Liaison Committee

Scrutiny of Government: Select Committees after Hutton
Note by the Clerks

Introduction

Review by the Liaison Committee

1. At its meeting on 16 October, the Committee decided to review the working of select committees in the light of the Hutton Inquiry into the circumstances surrounding the death of Dr David Kelly. This note sets out some issues in preparation for the initial discussion by the Committee. It seeks to:

- compare the experience of the Hutton Inquiry with the scrutiny process currently operated by select committees, and
- identify issues where select committees might reassess their access to persons or information, or their own working practices.

I ACCOUNTABILITY OF MINISTERS AND CIVIL SERVANTS TO PARLIAMENT

Tribunals of Inquiry

2. The inquiry by Lord Hutton "urgently to conduct an investigation into the circumstances surrounding the death of Dr Kelly" is not a statutory inquiry established under the Tribunals of Inquiry (Evidence) Act 1921, with formal powers equivalent to the High Court, but an inquiry set up by the Government which happens to be headed by a judge. In such cases, cooperation is voluntary, as in the Scott Inquiry on arms shipments to Iraq (1996).

Attendance by Witnesses

3. As the **Hutton Inquiry** lacks the statutory powers granted under the 1921 Act, it has no power to compel attendance of witnesses. However the absence of the formal powers does not seem to have limited its access to those from whom it wished to take evidence. The Prime Minister, the Chairman of the Joint Intelligence Committee, and even the Chief of the Secret Intelligence Service gave evidence on the record, even if the last-named used an audio-link. Pressure for cooperation in the face of public disquiet made sanctions unnecessary.

4. **Select committees** enjoy formal powers of summons. Under Standing Order No. 152 (4a), all departmental select committees have power to send for "persons, papers and records". In practice, there is rarely a need to invoke this power, which has two principal exceptions:

- Civil servants
- Members of either House

Civil Servants

5. At least since the 1970s, there has been a continuing struggle between committees and successive Governments to establish a modus operandi on attendance by **civil servants**. The Government's position is set out in the so called Osmotherly rules. These have, however, never been approved by the House, which asserts that it is not for Ministers unilaterally to abridge or

fetter its powers to call evidence. On the other hand, political reality implies that these powers cannot be enforced against the wishes of a Government with a majority in the House. The resulting agreement to disagree, on this point, together with undertakings by Government, most notably set out in the Resolution of 19 March 1997, have created informal conventions which normally enable committees to carry out their work without major hindrance. However, periodically there are refusals of cooperation over particular Government witnesses.

Named Civil Servants and their 'Conduct'

6. In the mid 1980s, the Westland affair led to disagreement between the Liaison Committee and the Government about the attendance of named civil servants and whether committees should be able to examine their 'conduct'.[1] As Erskine May sets out:

> *Civil servants frequently give evidence to select committees, although successive Governments have taken the view that they do so on behalf of their Ministers and under their discretion, and that it is therefore customary for Ministers to decide which official should represent them for that purpose. The Government issues guidance to civil servants appearing as witnesses before select committees, which is now published. The guidance says that Ministers will usually agree to a request from a committee to take evidence from a particular named official, but that they retain the right to suggest an alternative official if they feel that the latter 'is better placed to represent them', and that 'it is open to the Minister to appear personally before the Committee in the unlikely event of there being no agreement about which officials should most appropriately give evidence'. The guidance says that 'it has been agreed that it is not the role of select committees to act as disciplinary tribunals'; where a committee is likely to ask a named official to give evidence about their personal responsibility or about the allocation of blame as between them and others—particularly where the official concerned is the subject of existing or possible internal inquiries or disciplinary proceedings—Ministers might want to suggest another official to give evidence instead. The guidance suggests that if committees require details of disciplinary proceedings which identify individuals, they should be given in confidence, after the proceedings are complete.*
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> *The guidance has not been approved by Parliament and has no parliamentary status, and although select committees have from time to time commented upon its provisions, they have never formally agreed to them.*[2]

