

## PARLIAMENTARY GUIDANCE NOTES – SG OFFICIAL EVIDENCE TO COMMITTEES OF THE SCOTTISH PARLIAMENT

### FOR:

SG colleagues seeking background on issues they should be aware of when asked to give oral or written evidence to Scottish Parliamentary Committees.

### KEY POINTS:

- **The Government should always seek to make as much information as possible publicly available as a matter of course and should respond positively to requests for information from the Parliament and its Committees.**
- **Despite any request from a Committee to take evidence from a named official, it is for Ministers to decide which official or officials should represent them.**
- **Officials should confine their evidence to factual information and explanation of Government policy. Committees should look to Ministers to account for the policy decisions they take.**
- **Committees have the power to require any person to appear before them for the purpose of giving evidence concerning any subject for which a member of the Scottish Government has general responsibility.**
- **Colleagues must consider whether various restrictions on giving evidence can apply (e.g. Freedom of Information; Excessive Cost; matters which may be sub-judice; Conduct of Officials; Defamation etc.)**
- **Scope available, subject to ministerial discretion, to provide evidence on an '*in confidence*' basis.**
- **Government should consider handling of Committee Reports on publication, in terms of formal responses, and in the longer term.**

### CONTACTS:

[Redacted]

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## 1 INTRODUCTION

### Status

1.1 This guidance is for colleagues in the Scottish Administration (whether from the Scottish Government and its Agencies or from offices headed by a non-ministerial office-holder in the Scottish Administration) who may be called upon to give evidence before, or prepare submissions to, Committees of the Scottish Parliament (“Committees”).

### Scope

1.2 This guidance applies in any circumstances in which a Committee requests or requires an official to appear before it (e.g. during an inquiry on a particular subject or during consideration of a Bill or subordinate legislation).

1.3 Colleagues may occasionally be invited to give **evidence to UK Parliamentary Committees**, or their equivalents, of other countries. Before such requests are accepted clearance should be obtained from the Scottish Ministers. [Guidance on Giving Evidence to Select Committees](#) has been issued by the Cabinet Office.

### Principles governing official information and accountability to Parliament

1.4 The Scottish Government regards committees as having a crucial role to play in ensuring its full, open and proper accountability to the Scottish Parliament a principle enshrined in the Scottish Ministerial Code. Our Ministers have emphasised the importance of officials being as forthcoming and helpful as they can in providing information to Parliamentary committees.

**1.5 Ministers regard the following principles, approved by the Parliament on 1 November 2000, as the cornerstone of a good working relationship between the Government and committees of the Parliament.** (Further guidance on the operation of these principles is set out in sections 5 and 6 below.)

On 1 November 2000, the Scottish Parliament approved the following motion after a debate on official information and the Government’s accountability to the Scottish Parliament:

*“That the Parliament notes that the Government is committed to a policy of openness, accessibility and accountability in all its dealings with the Parliament and its Committees; further notes both the Parliament’s right and duty to hold the Government to account, including the power to invoke section 23 of the Scotland Act, and the public interest in maintaining the confidentiality of exchanges between officials and Ministers concerning policy advice; observes that other Parliaments with strong freedom of information regimes do not disclose the terms of such exchanges; calls, to that end, for the Government and the Parliament to observe the following principles:*

*i) consistent with its policy of openness, the Government should always seek to make as much information as possible publicly available as a matter of course and should respond positively to requests for information from the parliament and its Committees;*

*ii) officials are accountable to Ministers and Ministers in turn are accountable to the Parliament and it follows that, while officials can provide Committees with factual information, Committees should look to Ministers to account for the policy decisions they have taken;*

*iii) where, exceptionally, Committees find it necessary to scrutinise exchanges between officials and Ministers on policy issues, arrangements should be made to ensure that the confidentiality of these exchanges is respected, and commends these principles to Committees as guidelines to be followed in their dealings with the Government.”*

## **2 COMMITTEE REMITS**

2.1 Rule 6.2 of *Standing Orders* states that a Committee shall examine such matters within its remit (“competent matters”) as it may determine appropriate or as may be referred to it by the Parliament or another Committee and shall report to the Parliament on any such matter.

2.2 Committees may:

- consider the policy and administration of the Scottish Administration upon any competent matter;
- consider any European Communities legislation or any international conventions or agreements which relate to or affect any competent matter;
- consider any proposals for legislation which relate to or affect any competent matter;
- consider the need for reform of the law;
- initiate Bills on any competent matter; and
- consider the financial proposals and financial administration of the Scottish Administration which relate to or affect any competent matter.

## **3 ROLE OF OFFICIALS GIVING EVIDENCE TO COMMITTEES**

### Central Principles

3.1 It is important for officials to be fully aware of their constitutional position. A central principle of the relationship between officials and Committees is that officials give evidence to Committees on behalf of their Ministers, under their directions and with their approval. This in turn reflects the principle that it is Ministers who are directly accountable to the Parliament for both their own policies and for the actions of the Scottish Government.

3.2 Officials are accountable to Ministers and are subject to their instruction; but they are not directly accountable to the Parliament. This does not mean, of course, that officials may not be called upon to give a full account of Government policies, or indeed of their own actions or recollections of particular events. But their purpose in doing so is to contribute to the central process of Ministerial accountability, not to offer personal views or judgements on matters of political controversy (*see section 6 below on Status and Handling of Evidence*), or to become involved in what would amount to disciplinary investigations which is for the Scottish Government to undertake (*see paragraph 5.7 below on Conduct of Individual Officers*).

