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CABINET

ACCOUNTABILITY OF MINISTERS AND CIVIL SERVANTS

Memorandum by the Lord Privy Seal

I attach for the information of members of the Cabinet the draft Government response to reports on accountability from the Treasury and Civil Service Committee (HC 62) and the Liaison Committee (HC 100). It is intended that the response, in the form of a Command Paper, should be presented to Parliament by the Prime Minister, the Minister of State, Privy Council Office and myself on Thursday 5 February.

2. The reports from the two Committees and the response are concerned mainly with the guidelines to be issued to civil servants who may be asked questions by Select Committees directed at their own individual "conduct". This arises from our response to the Fourth Report from the Defence Select Committee on Westland (Cmd 9916), in which we announced our intention to issue such guidelines, to make clear that "civil servants should not answer questions which are or appear to be directed at the conduct of themselves or of other named civil servants".

3. Considerable concern was expressed in the debate on Westland on 29 October 1986 that this new guidance would have the effect of inhibiting Select Committees in their proper task of inquiring into the expenditure, administration and policy of Government Departments. In the light of this both the Treasury and Civil Service Committee, and the Liaison Committee, urgently considered our proposal.

4. On accountability the Treasury and Civil Service Committee report provides background argumentation, but makes no specific recommendations. The Liaison Committee report, picking up key points from the Treasury and Civil Service Committee, recommends that the Government should clarify the distinction between "actions" and "conduct", should not issue the proposed guidelines, and should undertake that a Minister will always be accountable to the appropriate Select Committee.

5. The intention has been to keep the reply as short as possible, stressing the common ground between the Government and the Committees, in order to end this exchange. At the same time there is no intention of giving way on the key points of the accountability of Ministers and the need for guidelines for civil servants. These are attached to the reply and will be formally issued to civil servants at about the end of February. This fulfils the commitment I gave in the debate on

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29 October 1986 to give the Liaison Committee an opportunity to consider the guidelines before they are issued, although I understand that the Liaison Committee is unlikely to wish to comment on or endorse the guidelines.

6. The Treasury and Civil Service Committee report also covers several detailed aspects of the relationship between Ministers and civil servants, following their earlier report (HC 92) and the Government reply to that (Cmd 9841). In this reply it is proposed simply to note these further comments.

7. The reply and guidelines have already been the subject of consultation with colleagues principally concerned with the management of the Civil Service and with events that gave rise to the earlier reports. I invite colleagues to note the draft response and the proposed guidelines to civil servants.

J B

Privy Council Office

26 January 1987

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FINAL DRAFT

ACCOUNTABILITY OF MINISTERS AND CIVIL SERVANTS

Government Response to the First Report from the
Treasury and Civil Service Committee (Session 1986/7, HC62)
and to the First Report from the Liaison Committee
(Session 1986/7, HC 100)

The Issue of Accountability

The Government recognises and welcomes the common ground which exists between it and the Committees on the basic principles underlying accountability, and which the Treasury and Civil Service Committee record in their Report. With these basic principles agreed, the Government is confident that understandings can be established which will enable the work of Select Committees to be carried on in a way which conforms with those principles and meets the needs both of Parliament and of Government.

2. The Treasury and Civil Service Committee consider as "too narrow" the Government's statement that "Select committees exercise their formal powers ... by virtue of the accountability of Ministers to Parliament." The Committee note that "Select Committees exercise their formal powers ... because Parliament is sovereign and has established Select Committees to monitor Government Departments ...". The Government agrees with this statement of one aspect of the constitutional basis on which Parliament oversees the actions of the executive. But the Government also believes that it is of fundamental importance to recognise another aspect of the constitutional relationships involved: that the oversight that is exercised

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is of policies and actions of Departments for which Ministers are formally and ultimately responsible and accountable to Parliament. This does not mean that only Ministers may give evidence to Select Committees; this has certainly not been the case hitherto and the Government has no wish to make it so. It does mean that, as a general rule*, when civil servants give evidence to Select Committees on the actions of their Departments in carrying out the policies of Ministers, they do so on behalf of, and subject to their duty and accountability to, their Ministers.

3. The Liaison Committee recommend "that the Government give an undertaking that in future it will always ensure that a Minister will be accountable to the appropriate Select Committee". And both Committees invite the Government to reconsider its response to the recommendation made by the Procedure Committee in their First Report of 1977-78, namely "that in future Select Committees should be empowered by the House to order the attendance of Ministers" (HC 588, paragraph 7.21). This recommendation was not accepted by the Government when the present Select Committee system was set up in 1979; the reasons were set out by the then Leader of the House in the debate on the proposed Select Committee system on 25 June 1979 (House of Commons, Official Report, cols. 44-46), the main one being the constitutional inappropriateness of a departmental Select Committee being empowered without the specific authority of the House as a whole, to order the attendance of a Minister (or indeed any Member of the House of Commons). The then Leader of the House went on to give the House and Select Committees a pledge of the Government's determination to do all in its power to "co-operate with the new system of Committees and to make it a success. I believe that declaration

*Special considerations apply to civil servants designated and giving evidence as Accounting Officers, and to those exercising powers vested in their offices by statute.