7. In the mid 1990s, the limitations imposed on committees' access to civil servants contrasted with the undertaking given to Sir Richard Scott for his arms to Iraq inquiry that any civil servants that he wanted to give evidence would be required to do so – on their own behalf, not that of the Minister: in other words their duty was to the inquiry not their Minister.[3]

8. The presumption that similar treatment should be given to select committees was recommended by the Public Service Committee in its Second Report in 1996.[4] In its Reply (1996-97, HC 67) the Government agreed that such attendance should be normal but added the qualifications referred to in May, ie

- attendance on behalf of Ministers and under their directions

[1] First Report, 1986-87, HC 100
[2] *Erskine May*, 22nd Edition, p 649
[3] Public Service Committee, Second Report, 1995-96, HC 313, para 83
[4] Ibid

- no use of committees as disciplinary tribunals.

Attendance of Dr Kelly

9. The attendance of Dr Kelly before the Foreign Affairs Committee on 15 July 2003 raised just such issues. After he had been identified in the media as the source of a journalist's story, the Committee sought to take evidence from him. In effect, this request was made in respect of his personal behaviour, rather than as a spokesman for government policy or as an expert witness on factual matters. Indeed, the extent to which Dr Kelly had acted beyond departmentally authorised limits was a principal issue before the Committee. His Minister, the Secretary of State for Defence, Mr Hoon, authorised his appearance, but on condition that the Committee only questioned Dr Kelly on those matters which were directly relevant to the evidence given by Andrew Gilligan, and not on the wider issue of Iraqi WMD and the preparation of the Dossier. However, once approval had been given, Mr Hoon was not in a position to enforce his proposed conditions; and, in the event the questioning touched on some of the matters supposedly off limits.

Other Government Departments

10. Problems have been encountered, mainly by departmental select committees (DSCs), in getting evidence from departments other than those they scrutinise, and particularly from the Treasury. DSCs accept that it is not generally appropriate to have recourse to oral or written evidence from the Treasury on, for example, general public expenditure issues: but there are often occasions when, for example, taxation policy is a crucial component of an inquiry. Nonetheless, it is only fair to note that public oral evidence to DSCs from Treasury Ministers, notably the Economic Secretary Mr Healey, is relatively frequent.

Treasury Ministers

11. The most recent major difficulty arose in April 2002 when the Transport, Local Government and the Regions Committee reported to the House the refusal of Treasury Ministers to give evidence to its Transport Sub-Committee in connection with its inquiry into the London Underground PPP. The Sub-Committee had learned in evidence that the Treasury had played, and was playing, a major and detailed part in the design and administration of the whole scheme, including the process of bidding. The Committee recommended that the House make an order to a Treasury Minister to attend. Although the issue was discussed in the June 2002 Estimates Day debate, no opportunity was given to debate the proposed order. This was despite the previous undertaking by Government in 1981 to provide time for a debate "where there is evidence of widespread general concern in the House regarding an alleged Ministerial refusal to divulge information to a Select Committee".[5]

Cabinet Office

12. The same Committee reported in March 2002 on the refusal of the Cabinet Office to allow a named individual (Lord Birt), then acting as the Prime Minister's unpaid strategy adviser on transport issues, to give evidence on the Transport Sub-Committee's review of the 10 Year Plan for transport. The Committee's Report set out its irritation at the growth in influence of the Central Unit at No. 10 Downing Street and its lack of accountability to Parliament.

[5] HC Deb 16 January 1981 col 1312, quoted in Public Service Committee, Second Report HC 313 Session 1995-96, Ministerial Accountability and Responsibility, para 128

Home Office

13. In recent months, there have also been problems over securing the attendance of Home Office Ministers. In November 2003, the Science and Technology Committee reported on these and related difficulties with the Home Office and other agencies, during its inquiry into the scientific response to terrorism. This had led to the last minute withdrawal of witnesses in May 2003, and the Chairman having to agree with Ministers formal constraints on the scope of the Committee's inquiry. The Committee recommended that "the Liaison Committee establish clear ground rules on the nature and extent of cooperation which is expected from Government in select Committee inquiries". In a letter to Mr Williams of 10 November 2003, the Committee's Chairman expressed the hope that this issue might be pursued in the context of the Liaison Committee's consideration of the lessons to be learned from the Hutton inquiry.