3.3 This guidance constitutes standing instructions to colleagues appearing before Committees. These instructions may be supplemented by specific Ministerial instructions on specific matters. It is for the Minister to engage the Committee on issues of policy and for officials to avoid being drawn into debates on policy options or advice to Ministers. It would

be a breach of the [Civil Service Code](#) for an official to advise Members other than Ministers (see paragraphs 4.7 - 4.9 below on *Discussing Government Policy*).

3.4 Colleagues must ensure that they apply the principles contained in this guidance consistently when appearing before Committees, for example in answering questions. This will avoid unhelpful comparisons being drawn between the approaches of different officials to different Committees.

3.5 Taking account of the constitutional position set out above, the role of civil servants is to:

- assist Committees by providing factual information;
- contribute to informal briefing;
- prepare memoranda for Committees;
- give formal evidence to Committees;
- provide support to Ministers; and
- monitor the work of Committees.

### Summoning of Named Officials

3.6 A Committee may during the course of its work invite officials to give evidence. Under the principles outlined above, it is appropriate that Ministers decide which official or officials should represent them.

3.7 Where a Committee indicates that it wishes to take evidence from a particular named official, Ministers will usually agree to meet such a request, but this is subject to two important qualifications:

(a) Ministers retain the right to suggest an alternative official to that named by the Committee if they feel that the former is better placed to represent them, or to suggest their own attendance in place of the official. While the Committee is under no obligation to accept the Minister's proposal, it is open to the Minister to appear personally before the Committee in the unlikely event of there being no agreement about which official should most appropriately give evidence.

(b) It is not the role of Committees to act as disciplinary tribunals (see paragraphs 5.7 to 5.11). A Minister will therefore wish to consider carefully a Committee's request to take evidence from a named official where this is likely to expose the individual concerned to questioning about their personal responsibility or the allocation of blame as between them and others. This will be particularly so where the official concerned has been subject to, or may be subject to, an internal departmental inquiry or disciplinary proceedings. Ministers may, in such circumstances, wish to suggest either that they give evidence personally to the Committee or that a designated senior official do so on their behalf.

3.8 **Under section 23 of the Scotland Act, the Parliament or a Committee of the Parliament has the power to require any person to appear before it for the purpose of giving evidence concerning any subject for which a member of the Scottish Government has general responsibility.** A Committee may therefore require a particular official to appear before them, contrary to the Minister's wishes, or indeed require the Minister to attend. In such an event the official, as any other citizen, would have to appear before the Committee but in doing so would remain subject to Ministerial instruction under the terms of this Guidance and of the *Civil Service Code*. Scottish Ministers have expressed the hope that adherence to the principles which the Parliament has approved on official

information and accountability (see *paragraph 1.5 above*) should make it unnecessary for the Parliament or its Committees to have recourse to their formal powers under section 23.

### Procurators Fiscal

3.9 Section 23(10) of the Scotland Act contains special provision about evidence from procurators fiscal. Further details are contained in the **Annex** to this Parliamentary Guidance Note.

### Agency Chief Executives

3.10 Where a Committee wishes to take evidence on matters assigned to an Agency, Ministers will normally wish to nominate the Chief Executive as being the official best placed to represent them. While Agency Chief Executives have managerial authority to the extent set out in their Framework Documents, like other officials they give evidence on behalf of the Minister to whom they are accountable and are subject to that Minister's instruction.

### Position of Retired Officials

3.11 Committees can request evidence from officials who have retired, and as indicated at paragraph 3.8 above have the power to require any person to attend and to give evidence concerning any subject for which a member of the Government has general responsibility. However, retired officials cannot be said to represent the Minister and hence cannot contribute directly to his accountability to the Parliament. For these reasons, and because retired officials do not have access to up to date information and thinking, Ministers would normally expect evidence on Government matters to be given by themselves or by serving officials who report to them.

### **Accountable Officers**

3.12 Special rules apply to senior officials in their role as [Accountable Officers](#). Further details can be found in the [Scottish Public Finance Manual](#) (SPFM), in particular [the section on accountability](#).

3.13 The Principal Accountable Officer for the Scottish Administration is the Permanent Secretary, who in turn designates functions to Accountable Officers (DGs or equivalent) in line with their respective remits. This role carries a **personal** responsibility for the propriety and regularity of the public finances for the part of the Scottish Administration for which accountable officers are answerable and a requirement to ensure that these public finances are used economically, efficiently and effectively.

3.14 A specific responsibility in the SPFM memorandum to accountable officers is to ensure that [delegation of authority](#) is accompanied by clear lines of control and responsibility together with effective reporting arrangements. This extends to the governance arrangements for [major investment projects](#), the basic control arrangements are as follows:

- **Investment Decision Maker** (IDS) - (About SG Director General level);
- **Project / Senior Responsible Owner** (PRO/SRO) - (About SG Director / Deputy Director level); and
- **Project Sponsor** (Optional) (About SG Deputy Director level); and
- **Project Manager** (About C band level).

3.15 **Delegation of financial and operational authority within any line does not equate to delegation of direct accountability.** It is open and entirely reasonable for a

parliamentary committee to request evidence from an individual who is responsible for particular matters or issues they are scrutinising, but all public officials in the line remain responsible, proportionate to their role and thereby open to appropriate committee scrutiny.

### Trade Union Officials

3.16 Elected trade union representatives may be called on to give evidence to Committees, to represent the legitimate interests of their members. In doing so, they may comment on Government policy but must make it clear that they are expressing views as representatives of the union and not as civil servants on behalf of Ministers.

### External Expert Witnesses

3.17 If the Scottish Government wishes to include any external experts in the team of officials giving evidence, the Clerk should be consulted with an explanation of the reasons. It is expected that most Committees will be willing to agree to requests of this kind but they are not obliged to do so.

