



Chancellor of the Duchy of Lancaster

PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2AT

11 April 1980

See Nick

DEPARTMENTAL SELECT COMMITTEES: MEMORANDUM OF GUIDANCE TO
MINISTERS

see A2 { You will recall that Cabinet Minutes (CC(80) ~~and~~ Conclusions
Minute 5) invited the Chancellor of the Duchy, after
consultation with the House authorities, to prepare for
consideration a memorandum of guidance for Ministers on the
powers of Select Committees to summon officials in relation
to the rights of Ministers to determine who should represent
their Departments, and to summon members of the House of
Lords and other non-governmental witnesses. The attached
... paper has now been approved by the Chancellor of the Duchy.
Before clearing this paper, by correspondence, with colleagues
the Chancellor would be grateful to know that the Prime
Minister is content with it.

I am copying this, together with a copy of the paper, to
David Wright (Sir Robert Armstrong's Office).

J W STEVENS
Private Secretary

N Sanders Esq
Private Secretary
10 Downing Street
SW1

PRYOR & CO. LTD.
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DEPARTMENTAL SELECT COMMITTEES

MEMORANDUM OF GUIDANCE TO MINISTERS

1. This note gives guidance about the relations between Ministers and the Select Committees set up by the House of Commons to "mark" departments.

2. The guidance covers:

Attendance of Ministers and Officials (paragraphs 5-7)

Answers in oral evidence (paragraphs 8-13)

Requests for papers and records (paragraphs 14-17)

The position of other witnesses (paragraph 18-19).

GENERAL

3. Select Committees normally proceed informally when asking for the attendance of witnesses and for written material. The terms of reference given to the Committees by the House confer on them formal powers to send for "persons, papers and records". This note summarises the present extent of those powers*. When the Procedure Committee recommended the establishment of departmental select committees they included in their Report¹ recommendations for

* This note and its annex refer to the powers of the departmental select committees. Although most of what is said would be true of other committees of the House of Commons, there are some special considerations applying to other select committees, and in particular to the Public Accounts Committees, with which this note is not concerned.

¹ First Report from the Select Committee on Procedure, Session 1977-78

the increase and clarification of the formal powers of the committees. In the debate on the Procedure Committee's report on 25 June 1979 the Chancellor of the Duchy of Lancaster explained why the Government did not think there need be any change in the present position. He said:

"There need be no fear that departmental Ministers will refuse to attend Committees to answer questions about their departments or that they will not make every effort to ensure that the fullest possible information is made available to them.

I give the House the pledge on the part of the Government that every Minister ... will do all in his or her power to co-operate with the new system of Committees and to make it a success. I believe that declaration of intent to be a better guarantee than formal provisions laid down in Standing Orders." (Hansard, 25 June 1979, columns 45-46).

4. Select Committees have no independent penal jurisdiction to enforce their powers to send for persons, papers and records or to punish for contempt. These powers of enforcement can be exercised only by order of the House itself. (see Annex, paragraphs 2-3) If a Select Committee sought the backing of the House in any dispute, Ministers would be accountable to the House for their actions and those of their officials. The outcome would depend on the Government's ability to command a Parliamentary majority. Because Ministers and departments generally comply with the requests of Committees, and Committees themselves have rarely pressed their requests if good reason were shown for not meeting them, there is little recent experience of a Committee exercising its formal powers, or of a dispute

requiring resolution by the House. Ministers should aim to avoid such disputes unless a matter of principle or overriding importance is at stake.

ATTENDANCE

Ministers

5. The general power of Select Committees to send for "persons" does not apply to members of either House of Parliament. Ministers who are Members of either House can be "invited" by a Commons Select Committee to attend to give evidence to it. Only the House of Commons can order a Minister who is a member of the House to attend before a Select Committee. A Minister who is a Member of the House of Lords must be given leave by that House to appear before a Commons' Select Committee and need attend only 'if he thinks fit'.

6. Ministers should, so far as possible, accede to requests from Select Committees to attend before them. A Select Committee may choose to study a subject which concerns other Departments in addition to its "parent" Department, and there will therefore be occasions on which a Minister is invited to appear before a Select Committee other than that for his own Department to give evidence on matters within his own sphere of responsibility. Nevertheless, it might still be a proper ground for refusal of an invitation that a Minister is not ministerially responsible for the matter about which he is asked to give evidence. Ministers have declined invitations on these grounds in the past. If a Select Committee wished to press a request, regardless of ministerial responsibility, only the House as a whole could order a Minister to attend.