Issues for Consideration

- **What is the most effective method of avoiding refusals – firm negotiation case by case or a general Government undertaking? If the latter, what elements should it contain? What form should it take?**

II ACCESS TO PAPERS

Hutton papers

14. The **Hutton Inquiry** had access to a wide range of written material submitted by government departments and agencies, other organisations and individuals. The evidence was voluntarily submitted, in response to a general request for all relevant material, equivalent to the discovery of papers in a civil court. It includes a mass of e.mails between officials, drafts of official papers, confidential correspondence, minutes of private meetings and personnel records. The evidence is listed on the Inquiry website, with reference numbers: it can be viewed in the original form, having been scanned in. There are some words or passages blacked out.

Contrast with select committees

15. This presents a striking contrast to the regime for **select committees**:

- a select committee would not be given the ***form*** of documentary evidence supplied to Hutton: most strikingly perhaps the correspondence or loose minutes between senior officials and the mass of e.mails, which constitute the richest source for an audit trail

- a select committee would not be given the ***nature*** of documentary evidence supplied to Hutton, much of which would fall into the categories of advice to Ministers or paper whose release would adversely affect the candour of internal discussion, where release would be blocked under the terms of the 1997 Code of Practice

- above all a select committee would not be given (and might not ask for) ***documentary evidence*** as opposed to information**.** The Osmotherly Rules set out that the Government's commitment to provide as much information as possible "does not amount to a commitment to provide access to internal files, private correspondence, including advice given on a confidential basis, or working papers. Should a Committee press to see such documents, rather than accepting written or oral evidence on the subject, Departments should consult their Ministers and the Cabinet Office Central Secretariat." Para 4 of the Code of Practice warns:" There is no commitment that pre-

existing documents, as distinct from information, will be made available in response to requests."

Recent experience

16. Committees have to live within the framework of the existing rules and of the 1997 Code of Practice, which the House indirectly endorsed on 19 March 1997. There are therefore not many cases of Committees requesting specific documents and encountering a straight refusal. In its post-Scott July 1996 Report the Public Service Committee noted several such instances, including the refusal of reports, commissioned by departments from outsiders. Recent experience has thrown up some further examples.

- The Defence Committee asked for copies of 'Lessons learnt' reports from Commanding Operations in Operation Telic which were prepared as part of MoD's overall assessment of the operation. This was refused. The Chairman expressed his displeasure at the refusal in the course of an evidence session in September 2003. The MoD has subsequently reiterated its refusal.

- The Environmental Audit Committee has complained of the refusal of departments to publish their sustainable development reports.[6] The Treasury claimed that these were an internal part of the spending review process.

- The FAC had difficulty in procuring actual FCO telegrams (i.e. official correspondence) in its Sierra Leone inquiry and more recently was refused access to official papers relating to the Bali bombing, on the grounds that these were being supplied to the Intelligence and Security Committee.

- The International Development Committee eventually resorted to an appeal to the Ombudsman under the Code of Practice to seek copies of ministerial correspondence between FCO and DTI/ECGD on the Ilisu Dam.

- The Quadripartite has encountered a refusal to provide – even in confidence – an analysis of the costs and benefits to Tanzania of acquiring a military air traffic control system, with the FCO claiming that to do so would risk either breaching commercial confidences or harming the frankness and candour of internal discussion.