## **4 GIVING EVIDENCE: CORE PRINCIPLES**

### General

4.1 Officials have a duty to be as helpful as possible to Committees. Colleagues should be as forthcoming as they can in providing information, whether giving evidence in writing or orally. They should generally only withhold information which would be exempt from release under Freedom of Information legislation (FOISA) or EIRs. Where officials consider that it may be necessary to withhold information from a Committee, they should seek advice from colleagues in the Parliament and Legislation Unit and the **FOI Unit who can provide advice on the application of FOISA exemptions and EIRs exceptions.**

4.2 Under FOISA/EIRs the types of information which *might* be exempt from disclosure include:

- proceedings of Scottish Cabinet and Scottish Ministerial committees;
- free and frank policy advice and discussion involving Ministers, officials and/or external stakeholders;
- legal advice;
- personal data;
- confidential communications between the Scottish Government, other UK administrations, where disclosure would substantially prejudice relations between the administrations;
- confidential communications between the Scottish Government and other states or international organisations, where disclosure would substantially prejudice their relations with the UK Government.

4.3 If official witnesses are pressed by the Committee to go beyond what they consider they would be required to disclose under FOISA/EIRs, they should suggest that the questioning be referred to Ministers.

4.4 Colleagues should bear in mind the powers available to the Parliament and its committees under section 23 of the Scotland Act 1998 to require a person to attend their proceedings to give evidence or to produce documents in his/her custody or under his/her control concerning any subject for which the Scottish Ministers have general responsibility.

This power applies to the Scottish Government and its officials as it does to other persons<sup>1</sup>. Where such a requirement is imposed, failure to comply can amount to a criminal offence under section 25. The only grounds on which a person (other than a procurator fiscal) may refuse to give evidence is where he would be entitled to refuse to do so in a court in Scotland (section 23(9)). The main grounds upon which a Minister or official would be entitled to refuse to answer any question or produce any document in Scottish court proceedings is where a claim of public interest immunity (PII) is made in respect of that information.

4.5 Where information is sought by the Parliament which the Scottish Government would not be obliged to release under FOISA/EIRs, it may be appropriate to provide the information on an 'in confidence' basis. This is discussed in more detail at paragraphs 6.3 to 6.12 below.

#### Accuracy of Evidence

4.6 Officials appearing before Committees are responsible for ensuring that the evidence they give is accurate. They will therefore need to be fully briefed on the main facts of the matters on which they expect to be examined. This can be a major exercise as a Committee's questions can range widely and can be expected to be testing. See *paragraphs 4.20 to 4.23 below on checking and correcting evidence.*

#### Discussion of Government Policy

**4.7 Officials should as far as possible confine their evidence to questions of fact and explanation relating to Government policies and actions.** Officials must avoid either suggesting or commenting on policy options or engaging in debate about the merits of the Government's policies and may provide only factual information or factual briefing.

4.8 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 discussion of the merits of alternative policies. If official witnesses are pressed by the Committee to go beyond these limits, they should suggest that the questioning be referred to Ministers.

4.9 A Committee may invite specialist (as opposed to administrative) officials to comment on the professional or technical issues underlying Government policies or decisions. This can require careful handling where Committees wish to take evidence from, for example, economists or statisticians on issues which bear on controversial policy questions and which are also matters of controversy within the respective profession. Such specialists may find themselves in some difficulty if their own judgement on the professional issues has, or appears to have, implications that are critical of Government policies. It is not generally open to such witnesses to describe or comment upon the advice which they have given to Directorates, or would give if asked. They should not therefore go beyond explaining the reasoning which, in the Government's judgement, supports its policy. The status of such evidence should, if necessary, be made clear to the Committee. If pressed for a professional judgement on the question the witness should, if necessary, refer to the political nature of the issue and, as indicated above, suggest that the line of questioning be referred to Ministers.

#### Privilege

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<sup>1</sup> *The power in section 23 is limited in its application to persons outside Scotland, to UK Ministers (and their civil servants), but these limitations are unlikely to have a significant effect for the Scottish Government.*



4.10 **Section 41 of the Scotland Act 1998** provides that for the purposes of the law of defamation, any statement made in “proceedings of the Parliament” (which includes proceedings in the committees) and the publication under the authority of the Parliament of any statement is absolutely privileged. This means that such statements cannot form the basis of an action of defamation. “Statement” in this context means “words, pictures, visual images, gestures or any other method of signifying meaning”. Accordingly, this protection applies to any statements made in public or private meetings of a committee and any committee reports, including written evidence published in or as an annex to a committee report.

4.11 It is, however, important to note that **the protection applies only to statements made in the proceedings of the Parliament and publications under the authority of the Parliament**. The effect of this is that any written material published on a committee’s webpage, such as written evidence, which is not published as a committee report under the authority of the Parliament, is not covered by privilege.

4.12 It is also important to note that **the protection provided by section 41 relates only to the law of defamation**. It does not offer protection against the operation of the law in relation to other matters, for example contempt of court.

#### Provision of Information through Memoranda

4.13 The Government’s commitment to provide as much information as possible to Committees is met largely through the provision of memoranda, written replies to Committees’ questions and oral evidence from Ministers and officials. This commitment does not extend to providing access to internal files, private correspondence, including advice given on a confidential basis or working papers, much of which may be covered by exemptions/exceptions under FOISA/EIRs. Should a Committee press to see such documents, rather than accepting written or oral evidence on the subject, Directorates should consult their Ministers, the Director of People and the Head of Cabinet, Parliament and Governance Division. Despite Committees formal power under section 23 of the Scotland Act, the principles approved by the Parliament on official information and accountability (*see paragraph 1.5 above*) recommend that where, exceptionally, Committees find it necessary to scrutinise exchanges between officials and Ministers on policy issues, arrangements should be made to ensure that the confidentiality of these exchanges is *respected*. (*Further advice about the release of information to Committees on an ‘in confidence’ basis is set out at paragraphs 6.3 – 6.12 below*). Committees may sometimes submit a formal FOI/EIRs request for information they want to see, rather than using their powers under section 23 of the Scotland Act. Such requests should be dealt with in the same way as any other request – see the guidance and templates on the [FOI SharePoint site](#).

