulatory decisions taken by the statutory regulators of certain industries (such as energy or telecommunications). In such cases, there is a clear constitutional need to maintain a separation between ministers and decision-makers.

### **The policy–implementation divide**

109. Another justification for establishing an ALB is that the implementation of a particular policy is clearly separate from the formulation of the policy. In such cases, it is argued, there can be clearer, enhanced accountability by creating a separate delivery body.
110. Several of our witnesses thought that, where a clean separation between policy and implementation is possible, the creation of an ALB to take responsibility for implementation is efficient and effective. Lord O’Donnell told us that the central issue in relation to ALBs is clarity: “the really important bit is: [whether it is possible to] define and be clear about who is accountable for what”.<sup>142</sup>
111. It seems, therefore, that the success or otherwise of an ALB is strongly linked to the clarity with which its objectives and purposes are defined. We heard evidence, however, that suggested that such clean definition is not always possible. Lord Turnbull explained that, even in cases where failures were clearly operational, the underlying reasons for such failures are often related to the availability of resources, which is a policy matter. In this way, ministers can become entangled in what are at first glance clearly delegated areas of implementation.<sup>143</sup> It may also be that matters which are, on a technical level, purely concerned with implementation are nonetheless extremely politically sensitive, such that ministers will on occasion wish to retain control over them.<sup>144</sup>
112. We also heard evidence that, even where a split between policy and implementation is possible and desirable, the accountability of the minister to Parliament for implementation remains intact. Penny Ciniewicz, chief executive of the Valuation Office Agency, stressed that the minister is ultimately accountable to Parliament for the work of the VOA, and that her duties as chief executive were performed in support of the minister’s accountability.<sup>145</sup>
- 113. The accountability mechanisms of ALBs are a supplement to ministers’ constitutional responsibility to Parliament, not a replacement for it. The primary means by which public servants in ALBs are held to account is via the convention of individual ministerial responsibility.**

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<sup>141</sup> Q 191.

<sup>142</sup> Q 279. Lord Butler of Brockwell agreed (Q 296).

<sup>143</sup> Q 273.

<sup>144</sup> Q 281.

<sup>145</sup> Q 197.

## CHAPTER 6: SUMMARY OF RECOMMENDATIONS

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### Ministerial responsibility for the civil service

114. We conclude that the convention that ministers are constitutionally responsible for all aspects of their departments' business is an essential principle underlying the arrangements that enable Parliament properly to perform its function of holding the Government to account. The convention is clear, straightforward and leaves no gaps. (Para 12)
115. We maintain our view that there is no constitutional difference between the terms responsibility and accountability. (Para 17)

### Accountability of civil servants to ministers

116. However the existing appointments process for permanent secretaries may be modified, it must continue to conform fully with the constitutional principles of integrity, honesty, objectivity and impartiality. In particular, any modified process should protect the principle of appointment on merit, on the basis of fair and open competition. (Para 29)
117. The Government should set out, in detail, the nature of the temporary appointments scheme they envisage. They should put in place safeguards to ensure that those civil servants on fixed-term contracts possess the civil service attributes set out in the Constitutional Reform and Governance Act 2010: integrity, honesty, objectivity and impartiality. Ministers should be limited to requesting the category of expertise which they consider is required; the decision on which individual to appoint should rest with the relevant departmental permanent secretary, with the approval of the Civil Service Commission. (Para 35)
118. It would be entirely inappropriate for ministers to be formally empowered to make disciplinary decisions about civil servants in their departments. We recognise, however, that ministers have an important and legitimate consultative role in the performance management of civil servants. Accordingly, we support the Government's proposal to allow ministers to contribute to the appraisal of certain civil servants. (Para 39)
119. We recommend that there should be a presumption that a single senior civil servant will lead the implementation of a major project from beginning to end. This will enhance the ability of Parliament, through its select committees, to hold the executive to account for the success or failure of such projects. (Para 44)
120. The power to seek a ministerial direction is therefore a significant one, and its very existence no doubt prevents impropriety in some cases. (Para 49)
121. We do not recommend any additional powers for the civil service to act as a check on the constitutionality of ministerial actions. However, we would expect ministers to treat advice that they may be acting unconstitutionally with the utmost seriousness. (Para 53)
122. In our view, the constitutional position as regards special advisers is clear: ministers are responsible for the actions of their special advisers. Ministers have a duty to ensure their special advisers abide by the Code of Conduct for Special Advisers at all times. (Para 59)