What Committees need

17. Such a brief survey cannot identify categories of papers currently withheld whose release to Committees would assist them in their scrutiny work. Committees may not bother to ask, knowing the likely outcome: and often will not be aware of the existence of papers which would help them. But experience suggests some possible categories, such as full records of past events and decisions, including those of the Cabinet and its sub-committees; internal reports, detailed options papers, documents passed between departments (including HM Treasury); and departmental work programmes and agendas such as are available at divisional or central level to management of a department and to Ministers, [cf papers often made available by Executive Agencies]

[6] Environmental Audit Committee, Third Report of Session 2002-03, *Annual Report for 2002*, HC 262, para 16

Confidential material

18. Hutton had access to some classified documents, although much was *not* technically classified. Select committees, notably but by no means exclusively Defence and Foreign Affairs, are given classified information and some highly classified documentary material. Many committees receive commercially classified or personally sensitive information. Most of it is handled under standard procedures, rather than the extreme Belgrano inquiry case of papers being seen on departmental premises. Furthermore, some committees have been given private briefings. There are few reported instances of information being denied on grounds of classification or commercial confidentiality **alone**, since departments and others can be given assurances that it will be securely handled.

Speed of provision

19. One further minor but significant contrast emerges from the Hutton experience: the speed with which papers are supplied, in marked contrast to the record of some departments in supplying information and responding to requests.

Issues for Consideration:

20. In brief

- select committees tend to get **information** but not **documents**:

- the Government makes use of the exemption in the Code and in particular Group 2 on "Internal Discussion and Advice" –

  "Information whose disclosure would harm the frankness and candour of internal discussion including: proceedings of Cabinet and Cabinet committees; internal opinion, advice, recommendation, consultation and deliberation; projections and assumptions relating to internal policy analysis, analysis of alternative policy options and information relating to rejected policy options; confidential communications between departments, public bodies and regulatory bodies"

  Much of the material made available to Hutton would be covered by the Code and so would not currently be provided to select committees

- **select committees could be more active in requesting documents rather than information; but**

- **eventually the question of principle will have to be faced as to whether select committees should enjoy substantially enhanced access to official documentation.**

III WORKING PRACTICES OF COMMITTEES

21. The main issues to arise from the Hutton inquiry, as far as the working practices of select committees are concerned, were:

- the wisdom or otherwise of choosing subjects for inquiries which involve a forensic, fact-finding approach;
- the way in which committees conduct their questioning;
- and the effect on some witnesses of exposing them to the media glare.

These are summarised in turn below.

Choice of subjects for inquiries

22. Some press comment has suggested that a judge-led quasi-judicial inquiry such as Hutton is better suited than a select committee to carry out an investigation designed to establish the facts from a welter of conflicting evidence, particularly where the conduct of individuals is involved. The fact that the FAC split on party lines (or otherwise failed to reach agreement) on some of the issues before it is cited in support of this proposition. The counter- argument is that the more the "facts" in question are susceptible to political interpretation, the more appropriate it is that any inquiry should be conducted in a parliamentary forum.

23. This in turn raises the issues of the way in which select committees conduct inquiries and, in particular, their questioning of witnesses. Close coordination between Members is needed if a sustained line of questioning is to be followed through effectively. Sometimes competing interests of different Members allow witnesses "off the hook". A further criticism is that Members individually are not all sufficiently well versed in the art of putting questions in a sharp, focussed way.

The use of Counsel to conduct questioning

24. It may be with these considerations in mind that at the end of the evidence given by the Chairman of the FAC, Lord Hutton asked whether any thought had been given to the use of Counsel to conduct the questioning of witnesses, possibly as an addition to, rather than a substitute for, the role of Members themselves. The Chairman of the FAC quite properly pointed out that this was a matter for the House, not individual committees. It was not clear how far such a development was intended to apply to all types of inquiry or solely to those concerned with the conduct of individuals. This idea raises two main questions: the extent to which non-elected people such as legal Counsel (or other kinds of proxy interrogators) are qualified to put questions to witnesses on matters of political controversy; and the additional costs involved.

Exposing witnesses to media coverage

25. One of the sources of pressure apparently felt by Dr Kelly was his appearance before the Foreign Affairs Committee, which it was known in advance would be televised. The only committee which currently has the power to prohibit television coverage of a public meeting is the Standards and Privileges Committee. It would require a resolution of the House to extend this power to other select committees.