#### Consulting Ministers on Evidence

4.14 Because officials appear on behalf of their Ministers, written evidence and briefing material should always be cleared with them. Ministers should always be given sight of information colleagues propose to disclose to Committees. As Ministers are ultimately accountable for deciding what information is to be given and for defending those decisions as necessary, their views should always be sought if a question arises of withholding information for which a Committee has asked or providing it on an ‘in confidence’ basis.

#### Liaison between SG Directorates

4.15 The subject matter of Committee work may span the work of more than one Directorate. It is important in these cases that the Directorate with the predominant role

should take the lead to ensure that the evidence given is co-ordinated and consistent. If the subject in question is one in which no Directorate can be said to have a predominant role, it will be necessary for relevant Directorates to agree among themselves which should take the lead.

4.16 In such cases it is clearly desirable for all the Directorates concerned to be kept in touch, in accordance with normal working practice, on the preparation of evidence and on the subsequent response to the Committee.

4.17 Where several Directorates are involved, it is particularly important to ensure in any response that the Committee can be clear (via labels in the response) as to which Directorate to direct any subsequent questions.

### Research and Surveys

4.18 If the SG is asked by Committees to undertake research work or surveys on their behalf, it may be possible to meet such requests by using existing information, edited or collated as appropriate. **Committees cannot require the Government to undertake work or to produce information or documents it does not possess.** Committees may, with the approval of the Parliamentary Bureau, require the SPCB to appoint a person to “inquire into and advise the Committee upon any competent matter”. If the new work involved is likely to be substantial, it may be appropriate to suggest to the Committee that it consider this alternative.

4.19 Information provided by officials to a Committee as part of a research project or survey is subject to the same principles as apply to direct evidence. In particular, officials should not take part in research projects or surveys carried out by or on behalf of Committees which seek to establish their personal views on Government policies or on matters which are politically contentious – see the ‘participating in research’ advice note, accessible on Saltire via the following link:

<http://saltire/my-workplace/conduct-and-discipline/outside-interests-and-activities/Pages/authorisation-for-specific-activities.aspx?pageid=4d42e395-e86d-4eda-8e6e-c1c8ded80806>.

### Checking Oral Evidence

4.20 Oral evidence given to Committees will be recorded and published in the [Official Report](#). It will normally take a few days after the meeting of the Committee for the transcript to appear on the website. In the same way as the draft of the *Official Report* for plenary sessions can be checked, it is possible for the Minister, the Private Secretary or the official concerned to check the draft text. It is recommended that the *Official Report* staff should be contacted at the end of the Committee session to make arrangements for the draft text to be checked.

4.21 Acceptance of suggested changes will be at the discretion of the Editor of the *Official Report*. It is not possible to change the sense of what has been said or to make substantial amendments if what has been reported is correct. Where evidence has been taken on oath, acceptance of suggested changes will be a matter for the Committee. Suggested changes should be sent in the first instance to the *Official Report*, who will check them and pass them on to the Clerk.

4.22 The Clerk will, in any event, invite witnesses to indicate whether they wish to receive copies of the *Official Report* of their evidence. Corrections can be offered to the Report at this stage and, if accepted, will be incorporated – the *Official Report* of the individual committee session will however already have been printed and will not be changed.

4.23 Should it be discovered subsequently that the evidence unwittingly contained factual errors, or where corrections to the evidence are not acceptable to the *Official Report* staff, these should be made known to the Committee, usually in writing via the Clerk, and corrected at the earliest opportunity. Such corrections may, at the Committee's discretion, be dealt with in its report.

#### Support for witnesses

4.24 Where a civil servant is giving evidence to a parliamentary committee for the first time, or in terms of being named to give evidence by the Committee (*see paragraphs 3.6 to 3.8*), Directorates will wish to consider the support that should be made available to them, including appropriate training, briefing and whether a more experienced civil servant should attend alongside them.

## **5 EVIDENCE TO COMMITTEES: POTENTIAL RESTRICTIONS**

### Excessive Cost

5.1 It may exceptionally prove necessary to decline requests for information that would involve the Government in excessive cost or diversion of effort. Generally, it would not be appropriate to refuse Committee requests on cost grounds if the same request made under FOI would not breach the cost limit in FOISA – see guidance on [Applying the upper cost limit](#). Ministers should always be consulted on their priorities in such cases.

5.2 Requests for named officials who are serving overseas to attend to give evidence should not be refused on cost grounds alone if the official is the one best placed to represent the Minister. Committees may be willing to arrange for such witnesses to give evidence on a mutually acceptable date. Alternatively, video-conference facilities might be an option.

### Matters which may be *sub judice*

5.3 Rule 7.5 of the *Standing Orders* provides that “A member may not in the proceedings of the Parliament refer to any matter in relation to which legal proceedings are active except to the extent permitted by the Presiding Officer”. For this purpose, legal proceedings are active in relation to a matter if they are active for the purposes of section 2 of the Contempt of Court Act 1981.