### Accountability of civil servants to Parliament

123. The Osmotherly rules are an executive document offering guidance to civil servants—and no more. They in no way have the effect of imposing restrictions on the activities of select committees. It is for Parliament to determine how it scrutinises the executive. (Para 70)
124. However, in view of the importance of the Osmotherly rules in guiding civil servants in their dealings with select committees, we recommend that future revisions of the rules should be published in draft to enable scrutiny by Parliament and its select committees. Whatever the outcome of that scrutiny, the rules will remain an executive document and should not be taken to have the formal approval of Parliament. (Para 71)
125. We recommend that where a select committee requests evidence from a named senior civil servant the Government should accede to that request unless there are exceptional reasons not to do so. Taking evidence from civil servants is complementary to, not a replacement for, the accountability of ministers. We recommend that the revised Osmotherly rules incorporate this change in emphasis. (Para 79)
126. We agree with the proposal in the *Civil Service Reform Plan* to allow former Accounting Officers to give evidence to select committees on major projects and policies on which they had formerly worked. We recommend that this principle should be extended so that, where select committees request evidence from other former senior civil service post holders (whether or not they are still in the civil service) on policies or projects on which they used to work, the expectation is that such requests will be acceded to. (Para 85)
127. We do not think it satisfactory that select committees are deemed by the Osmotherly rules to have weaker rights of access to civil service policy advice than those making a request under the Freedom of Information Act 2000. We recommend that a select committee should be able to request access to relevant policy advice given by civil servants to ministers, on the rare occasions where it considers it essential to its examination of an issue. The decision on whether to disclose policy advice should be taken by a minister, consistent with the tests in the Freedom of Information Act 2000. The minister may decide to disclose a summary or relevant extracts rather than the whole of the advice. Select committees should be judicious in requesting such advice; in return, the Government should consider each request on its merits and not reject them out of hand. (Para 92)
128. For the avoidance of doubt, civil servants themselves should not, and should not be invited to, disclose the policy advice they give to ministers: it is for ministers, not civil servants, to waive the confidentiality of such advice. (Para 93)
129. We are conscious that select committees are not disciplinary tribunals and do not contain the safeguards that employees are entitled to in a disciplinary process. However, when the evidence a committee receives leads it to conclude that a particular civil servant has been at fault, that committee should not be precluded from expressing criticism and, in extreme cases, recommending that the department consider appropriate disciplinary procedures. (Para 99)

130. Select committees should only take such action where there are strong grounds for doing so. The decision on all such disciplinary matters should remain within the relevant department. (Para 100)

### **Arm's-length bodies**

131. We recommend that the Government publish, maintain and make available to Parliament a full diagram of the central state, similar to an organisational chart. (Para 106)
132. The accountability mechanisms of ALBs are a supplement to ministers' constitutional responsibility to Parliament, not a replacement for it. The primary means by which public servants in ALBs are held to account is via the convention of individual ministerial responsibility. (Para 113)

## APPENDIX 1: SELECT COMMITTEE ON THE CONSTITUTION

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The members of the committee that conducted the inquiry were—

Lord Crickhowell  
 Baroness Falkner of Margravine  
 Lord Goldsmith  
 Lord Hart of Chilton  
 Lord Irvine of Lairg  
 Baroness Jay of Paddington (chairman)  
 Lord Lang of Monkton (from 24 May 2012)  
 Lord Lexden  
 Lord Macdonald of River Glaven  
 Lord Pannick  
 Lord Powell of Bayswater  
 Lord Renton of Mount Harry (until 24 May 2012)  
 Lord Shaw of Northstead (until 17 October 2012)  
 Baroness Wheatcroft (from 17 October 2012)

Professor Richard Rawlings, Professor of Public Law at the University College London, and Professor Adam Tomkins, John Millar Professor of Public Law at the University of Glasgow, acted as specialist advisers for the inquiry.