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of intent to be a better guarantee than formal provisions laid down by Standing Orders". A formal undertaking was also given by the then Leader of the House on 16 January 1981 that he would seek to provide time for the House to express its view "where there is evidence of widespread general concern in the House regarding an alleged Ministerial refusal to divulge information to a Select Committee" (House of Commons, Official Report, 16 January 1981, col 1312).

4. The Government, having considered the matter further as requested, remains of the view that this is the appropriate way for matters of this kind to be handled and reaffirms the pledges and undertakings given in these respects in 1979 and 1981. While it may often - indeed generally - be convenient that departmental evidence to Select Committees should be given by civil servants, it is the Minister in charge of the Department concerned who is accountable. That being so, the Government accepts that it would be consistent with the earlier pledges and undertakings that, if civil servants giving evidence to a Select Committee were unable to answer a question to the Committee's satisfaction because they were inhibited by their duty to or the instructions of Ministers, the relevant Departmental Minister should be prepared himself to attend the Committee.

5. The Government agrees with both Committees that it is helpful to define "actions" and "conduct" of civil servants separately, and accepts the recommendation of the Liaison Committee that the position be clarified without delay. An unambiguous distinction is clearly vital to the guidelines that the Government proposes to issue to civil servants on answering questions relating to conduct. The Government believes that the most important distinction to be drawn in this context is between questions which seek to establish the facts of what has occurred ("actions") and those which explicitly or implicitly seek to assign criticism or blame to individual civil servants ("conduct").

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6. In discussing the definition of "actions" of a civil servant, the Treasury and Civil Service Committee note that they are "in no doubt that it would be quite wrong and entirely unacceptable for any restrictions to be placed" on the giving of evidence about "actions" and invite the Government to make clear that it has no intention of doing any such thing. On the understanding that the Committee are not calling in question the existing conventions which limit the provision of information on such grounds as national security, confidentiality, and the preservation of collective responsibility, the Government is happy to confirm that it has no such intention. As the Leader of the House said in his speech in the House on 29 October, referring to the Government's response to the Fourth Report of the Defence Committee (Cmnd. 9916),: "It has been represented as a way of making any future Select Committee inquiry ineffective. It does not, and is not intended to, do anything of the sort". He went on to say: "As now, if something has gone amiss, a Select Committee will be free to seek an account from the Minister concerned or from a senior official representing the Minister. This could cover what has gone amiss, why it went amiss, what has been done to correct and remedy what has gone wrong and to prevent a recurrence. In short, we do not seek to prevent Select Committees from pursuing their enquiries into the expenditure, administration and policies of Departments." (House of Commons, Official Report, 29 October 1986, Col. 415).

7. The Treasury and Civil Service Committee's report quotes at some length from the speech made in the course of a debate on the Crichel Down affair by the then Home Secretary, Sir David Maxwell Fyfe. The Government is of the view that the four instances set out by Sir David Maxwell Fyfe in that speech provide a comprehensive framework within which to consider the accountability of Ministers for the activities of civil servants, and wishes to point in particular to the concluding sentence of Sir David Maxwell Fyfe's explanation of his fourth category: "But, of course, he [the Minister] remains constitutionally responsible to Parliament

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for the fact that something has gone wrong, and he alone can tell Parliament what has occurred and render an account of his stewardship". (House of Commons, Official Report, 20 July 1954, Cols. 1286-7).

8. The Government welcomes the fact that the Liaison Committee agree with its view that Select Committees should not act as disciplinary tribunals. The Government for its part agrees that Select Committees should not be prevented from seeking to establish facts. If in the course of an inquiry a Select Committee were to discover evidence that called in question the "conduct" of a particular civil servant, the right course would be for the Select Committee to pursue the matter with the Minister concerned, rather than pursue their own investigation into the "conduct" of the civil servant. It would then be for the Minister to arrange for the matter to be looked into and for the Committee to be informed of the result in due course. Such a procedure would, in the Government's view, be consistent with the needs of Select Committees as expressed in paragraph 14 of the Liaison Committee's Report.

9. The Government has considered carefully the arguments put forward in the Reports from both Committees that guidelines to civil servants, on answering questions which are or appear to be related to "conduct", should not be issued. The Government understands the concern which has been expressed but remains of the view that civil servants appearing before Select Committees need to have guidelines within which to work when they are giving evidence. The Government has therefore prepared supplementary guidelines which take account of the views expressed by the Treasury and Civil Service Committee and the Liaison Committee. These supplementary guidelines are appended herewith. The Government believes that these clarify the distinction between "actions" and "conduct", that they are consistent with the principle of Ministerial accountability to Parliament, and that their operation will allow Select Committees to continue to discharge effectively their proper role of inquiring into the expenditure, administration and policies of Departments.