5.4 Where a member refers to such a matter, the Presiding Officer may order that member not to do so. In its application to Committees, the power to permit a member to refer to *sub judice* matters is retained by the Presiding Officer. If a matter already before the courts is likely to come up for discussion before a Committee, the Clerk will usually be aware of this and will draw the attention of the Convener to Rule 7.5. Nonetheless, if a Directorate has reason to believe that such matters may arise, they may wish to check with the Clerk that the Committee is also aware.

5.5 Colleagues should take care in discussing or giving written evidence on matters which may become the subject of litigation but which, at the time, do not strictly come under the rules precluding discussion of *sub judice* questions. Such caution should be exercised whether or not the Crown is likely to be a party to such litigation. If such matters seem likely to be raised, officials should first consult their legal advisers on how to handle questions which might arise. In any case of doubt about the extent to which details may be disclosed of criminal cases, not currently *sub judice*, the Scottish Law Officers are available for consultation.

5.6 Similar considerations apply in cases where a Minister has or may have a quasi-judicial or appellate function, for example in relation to planning applications and appeals.

### Conduct of Individual Officials

5.7 Occasionally questions from a Committee may appear to be directed to the conduct of individual officials, not just in the sense of establishing the facts about what occurred in making decisions or implementing Government policies, but with the implication of allocating individual criticism or blame.

5.8 In such circumstances, and in accordance with the principles of Ministerial accountability, it is for the relevant Minister to look into the matter and if necessary to institute a formal inquiry. Such an inquiry into the conduct and behaviour of individual officials and consideration of disciplinary action is properly carried out within the Government 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. Evidence to a Committee on this should be given not by the official or officials concerned, but by the Minister or by a senior official designated by the Minister to give such evidence on the Minister's behalf.

5.9 In this context, the SG should adhere to the principle that disciplinary and employment matters are a matter of confidence and trust (extending in law beyond the end of employment). In such circumstances, public disclosure may damage an individual's reputation without that individual having the same "natural justice" right of response which is recognised by other forms of tribunal or inquiry. Any public information should therefore be cast as far as possible in ways which do not reveal individual or identifiable details. Where Committees need such details to discharge their responsibilities, they should be offered in closed session and on an understanding of confidentiality (*see paragraphs 6.3 – 6.12 below*). Evidence on such matters should normally be given on the basis that:

- (a) information will not be given about Government disciplinary proceedings until the hearings are complete;
- (b) when hearings have been completed, the Government will inform the Committee of their outcome in a form which protects the identity of the individual or individuals concerned except insofar as this is already public knowledge;
- (c) where more detail is needed to enable the Committee to discharge its responsibilities, such detail will be given but on the basis of a clear understanding of its confidentiality;
- (d) the Committee will thereafter be given an account of the measures taken to put right what went wrong and to prevent a repeat of any failures which have arisen from weaknesses in the Departmental arrangements.

5.10 Committees will be aware that it is not their task to act as disciplinary tribunals. Accordingly, if in the course of an inquiry a Committee were to discover evidence that called into question the conduct (in this sense) of individual named officials, the Committee should be asked not to pursue their own investigation into the conduct of the person concerned, but to take up the matter with the Minister.

5.11 If it is foreseen that a Committee's line of enquiry may involve questions about the conduct of named 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. If an official giving evidence to a Committee is unexpectedly asked questions which are directed at his or her individual conduct, or at the conduct of another named official, the official should indicate that he wishes to seek instructions from Ministers, and the Committee should be asked to allow time for this.

### Defamation

5.12 Section 41 of the Scotland Act provides some protection under the law of defamation for statements made in proceedings of the Parliament (including Committees) and for publication under the authority of the Parliament of any statement. This protection may be of particular relevance where investigations relate to the conduct of named officials or others. **Care should be taken to ensure that memoranda submitted by the Scottish Government are not defamatory.**

### Papers of a Previous Administration

5.13 Established procedures are in place to govern the withholding of policy papers of a previous Administration from an Administration of a different political complexion. Paragraph 4.2.7 of the [Civil Service Management Code](#) states-

*"In discharging their duties under paragraphs 5 and 9 of the Civil Service code (Section 4.1 Annex A), civil servants must maintain the long-standing conventions that new Administrations do not normally have access to papers of a previous Administration of a different political complexion. The conventions cover, in particular, Ministers' own deliberations and the advice given to them by officials, other than written advice from the Law Officers and those papers which were published or put in the public domain by the predecessor Administration. In applying the conventions to the devolved Administrations in Scotland and Wales, any information contained in the administrative and departmental records belonging to a Minister of the Crown or a UK Government department should be treated as if it were contained in papers of a previous Administration of a different political complexion."*

5.14 As officials appear before Committees as representatives of their Ministers, and given that Committees are themselves composed on a cross-party basis, it follows that officials should not provide a Committee with evidence from papers of a previous administration which they are not in a position to show their Ministers. It is appropriate for officials to provide a Committee with a factual account of a particular issue pre-dating the present Administration, including any decisions reached, but this should not include the views of previous Ministers. If evidence from a previous Administration is sought, Ministers should be consulted. Where Ministers propose to make an exception, it would be necessary to consult a representative of the previous Administration and the Director of People before either showing the papers to present Ministers or, with Ministers' authority, releasing information from them to a Committee.

## **6 STATUS AND HANDLING OF EVIDENCE**

### Status of Evidence

6.1 Once information has been supplied to a Committee it becomes "evidence" and, subject to any agreement with the Committee on the non-publication of protectively marked information (see *paragraphs 6.3 and 6.4 below*), it is entirely a matter for the Committee to

determine whether or not to publish it and report it to the Parliament. This does not prevent the continued use of the material by the Government in the interim, but the Government should exercise care about release of material which might be viewed by Committees as pre-empting their report.