### Declarations of interests

The following interests were declared—

Lord Hart of Chilton  
*Paid special adviser to two Lord Chancellors (Lord Irvine of Lairg and Lord Falconer of Thoroton).*

Lord Irvine of Lairg  
*Lord Chancellor from 1997 to 2003.*

Lord Lang of Monkton  
*Chairman of the Advisory Committee on Business Appointments (has dealings with 4 to 6 civil servants who service the committee, and with senior civil servants and special advisers, whose future employment plans are vetted by the committee).*

Lord Macdonald of River Glaven  
*Former Permanent Secretary of the Crown Prosecution Service.  
 Practising barrister (Queen's Counsel).  
 Deputy High Court Judge sitting in the Administrative Court.*

Lord Pannick  
*Practising member of the Bar.*

Lord Powell of Bayswater  
*Former civil servant.*

A full list of members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

## APPENDIX 2: LIST OF WITNESSES

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Evidence is published online at [www.parliament.uk/hlconstitution](http://www.parliament.uk/hlconstitution) and available for inspection at the Parliamentary Archives (020 7219 5341).

Evidence received by the committee is listed below in order of receipt and in alphabetical order. Those witnesses with \* gave both oral and written evidence. Those with \*\* gave oral evidence and did not submit written evidence. All other witnesses submitted written evidence only.

### Oral evidence in chronological order

- \*\* QQ 1–26 Rt Hon. Sir Alan Beith MP, chair of the Justice select committee and of the Liaison Committee
- \*\* Rt Hon. Margaret Hodge MP, chair of the Public Accounts Committee
- \*\* Bernard Jenkin MP, chair of the Public Administration Select Committee (*witnesses gave evidence in a personal capacity*)
- \*\* QQ 27–47 Rt Hon. Charles Clarke
- \*\* Rt Hon. Lord Howard of Lympne CH QC
- \*\* QQ 48–104 Rt Hon. David Blunkett MP
- \*\* Lord Fowler
- \*\* Mark Davies, former special adviser to Jack Straw MP at the Ministry of Justice
- \*\* Paul Richards, former special adviser to Hazel Blears at the Department for Communities and Local Government
- \*\* QQ 105–155 Reform
- \* Unlock Democracy
- \* Institute for Government
- \*\* Professor Lord Hennessy of Nympsfield, Attlee Professor of Contemporary British History, QMUL
- \* Professor Colin Talbot, Professor of Government and Public Administration, Manchester Business School
- \*\* Dr Andrew Blick, Senior Research Fellow, Centre for Political and Constitutional Studies, King’s College London
- \*\* QQ 156–211 Daniel Finkelstein, Executive Editor and Chief Leader Writer, *The Times*, and former special adviser to John Major as Prime Minister
- \*\* Christopher Hope, Senior Political Correspondent, *The Daily Telegraph*
- \*\* David Hencke, Tribune, and formerly of *The Guardian*
- \*\* Office of Fair Trading
- \*\* Mike Clasper CBE, non-executive chairman, HMRC
- \*\* Valuation Office Agency

- \*\* QQ 212–295      First Division Association
- \*\*                      Lord Armstrong of Ilminster GCB CVO
- \*\*                      Lord Wilson of Dinton GCB
- \*\*                      Lord Turnbull KCB CVO
- \*\*                      Lord O’Donnell GCB
- \*\* QQ 296–358      Rt Hon. Lord Butler of Brockwell KG GCB CVO, Cabinet Secretary and Head of the Home Civil Service, 1988–98
- \*\*                      Sir Jeremy Heywood CB CVO, Cabinet Secretary
- \*\*                      Sir Bob Kerslake, Head of the Home Civil Service
- \*                        Rt Hon. Francis Maude MP, Minister for the Cabinet Office and Paymaster General