Officials

7. Officials appearing before Select Committees do so on behalf of their Ministers. It is customary, therefore, for Ministers to decide which officials (including members of the Armed Services) should appear to give evidence. Select Committees have in the past generally accepted this position. Should a Committee invite a named official

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to appear, the Minister concerned, if he did not wish that official to represent him, might suggest to the Committee that another official could more appropriately do so, or that he himself should give evidence to the Committee. If however, these suggestions were rejected, and the Committee insisted on a particular official appearing before them they could issue a formal order for his attendance. In such an event, the official would have to appear before the Committee. Arrangements might be made, if necessary, for the official to attend, in company with his Minister. In any event, the official would remain subject to Ministerial instructions as to how he should answer questions.

ANSWERS IN ORAL EVIDENCE

Ministers

8. Erskine May (19th edition, page 687) states that: "when a Member submits himself to examination ... he is not at liberty to qualify his submission by stipulating that he is to answer only such questions as he pleases". It is, however, recognised that the extent to which a Minister gives a direct and full answer to a question must be a matter for his judgment, taking account of considerations of public policy. Speaking for the Government in the debate on 25 June 1979 the Chancellor of the Duchy of Lancaster said:

"Inevitably there will be occasions when Ministers will have to decide that it would not be in the public interest to answer certain questions or to disclose information. There are conventions governing these matters that the House has accepted over a long period and that the Government will respect. They are dealt with in the Procedure Committee's report, and the Committee for the most part was satisfied with them.

The Government will make available to Select Committees as much information as possible, including confidential information

for which, of course, protection may have to be sought by means of the sidelining procedure. There may also from time to time be issues on which a Minister does not feel able to give a Select Committee as much information as it would like. But on these occasions Ministers will explain the reasons for which the information has to be withheld." (Hansard, 25 June 1979, column 45).

9. The conventions to which the Chancellor of the Duchy of Lancaster referred were summarised in 1967 by the then Leader of the House (Mr Crossman), and though never formally endorsed by the House have been largely followed since then. The matters on which Ministers were said to be unwilling to give them information included matters of national security, the private affairs of individuals or companies where information had been given on a confidential basis, matters which were or might become the subject of sensitive negotiations with Governments or with other bodies, and specific cases where the Minister concerned had a quasi-judicial or appellate function. These categories are not exhaustive and Ministers should not, for example, disclose information which is commercially or financially sensitive.

10. Information may be given to Select Committees on a confidential "not for Publication" basis and Ministers can ask that a Committee sit in private session, rather than in public, if they are likely to be asked for information which they would not be willing to provide except on such a basis. The decision about publication rests, however, with the Select Committee. Such matters apart, the extent to which information would be given in answer to a Parliamentary Question is a useful, but not conclusive, guidelines in considering whether it should be given in answer to a question from a member of a Select Committee.

Officials

11. In the past, Select Committees have recognised that officials who appear before them do so on behalf of their Ministers and under their directions. A Minister may therefore instruct his officials about the manner in which they should answer questions or about matters on which they should decline to answer questions. He should, of course, be ready to appear before the Committee or the House to answer in the usual way for the conduct of his officials.

12. The Memorandum of Guidance for Officials Appearing before Select Committees says that officials should not provide information on the matters mentioned in paragraph 9. In addition, officials are advised not to express opinions on matters of Ministerial policy or indicate the advice that they or other officials have given to Ministers, and they are to avoid, so far as possible, entering into matters of political controversy.

13. There is no record of a civil servant being ordered by a Select Committee to provide a substantive answer to a question when he has declined to do so or of a Select Committee reporting such a refusal by a civil servant to the House.

REQUESTS FOR PAPERS AND RECORDS

14. Select Committees normally proceed informally when calling for official documents and, subject to the important qualifications in the following paragraphs, their requests should normally be met. Ministers should see they are consulted before any request is refused. (The formal powers of the House and of Select Committees to order the production of official papers and records are complicated by a

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by a technical distinction between papers in the custody of a Secretary of State and papers in the custody of a Minister who is not a Secretary of State (see Annex, paragraph 5). This distinction would become relevant only where formal dispute arose about the production of papers.)

15. There should be no departure from the existing rule that the advice of the Law Officers to the Government and the advice of officials to Ministers, including legal advice, should not be disclosed to Select Committees. Nor should documents be produced if they fall within the categories of private or confidential material summarised in paragraph 9 above.

16. The decision about the release of other documents of the current administration to a Select Committee is a matter of ministerial judgment. It would certainly be wrong to release documents which, by their nature, were confidential - for example, reports on staff. When questioned about official information, the Government said, however, that it would be their general practice "to make as much information as possible available, including background papers and analytical studies relevant to major policy decisions" (Hansard, 20 June 1979, column 1316). In case of difficulty it may be possible to provide a summary of an existing document as part of a fresh memorandum rather than to produce the document itself.