### Comment on Evidence from other Witnesses

6.2 Evidence critical of a Directorate may be given in public session by witnesses outside the Directorate on occasions where Directorate witnesses are not also present or at sessions held after the Directorate's evidence has been given. In such circumstances Directorates should not seek publicly to respond to such criticism outside the ambit of the Committee. Instead, the Committee may be asked to consider inviting the Directorate to express their view in the form of further evidence.

### Providing Sensitive Information 'in Confidence'

6.3 It is to the benefit of Committees in carrying out their task of scrutinising Government activities, and to the Government in explaining its actions and policies, for sensitive information to be provided from time to time on the basis that it will be treated in confidence and will not be published. **Information which should be treated as "sensitive" includes that carrying a protective security marking, official advice to Ministers and other information which would not normally be disclosed under FOISA/EIRs.**

6.4 The central principles referred to at Paragraph 1.5 of this PGN call upon the Government, for its part, to respond positively to requests for information from the Parliament and its Committees; and indicates that where, exceptionally, Committees find it necessary to scrutinise exchanges between officials and Ministers on policy issues, arrangements should be made to ensure that the confidentiality of these exchanges is respected.

6.5 It is hoped that Committees will normally be prepared to proceed in this way rather than exercising their formal powers to require information to be provided or making a formal request under FOISA/EIRs. The Government, for its part, must ensure that it does everything possible to reach a mutually acceptable arrangement which allowed the Committee access to sensitive information that would not normally be disclosed while protecting the confidentiality of that information.

6.6 An example of such an arrangement was the agreement reached with the then Education, Culture and Sport Committee, and the Enterprise and Lifelong Learning Committees during their inquiries into school exam results. The Government and the Committees agreed that: the Conveners of both Committees would be provided with a list of written advice that had

- been offered to the Minister on the issue in question, including a brief summary of the issues raised, to be treated as being for their personal information;
- the Conveners would then discuss (in confidence) this list with their respective Committees with a view to drawing up questions to put to the Government, which would then provide a memorandum responding to these questions;
- the Conveners would have access to the documentation on a confidential and personal basis to enable them to verify the memorandum;
- once the Conveners had considered the memorandum and the documentation, the memorandum would be sent to all members of the Committee for their consideration and could be published as an annex to their report if they so wished.

6.7 It should be emphasised that **the school exam arrangement is to be regarded as an example as opposed to a model** of the way in which the Government and Committees have been able to work together to ensure that Committees can, where they consider it necessary to do so, obtain access to information that would not normally be disclosed while respecting its confidentiality, and without the need to invoke their formal powers under section 23 of the Scotland Act or make a formal request under FOISA/EIRs. The particular arrangements which may be appropriate will vary from case to case, and will always be subject to the approval of both the Committee and the responsible Minister. The Parliament and Legislation Unit should always be consulted where the question arises of providing information to Committees on an 'in confidence' basis.

#### Handling of Sensitive Information in Oral Evidence

6.8 It would clearly be inappropriate for any evidence which a Directorate wished to be treated in confidence to be given at a public session of the Committee. If it appears likely, therefore, that subjects to be discussed at a forthcoming public session are such that the witnesses would only be able to give substantive answers in confidence, the Directorate should write to the Clerk explaining why this is so, after seeking advice from Parliament and Legislation Unit. The Committee may then agree to take that part of the Directorate's evidence in private.

6.9 If, despite such an approach, a Committee questions an official witness in public session on sensitive matters, or if such matters are raised unexpectedly, the official should inform the Committee that the questions could only be answered on an 'in confidence' basis. The Committee may then decide to sit in private or request a confidential memorandum. It is not for the witness to suggest that the Committee should go into private session as this is wholly a matter for the Committee to decide.

6.10 Private sessions are not recorded, unless the Parliament decides otherwise. Where evidence which is in part in confidence has been given in a private session but which will be recorded in the *Official Report* the witness should, at the end of the session, let the Clerk know which parts of the evidence these are.

#### Handling of Sensitive Information in Written Evidence

6.11 Where information is submitted to a Committee on the understanding that it will be treated in confidence, this understanding should be recorded in the covering letter forwarding the evidence to the Clerk. The letter should make clear whether the whole memorandum or, as is often the case, particular annexes are to be treated in confidence. **Agreements with the Committee should seek to ensure that-**

(a) The release of all sensitive information under these arrangements is subject to the personal approval of the responsible Minister in each case;

(b) Sensitive information will be restricted to those persons (in addition to the Clerk) to whom the Directorate has agreed to release it. In practice this will usually mean only the members of the Committee and any adviser appointed by the Committee. Protectively marked information will be disclosed to advisers only if they have security clearance. In some cases, by arrangement with the Committee, it may be agreed that the members of the Committee will not have access to the information but will rely on a report from the adviser; and

(c) Protectively marked memoranda will be made available to those authorised to see it only on request from the Clerk to the Committee. Persons authorised to see such protectively marked documents may not take them away.

6.12 Where only parts of a document are considered to be sensitive, these should be indicated by sidelining those parts in the margins. The Committee may then be invited to publish the document with the sidelined parts omitted.

## 7 EVIDENCE FROM OTHER BODIES

7.1 Committees may investigate and call for evidence from **Scottish public authorities or cross-border public authorities** for which the Government has responsibility. If a Directorate becomes aware that one of its NDPBs (or related bodies) has been invited to give evidence, it should consider whether it would be helpful to discuss the lines of evidence with the witnesses before the hearing. The Directorate may also wish to consider whether it would be advisable or helpful for the Minister also to be represented at the hearing; whether this is allowed is, of course, entirely at the discretion of the Committee.