Issues for Consideration

In practice, committees may not often be faced with potential inquiries as sensitive as the case of Dr Kelly, but current practice in general could be reassessed in respect of

- **questioning techniques – could Members plan more, or make use of guidance or forensic training? Use of Counsel for part of the questioning?**
- **removal of cameras for some public sessions – but in what circumstances? Would it damage the principle of transparency? (Hutton only admitted cameras for opening and closing moments.)**

IV RELATIONS BETWEEN THIRD PARTIES, INCLUDING WITNESSES, AND MEMBERS OF COMMITEES

26. Andrew Gilligan sent e-mails to two members of the FAC suggesting certain lines of questioning for the evidence session with Dr Kelly. Contrary to some comments at the time, there is nothing inherently improper in such a course – and certainly no question of contempt arises. Committees depend on a range of sources to inform their questioning of witnesses, in addition to the briefing material provided by their staff. These sources can include pressure groups, trade unions, business organisations and the like, some of which will themselves be giving evidence on their own behalf. This process of cross-fertilisation has always been valued by Committees.

27. Particular sensitivity arose in this case, however, in two respects. First, Mr Gilligan's own conduct and veracity were under examination by the committee, so that his decision to brief Members selectively raised questions of judgement. Second, Mr Gilligan's material was not shared with the rest of the Committee (save for a passing reference by one Member to the Chairman).

V INTERNAL WORKINGS OF COMMITTEES AND THEIR STAFF

28. The Hutton inquiry broke new constitutional ground in that internal working documents of the FAC, of a kind never previously published, were made available to the inquiry and subsequently appeared on its website. The relationship between the inquiry and the House raised a number of potentially awkward issues, centred around parliamentary privilege and the interpretation of Article IX of the Bill of Rights, which states that proceedings may not be "impeached or questioned" in "any court or place out of Parliament". The FAC was keen to assist Lord Hutton, but it was not for the Committee itself to determine the question of privilege.

29. The approach which was decided upon by the House authorities was that the House would co-operate with the inquiry to the fullest extent possible, but that this should be on the basis of a voluntary act and there could be no question of witnesses being summoned or papers being demanded (which the inquiry in any case had no power to do). In this way it was hoped that any precedents established would be strictly limited.

30. As to any lessons to be learned, the Liaison Committee may feel that, beyond the need for Members and staff to exercise some caution in the wording of e-mails and other documents, it would be unwise to embark on sweeping changes to select committee working practices on the basis of what is likely to be a very rare occurrence. The Freedom of Information Act will almost certainly have more impact on the way in which committee staff handle documents.

31. Two other issues are perhaps worth mentioning in this context:

- *The status of people sitting at the witness table.* Prior to the FAC hearing there were exchanges between its Clerk and the MoD about whether Dr Kelly might be accompanied at the witness table by an official in the capacity of a friend or supporter. The Clerk's advice, reflecting current practice, was that anyone sitting at the witness table was liable to be treated as a witness and to have questions put to him or her. In the event, Dr Kelly appeared alone – apparently his own decision. The Liaison Committee might wish to discuss whether, in future, the question whether someone seated at the table is or is not to

be treated formally as a witness should depend on the circumstances of each individual case.

- *Transcripts of evidence taken in private.* Some difficulty and confusion arose over the status and availability to other Members or the public at large of the transcript of the evidence taken by the FAC in private from Mr Gilligan. Because the evidence had already been reported to the House, it was technically in the House's possession and thus available on request to individual Members. On that basis, Dr Kelly's constituency Member of Parliament sought to obtain a copy. This request was problematic in that it was apparently in conflict with the Committee's decision not to publish the transcript in advance of any request from the Hutton inquiry for a copy of it – thus, in effect, leaving the timing of its publication to the inquiry. There may be a case for reviewing the practice with regard to the reporting to the House of evidence taken in private. This currently involves reporting "parts of" the minutes of evidence, leaving unclear, until questions of possible sidelining have been agreed, which parts have been reported (and will therefore be printed), and which not.

Issues for Consideration

- **should someone seated at the witness table always be treated formally as a witness?**
- **should the practice of reporting evidence taken in private be reviewed?**