### Alphabetical list of all witnesses

- \*\*      Lord Armstrong of Ilminster GCB CVO
- \*\*      Rt Hon. Sir Alan Beith MP
- \*      Dr. Andrew Blick, Senior Research Fellow, Centre for Political and Constitutional Studies, King’s College London
- \*\*      Rt Hon. David Blunkett MP
- \*\*      Rt Hon. Lord Butler of Brockwell KG GCB CVO  
Civil Service Commission
- \*\*      Rt Hon. Charles Clarke
- \*\*      Mike Clasper CBE, non-executive chairman, HMRC  
Simon Cramp
- \*\*      Mark Davies, former special adviser to Jack Straw MP at the Ministry of Justice
- \*\*      Daniel Finkelstein, Executive Editor and Chief Leader Writer, *The Times*, and former special adviser to John Major as Prime Minister  
Professor Matthew Flinders, Professor of Parliamentary Government & Governance, University of Sheffield
- \*\*      First Division Association
- \*\*      Lord Fowler
- \*\*      David Hencke, *Tribune*, and formerly of *The Guardian*
- \*\*      Professor Lord Hennessy of Nympsfield, Attlee Professor of Contemporary British History, Queen Mary University of London
- \*      Sir Jeremy Heywood CB CVO, Cabinet Secretary
- \*\*      Rt Hon. Margaret Hodge MP
- \*\*      Christopher Hope, Senior Political Correspondent, *The Daily Telegraph*
- \*\*      Rt Hon. Lord Howard of Lympne CH QC
- \*\*      Bernard Jenkin MP
- \*\*      Sir Bob Kerslake, Head of the Home Civil Service

- Dr Felicity Matthews, Lecturer in Governance and Public Policy,  
Department of Politics, University of Sheffield
- \* Rt Hon. Francis Maude MP, Minister for the Cabinet Office and  
Paymaster General
- Dame Julie Mellor DBE, UK Parliamentary Ombudsman and Health  
Service Ombudsman for England
- \*\* Lord O'Donnell GCB
- \*\* Office of Fair Trading
- \*\* Reform
- \*\* Paul Richards, former special adviser to Hazel Blears at the Department for  
Communities and Local Government
- \* Institute for Government
- Jenny Rowe, Chief Executive, United Kingdom Supreme Court
- \* Colin Talbot, Professor of Government and Public Administration,  
University of Manchester
- \*\* Lord Turnbull KCB CVO
- \* Unlock Democracy
- Valuation Office Agency
- Lord Wilson of Dinton GCB

### APPENDIX 3: CALL FOR EVIDENCE

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The House of Lords Select Committee on the Constitution, chaired by Baroness Jay, is announcing today an inquiry into the accountability of civil servants. The Committee invites interested organisations and individuals to submit written evidence as part of the inquiry. The Committee intends to focus on those in the home civil service.

Written evidence is sought by Friday 8 June 2012. Public hearings are expected to be held in May, June and July. The Committee aims to report to the House, with recommendations, before the end of the year. The report will receive a response from the Government and may be debated in the House.

Under the Constitutional Reform and Governance Act 2010 (CRAG), the civil service has for the first time been placed on a statutory basis. The Act enshrines the four civil service attributes of integrity, honesty, impartiality and objectivity, and requires the publication of codes of conduct for civil servants and for special advisers.

The accountability of the government to Parliament is governed by the convention of individual ministerial responsibility. Under this convention, civil servants are responsible to ministers, and ministers in turn are responsible to Parliament.<sup>146</sup> The rationale behind this arrangement is to protect the impartiality and anonymity of civil servants. However, the convention does not prevent civil servants giving evidence to parliamentary select committees on their minister's behalf. The government's position on the relationship between the civil service and select committees is contained in the document *Departmental Evidence and Response to Select Committees* (known as the "Osmotherly Rules").<sup>147</sup> These are, and always have been, drafted by and for the executive, without parliamentary input or express approval.

This convention has become subject to a number of criticisms, generally on the grounds that it is no longer an effective means of holding the government fully to account, and that it does not adequately reflect the distribution of power and responsibility between ministers, civil servants and special advisers. Proposals for reform of the system of civil service accountability have included calls for civil servants to be held directly accountable to Parliament (via select committees), and suggestions that ministers should become involved in senior civil service appointments.