7.2 Committees may occasionally call for evidence from **commercial companies**, particularly those handling Government contracts. Ministers remain accountable to the Parliament and the public for the functions provided by contractors. There should be no loss of transparency as to the quality and effectiveness of services delivered. Nor should there be any relaxation in the protection of private and sensitive third party information handled by contractors. There may also be a need in the public interest to preserve commercial confidentiality to protect the business interests of competing companies and to protect the position of the Government and the public purse in current or future tendering activity.

7.3 **Government contracts** will very often specify the contractor's obligations both to provide appropriate information to the public (under the Government's policies on openness) and to give necessary protection to confidential and sensitive information. Where contractors are prohibited from providing access without written consent to the details of contracts, Directorates may find it helpful to discuss with their contractors how they can best provide a Committee with a general picture of their work without going into the commercially sensitive details of specific contracts.

7.4 The normal relationships between Directorate-Generals and their associated public bodies or with commercial contractors should usually be sufficient to ensure an awareness on the part of witnesses from such organisations of the need to deal with Committee's questions in accordance with the rules about protecting classified information. Directorates may, however, wish to remind witnesses of these rules, and the options for providing sidelined evidence, before the hearing.

7.5 Where Directorates and associated public bodies have consulted one another, or a commercial contractor, prior to the submission of a memorandum to a Committee, the memorandum should include a note of the persons or organisations who have been consulted.

## 8 GOVERNMENT RESPONSES TO COMMITTEE REPORTS

### Pre - Publication

8.1 Committee Reports are made formally to the Parliament rather than to the Government although, given their subject matter, most of the recommendations tend to be addressed to the Government.



8.2 Consistent with the terms of the [Protocol between the Scottish Parliament and the Scottish Government in relation to the handling of Committee business](#), relevant Directorates (and the media) may receive embargoed copies of Committee Reports ahead of publication. Such advance issue is at the discretion of the Committee and Directorates cannot insist on seeing copies. If publication of a Report is known to be imminent, Directorates may wish to contact the Clerk on an informal basis (or through the relevant Committee Liaison Officer) to establish the likely timetable for publication and whether advance copies will be made available.

#### *Briefing Ministers on Forthcoming Committee Reports*

8.3 **As soon as possible after a copy of a Committee Report is received, a short note (not more than a single page of A4) should be prepared on the main points, with brief lines to take where necessary. Where an advance copy has been made available this note should be sent to the offices of the First Minister, the Deputy First Minister, the Minister for Parliamentary Business and the relevant portfolio Minister/s to arrive before publication of the Report concerned.** In the event of a Directorate receiving the Report only on the day of publication, a short note should still be put urgently in hand to reach the First Minister on the same day. This requirement stands for Reports published during the recess as well as when the Parliament is sitting.

#### *Preparation of briefing*

8.4 Receipt of the Report also enables Directorates to prepare briefing for comment on the Report as soon as it published. Press briefing may consist of a Press Release, issued to coincide with publication of the Report, or simply material for Press Office to use in response to enquiries. In either case it should be borne in mind that journalists will be working on their embargoed copies to a similar timetable so that media enquiries may arise almost as soon as these copies are available. Any information provided should be subject at least to the same embargo date as that of the Committee's report.

#### On publication

8.5 The basic principle in giving immediate comment on Committee Reports is that **Directorates should be careful not to pre-empt or prejudice the Government's final and considered reply to the Committee's recommendations** which must be given first to the Committee. This means that comments given to the media or in other statements, especially outside the Parliament, on publication of the Report, or in the intervening period up to the delivery of the Government's reply, should not seem to anticipate that reply.

8.6 The general conventions are:

- Directorates may respond immediately to correct mis-statements of fact, to provide background information, or to draw attention to particular passages in a Report or in published Government evidence to the Committee.
- The Right of Ministers to respond publicly to criticisms of the Government as robustly as appropriate; this would include criticisms of the Report itself, inaccuracy or mis-statement in media reporting, or public criticisms made individual Committee members.
- It is a long standing convention that recommendations in Committee Reports should not be subject to snap responses without detailed Government assessment. Nonetheless Ministers would feel free to respond immediately to certain recommendations, either positively or negatively, where the Government's policy was

clear established and clear, or where an early response was needed to influence fast-moving events.

### Timing of Government Response to Committee Reports

8.7 Directorates should aim to provide the considered Government response to a Committee Report within two months of its publication. This may not, however, always be possible to achieve as Committee Reports tend to address issues which require consideration in depth and this may involve consultation both within and outside the Government before a substantial reply can be provided. If it appears that preparing a response is going to take longer than two months, the Minister should write to the Committee Convener explaining the reasons and indicating the likely timetable.

### Form of Government Response

#### *General*

8.8 In considering the form which the Government's considered response to a Committee Report should take, it is important to remember that the response should normally be made first to the Parliament, either to the Chamber itself or to the relevant Committee. Replies usually take one of the following forms:

(a) ***Letter to the Committee***

A letter from the lead Minister to the Convener of the Committee is the usual way for the Government to respond to recommendations contained in Committee Reports. The Committee may decide to publish such Government responses itself and may add a further commentary on the points made. As this approach puts the publication of the Government's response in the hands of the Committee itself, it may be unsuitable on presentational grounds, particularly if the Government has a positive message to convey in its response. It would however be possible for the Directorate to release the response itself at the same time as it is sent to the Committee.

(b) ***Ministerial statement to the Parliament***

Should the Government consider that the substance of a Committee Report merits a response to the Parliament as a whole, this could be handled via the making of a ministerial statement in the Chamber, possibly supported by a formal publication (White Paper; etc) laid before the Parliament by the Scottish Ministers.