17. The documents of a former Administration are the property of the Government of the day, although by convention present Ministers do not have access to them. Where such documents were not released or published during the period of that Administration they should not, as a rule, be released to a Select Committee, even at the request of the former Administration".

POSITION OF OTHER WITNESSES

18. Select Committees may not order Members of either House of Parliament to attend before them. Members may only be invited to attend. The same applies to Officers of the House of Lords.

19. With that exception, a Select Committee may summon a citizen of the United Kingdom as witness if he is in the United Kingdom at the time in question. A private person refusing to comply with a summons to attend or to answer questions may be ordered to attend at the bar of the House and could be subject to its penal jurisdiction. A Select Committee enquiring into the work of a Department could order the attendance of members or officials of any public body if it considered their evidence likely to be relevant. For example, a Committee could seek evidence from local authority members or officials on the effect on the authority of the policy of the Government Department into which it was enquiring, even though the Committee were not empowered to examine the policy of the local authority itself.

20. In cases of difficulty, Ministers should consult as early as possible with the Chancellor of the Duchy of Lancaster. If collective discussion seemed desirable, the matter would be referred to the Home and Social Affairs Committee.

1. Paragraphs 2 and 3 of this Annex amplify what is said in the main note about the formal powers of departmental Select Committees and about the position that might arise if the orders of a Committee were not obeyed. Paragraphs 4 and 5 give further information about the extent of the power to send for papers and records*.

Powers : General

2. The powers of departmental Select Committees derive from the House and from their terms of reference. The House cannot delegate to a Committee more powers than it possesses itself and any individual Select Committee may exercise its delegated powers only within the area the House has defined. The terms of reference of the departmental Select Committees require the Committees to "examine the expenditure, administration and policy" of the departments concerned and "associated public bodies". It is for the Committee itself and in the last resort the House, to interpret its terms of reference. The House has granted the Committees powers to send for "persons, papers and records". Penal powers and, in particular, the power to punish for contempt are possessed by the House itself and can be exercised only by the House and not by a Select Committee.

3. If a Minister declined to comply with an invitation to appear before a Select Committee, the Committee could be expected to report the matter to the House, and the House would decide what action to

* The subject is dealt with at length in a memorandum by the Clerk of the House, reproduced at Appendix C to the Report of the Procedure Committee. Most of what is said in this annex applies to all Select Committees of the House of Commons. It does not deal, however, with some special considerations affecting the Public Accounts Committee and the Committee for the Parliamentary Commissioner for Administration arising from the access that the Controller and Auditor-General and the Parliamentary Commissioner have to official papers.

take. If an official were to disobey a formal order to attend before a Select Committee, he would probably be committing a contempt of the House. (This situation has never arisen so there are no precedents to learn from). Since the matter would be one of privilege, the Speaker would almost certainly give it precedence and the Government's control over the business of the House could not prevent a debate taking place. Alternatively, but less likely, the matter could be referred to the Committee on Privileges.

Papers and Records

4. If a Minister or department refused to provide papers, a Select Committee would have to be certain that the papers requested fell into a category which could be required by the House. The papers concerned must:

- (a) relate to a public matter in which the House or the Crown has jurisdiction;
- (b) be obtainable from public offices or from corporations, bodies or offices constituted for public purposes by Acts of Parliament or otherwise, and not from private associations or from individuals not exercising public functions; and
- (c) when sought from Government Departments, be of a public and official character, and not be private or confidential.

There is no definition of what is meant by "private or confidential". Official papers are likely otherwise to be within these defined categories.

5. Where papers or records were held by a Secretary of State the Select Committee could only invite their production. If the invitation were refused the Select Committee might decide to report the circumstances to the House. The House itself could then proceed by way of an Address to the Sovereign requesting that the papers be made available. The Memorandum from the Clerk of the House reproduced in the Report of the Procedure Committee gives a number of examples mostly in the 19th Century in which the House declined to make an Address. No action has been taken on a recommendation of the Procedure Committee to enable a Select Committee to claim precedence for debate in the House on a Motion for an Address for an Order for the Return of Papers. The Government, therefore, cannot be compelled to find Government time for a debate on such a Motion.

6. Where papers or records were held by a Minister who is not a Secretary of State, the Select Committee could make an Order for their production, though there is no record of this having been done. If the Order were refused the Select Committee might decide to report the circumstances to the House. In this case the refusal being a contempt of the House, could be given precedence by the Speaker so that the Government's control over the business of the House could not prevent a debate taking place.