As well as these general concerns, specific constitutional issues arise in the case of non-ministerial departments: government departments where, due to the nature of the work being undertaken by the department, it is not desirable for the department to be overseen by a minister directly.<sup>148</sup> Each non-ministerial department has a "sponsoring" minister, who is accountable to Parliament for its actions. However, questions exist over the effectiveness, and desirability, of ministers being held accountable for the actions of bodies over which they have limited control and information.

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<sup>146</sup> A more detailed discussion of individual ministerial responsibility can be found in the Constitution Committee's 22<sup>nd</sup> Report of Session 2010–12, *Health and Social Care Bill: Follow-Up*, in appendix 1, available online here: <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/240/24004.htm>

<sup>147</sup> <http://www.cabinetoffice.gov.uk/sites/default/files/resources/guide-deptal-evidence-and-response-to-select-committees.pdf>

<sup>148</sup> Examples include HM Revenue and Customs, the UK Statistics Authority, and the Office of Fair Trading.

The Committee would also welcome evidence on the status of special advisers. Special advisers occupy an unusual place in the civil service. Technically civil servants, they are exempt from the usual requirement of impartiality, objectivity, and appointment on merit, and as such are appointed to provide ministers with advice and support with regard to the political (and party political) aspects of government. Though prohibited from managing civil servants, the code of conduct for special advisers does allow them to communicate the minister's views and work priorities, and to request that permanent civil servants prepare and provide information and data. The influence of special advisers in government, and the mechanisms (or lack of them) for holding special advisers accountable for their work, are also of central interest to the Committee.

The Committee would welcome written submissions on the accountability of civil servants and related issues. Questions the Committee will consider include:

### **Overview**

Does the convention of individual ministerial responsibility remain the most appropriate and effective means of holding the government to account?

If the current model of individual ministerial responsibility is no longer appropriate, what should replace it?

Do the civil servants' and special advisers' codes of conduct require amendment?

To what extent should the content of the civil servants' and special advisers' codes of conduct be set down in statute? If so, how might CRAG be amended to achieve this?

### **The accountability of civil servants to ministers**

To what extent has the expansion of government activity, and the increasingly fractured nature of the state, weakened the ability of ministers to account for their civil servants?

What, if any, influence should ministers be able to exercise over home civil service appointments? What are the constitutional benefits and risks of allowing such influence? Are there any particular civil service posts to which special considerations apply?

To what extent does the home civil service act as a constitutional check on the actions of ministers? How does this check operate? Is a constitutional check on ministers by civil servants appropriate?

If such a "check" function exists, to what extent does it distort the operation of individual ministerial responsibility? What are the implications of this distortion?

### **The accountability of civil servants to Parliament**

In what circumstances, if any, is it appropriate for civil servants to be held directly accountable to Parliament?

Would direct accountability risk the politicisation of the home civil service?

If so, is civil service politicisation always and necessarily something to be avoided? In what circumstances should it be permitted, and what would be the benefits of politicisation?

Where civil servants should be held directly accountable to Parliament, is there a case for (enhanced) parliamentary involvement in their appointment?

Is there a case for redrafting the Osmotherly Rules? If so, what, if any, involvement should Parliament have in the process?

### **The accountability of non-ministerial departments**

Are the current accountability mechanisms for non-ministerial departments effective? If not, how should they be altered?

Where should the balance lie between accountability and operational independence? Is this balance correctly struck at present?

Do the boards of non-ministerial departments provide adequate oversight of, and accountability for, their departments? If not, how should this model be altered?

### **The accountability of special advisers**

What is the level of influence exercised by special advisers, both in theory and in real terms?

What are the current accountability mechanisms for special advisers, and are these appropriate to the level of influence they possess?

Is there a case for increasing the accountability of special advisers to Parliament? How should any such accountability mechanism operate in practice?

### **International perspectives**

How do other countries with Westminster-style parliaments hold their executives to account? What lessons can be learned from these international comparators?

You need not address all these questions. The Committee would also welcome any other views of which stakeholders think the Committee should be aware.