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10. The Liaison Committee expressed specific concern about the ability of certain non-departmental Select Committees to function effectively if guidelines were instituted. Their report refers to the Government's acknowledgement (in the debate on 29 October 1986, House of Commons, Official Report, Col. 415) of the special position of the Public Accounts Committee. The Government accepts also that several other Committees have requirements with respect to civil servants which differ from those of departmental Select Committees and confirms that nothing in these guidelines is intended to affect the way in which the Committees mentioned in the Liaison Committee's Report have taken evidence from civil servants hitherto.

Duties and Responsibilities

11. The Government notes the Treasury and Civil Service Committee's further views on these matters. As regards the provision of a right of appeal for members of the Diplomatic Service and of the Northern Ireland Civil Service (similar to that which the Government has agreed in principle should be provided for members of the Home Civil Service) it was not the Government's intention in its reply to the Committee's previous Report to imply that similar provision should not be made. Appropriate arrangements for such appeals to the Heads of the respective Services will be considered in the light of arrangements made in respect of the Home Civil Service. Beyond this, the Government has nothing to add to the views it expressed on these subjects in its reply (Cmnd. 9941) to the Committee's earlier report (HC 92).

Guidelines for Officials giving Evidence to Departmental
Select Committees*

Officials who give evidence to departmental Select Committees do so on behalf of their Ministers in accordance with the principles that civil servants are accountable to Ministers, and that it is Ministers who are accountable to Parliament. In giving evidence, civil servants are therefore subject to the instructions of Ministers and remain bound to observe their duty of confidentiality to Ministers.

2. In the course of Select Committee inquiries into the expenditure, administration and policies of Departments and their associated bodies, the evidence given by officials will normally be concerned with explaining the policies and actions undertaken by Ministers, and by Departments on their behalf, and the reasons for those policies and actions. Sometimes, however, a Select Committee's inquiries may involve questions relating to what has been done by individual civil servants. On such occasions, the principles of Ministerial accountability are still applicable, even if officials have acted outside or contrary to the authority given to them by Ministers.

3. Subject to the general principles set out above, official witnesses should in all Select Committee inquiries be as helpful as possible in answering questions concerned with the establishment of the facts of what has occurred in the making of decisions, or the carrying out of actions in the implementation of Government policies.

*These guidelines supplement, and should be read in conjunction with, the memorandum of guidance for officials appearing before Select Committees, and will be incorporated in future editions of that guidance.

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4. There may however be occasions when questions put by members of a Select Committee in the course of an inquiry appear to be directed to the "conduct" of individual civil servants. "Questions directed to the conduct" in this context means more than the establishing of facts about what has occurred; it carries the implication of allocating individual criticism or blame. In such circumstances, in accordance with the principles of Ministerial responsibility, it is for the Minister to look into the matter and if necessary institute a formal enquiry. Such an inquiry into the conduct and behaviour of individual civil servants and consideration of disciplinary action is properly carried out within a Department according to established procedures designed and agreed for the purpose, and with appropriate safeguards for the individual. It is then for the Minister to be responsible for informing the Committee of what has happened and of what has been done to put the matter right and to prevent a recurrence. Evidence to a Select Committee on this should be given not by the individual civil servant or servants concerned, but by the Minister or by a senior official specifically designated by the Minister to give such evidence on his behalf. This would include the result of any disciplinary or other departmental proceedings against individual civil servants.

5. So if in the course of an inquiry a Select Committee were to discover evidence that called in question the 'conduct' of an individual named civil servant, the understanding is that the Select Committee should not pursue their own investigation into the 'conduct' of the person concerned or act as a disciplinary tribunal, but should pursue the matter with the Minister, for whom it would then be to deal with it on the lines described above.

6. If, when officials are asked to give evidence to a Select Committee, it is foreseen that the inquiry may involve questions about the "conduct" of the individual officials in question or about other individual named

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officials, it should be suggested to the Committee that it would be appropriate for a Minister or a senior official designated by the Minister to give evidence, rather than the named officials in question. Any question which appears to relate to the 'conduct' of individual civil servants, such as the allocation of blame for what has occurred, can then be answered by the Minister or designated senior official. If an official giving evidence to a Committee is unexpectedly asked questions which he or she believes are directed at his or her individual 'conduct', or at the 'conduct' of another named individual civil servant, or if the official is uncertain whether or not questions fall into this category, the official should indicate that he or she wishes to seek instructions from his or her Minister, and the Committee should be asked to allow time for the Minister's instructions to be sought.