Arrangements should be made where appropriate for collective Ministerial consideration. Although relevant Ministers have considered the draft of a response, it should still be circulated to the Cabinet for information at the final draft stage. The response will be in the name of the Scottish Ministers collectively. Advance copies of any paper responding to a Committee Report may be made available to the Committee concerned. Committees will also find it helpful to be advised informally, where possible, when a reply is imminent.

If the Government's response is covered solely by the terms of an oral statement in the Parliament, whether in the context of a ministerial statement, or as part of a wider Ministerial speech, the lead Minister should write to the Convener of the Committee as early as possible drawing their attention to the statement and, if appropriate, making it clear that no further written reply is envisaged.

#### *Other points on handling*

8.9 Where a Committee's recommendations concern another public body as well, that body may reply direct to the Committee or its reply may be incorporated within the Government's response as appropriate.

8.10 There is no obligation to reply individually to every point made by a Committee: some may be general pronouncements or observations: some may be directed not to the Government but to the Parliament itself or to other bodies; some may conveniently be dealt with in one omnibus comment. Occasionally a report will contain observations by the Committee which, while not in the form of a recommendation, may nonetheless warrant a response or statement of the Government's views.

8.11 In the period between publication of a Committee's Report and the formal Government reply, there need be no constraint on Directorates taking action on its recommendations. However, if such action is taken the Committee should be informed, a Parliamentary announcement should be considered, and in any event the formal Government response to the Committee should refer to the action taken. Similarly, if a decision on a recommendation is made, or if a recommendation is implemented some time after the formal reply has been given, the Directorate should write to the Committee to make them aware of the fact.

## **9. COMMITTEE DEBATES**

9.1 A Committee may seek to discuss the subject matter of one of its Reports in the Chamber (12 half sitting days per Parliamentary Year are set aside for Committee Business). When such business is conducted, it is courteous for the lead portfolio Minister to be in attendance. There is no automatic expectation that Ministers should participate in such debates but, should they wish to do so, Directorates should in any briefing adhere to the convention that they should not pre-empt or prejudge the Government's formal response. Ministers may, however, draw attention to and correct any errors of fact or misleading media reporting and respond to any direct criticisms of Government. Ministers should not generally respond to any recommendations, although they may restate existing policy on the subject concerned.

9.2 Should Ministers wish to make a substantive comment, opposition business managers should be alerted as Shadow spokespersons may also wish to respond. The PO's office should also be informed.

## **10. GENERAL ELECTIONS**

### *Dissolution of Parliament*

10.1 When Parliament is dissolved pending a General Election, membership of Committees lapses and work on their inquiries ceases. The point of contact for Directorates continues to be the Committee Clerk who remains in post to process the administrative work of the Committee (including the publication after dissolution of any reports which the Committee had authorised prior to dissolution). Directorates should continue to work, on a contingency basis, on any outstanding evidence requested by the outgoing Committee and on Government responses to outstanding Committee Reports. It will be for the newly-appointed Committee to decide whether to continue with its predecessor's inquiries; and for the incoming administration to review the terms of existing draft responses. It is also for the newly-appointed Committee to decide whether to publish Government responses to its predecessor's Reports.

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Parliament and Legislation Unit  
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## ANNEX

### PROCURATORS FISCAL: SPECIAL PROVISIONS

1. Section 27(3) of the Scotland Act provides that the Lord Advocate or Solicitor General for Scotland may decline to answer any question or produce any document relating to the operation of the system of criminal prosecution in any particular case if he considers that answering the question or producing the document—

- (a) might prejudice criminal proceedings in that case; or
- (b) would otherwise be contrary to the public interest.

2. Section 23(10) further provides that a procurator fiscal is not obliged to answer any question or produce any document concerning the operation of the system of criminal prosecution in any particular case if the Lord Advocate has authorised the procurator fiscal to decline to answer the question or produce the document on the same grounds as given above.

**3. In the event that a procurator fiscal or any other member of the department receives either an invitation or a requirement under section 23 to attend the Parliament or produce any document, the matter should be reported immediately by telephone to the Head of the Policy Group at Crown Office. This should be followed by a full report to Crown Office marked for the attention of the Head of Policy.**

4. The report to Crown Office should provide a copy of the notice summoning the member of the department and/or any documents as well as copies of the documents referred to in the notice or which appear to be in a category referred to in the notice. The procurator fiscal should provide a full report of the circumstances surrounding the summons including a copy of the police report and/or precognition where appropriate. As full information as possible should be provided and procurators fiscal should address in particular whether the exemption from providing information under section 23(10) should be sought in relation to any likely questions which may be posed about the case in question. The procurator fiscal should not contact the Clerk of the Parliament issuing the requirement. The Policy Group will liaise with the Clerk of the Parliament on behalf of the relevant procurator fiscal.

5. Procurators fiscal should note that the exemption from answering any question or producing any document under section 23(10) relates only to particular cases concerning the operation of the system of criminal prosecution. The exemption does not apply in relation to investigation of deaths in which there is no element of criminality. Accordingly, procurators fiscal may receive a requirement in relation to their deaths investigation function and may be obliged to answer questions in the Parliament in respect of the nature of the procurator fiscal's investigation into the same. Care will be required, in dealing with such questions, to ensure that the right of the relatives of victims (and others) under Article 8 ECHR to respect for their private and family life is not infringed, whilst at the same time providing the Parliament with such information as is proper. In such instances, procurators fiscal should report immediately by telephone in such cases along with a report in the same way as in a case involving a prosecution. The Policy Group at Crown Office will also liaise with the Clerk of the Parliament about requirements in relation to this category of case.