RESEARCH PAPER 04/82

15 NOVEMBER 2004

The collective responsibility of Ministers- an outline of the issues

This paper offers an introduction to the convention of collective Cabinet, or ministerial, responsibility and explores in general terms this important constitutional topic.

The paper examines both the historical development and the principles and content of collective responsibility. It also covers exemptions from the principle of unanimity such as 'free votes' and the 'agreements to differ' of 1932, 1975 and 1977. The Paper also examines breaches of the principle of confidentiality, such as ex-ministerial memoirs and the leaking of information to the media.

It does *not* seek to provide a comprehensive analysis of ministerial responsibility or Parliamentary accountability, and should be read as a companion paper to Research Paper 04/31, *Individual ministerial responsibility of Ministers- issues and examples*

This Paper updates and replaces Research Paper 96/55.

Oonagh Gay

Thomas Powell

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ISSN 1368-8456

Summary of main points

The convention of collective Cabinet, or ministerial, responsibility is at the heart of the British system of Parliamentary government yet, like individual responsibility, it is a concept which is not regulated by statute, although some guidance has been formalised in the *Ministerial Code*.

Collective responsibility serves to bind the government together so that it faces the Monarch, Parliament and the public united. Yet, as with individual responsibility, the operation of this concept must depend as much, if not more, on political reality as on constitutional convention.

Collective responsibility amongst groups of Ministers developed in the 18th and 19th centuries as a means of wresting political control from the Monarch. The development of genuinely national politics, the extension of the franchise, the growing size and scope of government and the increasing influence of the media have reinforced the need for the executive to maintain group discipline. Reports about the Government's decision-making in the lead up to the conflict in Iraq have raised questions about the current state of cabinet government and the relevance of the convention of collective responsibility. Lord Butler's *Review of Intelligence on Weapons of Mass Destruction* made a number of recommendations on the machinery of government and raised concerns about the reduced 'scope for informed collective political judgement'.

There are occasions on which the Government allows limited exemptions from the principle of unanimity, for 'free votes' (most commonly used where a division takes place on an 'issue of conscience') and 'agreements to differ'. Past agreements to differ have been established where there have been substantial policy differences within the cabinet over Tariff policy (1932), the referendum on membership of the EEC (1975), and on the issue of direct elections to the European Assembly (1977).

In addition to these officially sanctioned exemptions, there are also unauthorised 'breaches' of collective responsibility and the principle of confidentiality, such as the leaking of information to the media and the publication of ex-ministerial memoirs or diaries.

The *Ministerial Code* makes provisions for the papers of previous administrations to be made available to current ministers and this can raise issues of confidentiality. The confidentiality of Cabinet decision-making is also challenged by the recent freedom of information legislation which will enable the public to request Cabinet documents unless they fall within one of the exempted categories specified in the Act.

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> "Bye the bye, there is one thing we haven't agreed upon, which is, what are we to say? Is it better to make our corn dearer, or cheaper, or to make the price steady? I don't care *which*: but we had better all tell the same story".[1]

As with so much of the United Kingdom constitutional and political system, collective ministerial responsibility is not something created or explained in some statute or constitutional document. Rather, our present understanding of the concept is a product of three centuries of executive development, in particular the gradual dominance of the political executive over the monarchal executive. Indeed, although the modern concept is, to a large extent, directed to the executive's relationship with Parliament, it arose initially out of the battles between ministers and monarch.

The ancestors of the modern Cabinet system were, in reality as well as constitutional theory, creatures of the monarch, a monarch who appointed ministers, and arranged meetings of his or her government. 'Cabinet' was, in effect, a meeting of the monarch's individual ministers. The monarch was the Prime Minister of the era (and, in effect, Cabinet Secretary also). As the eighteenth century went on, the politicians sought to wrest control, especially from the Hanoverian kings, and collective action was a prerequisite for this development:[2]

> The king did nearly all business with the ministers in the room called his closet. He normally saw them one by one. (The Secretaries of State, before 1783-at any rate before 1760-were an exception, for their diplomatic responsibilities were divided geographically, so that a general question of foreign policy could best be discussed with the Secretaries for the northern and southern department together). Only certain officers had the entrée to the closet. For instance, the Secretary-at-War had it, but the Chancellor of the Exchequer had not, nor had the President of the Board of Trade. A minister had no strict right to discuss anything in the closet but the business of his own department; but a senior minister-especially if he were leader of the House of Commons or had pretensions to consider himself as Prime Minister, could range more freely. Moreover George III himself, in his prime, habitually talked so much, hopping from subject to subject in a desultory way, that the rule confining ministers to the business of their own departments cannot have been very strictly observed.
>
> The business of the closet does not appear, at first sight, to have afforded the ministers much opportunity for collective action. But they knew how to counteract the tendency to separate and confine them. On any question of general political importance, they would agree beforehand what to say, and then go into the closet, one by one, and repeat the identical story. There are many instances of this, of which, perhaps, the most celebrated is the collective resignation of 1746. The geography of the royal palace seems to have favoured this habit: the

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1 Lord Melbourne (Prime Minister) to his Cabinet in 1841, on the Corn Laws [Spencer Walpole *The Life of Lord John Russell*, 1889, vol 1, p369]

2 Pares, R (1953) , *King George III and the politicians,* pp 148-9 (footnotes omitted)

> ministers with access to the closet gathered by themselves in an ante-room, where they could prime each other before they went in, or report on the king's mood and expressions as they came out. But language in the closet could also be concerted from the country houses of England. It was a well recognized practice, and we should therefore remember that the Cabinet with its minutes was not the only institution, though it was the most effective one, where ministers exerted their collective influence and develop their solidarity.

From this grew the practice of the government submitting unified advice to the monarch, without indication of any internal dissent.[3]

The government's power grew as it took over the monarch's control through patronage of Parliament, and of the great offices of state, especially those with seats in the Cabinet. Within these developments grew the position of the Prime Minister as the link between the politicians (ministerial and Parliamentary) and the monarch, and the practical focus of ministerial allegiance as opposed to the formal loyalty owed to the monarch. Although the monarch retained formal power of appointment and removal of ministers and ministries, the development of collective solidarity made it increasingly difficult for the King or Queen to exercise such power freely against the wishes of the Prime Minister and Cabinet. Governments could begin to contemplate policies, such as Catholic emancipation, known to be opposed by the monarch, bolstered by the ultimate threat, stated or otherwise, of the unanimous resignation of a ministry.

Alongside these developments, spurred by the various Reform Acts of the nineteenth century, was the growing need of the executive to control Parliament and the House of Commons in particular as the true practical source of its authority. If the monarch, and later the government, could not entirely control Parliament by patronage, it would have to be done by group discipline. If elections were to become more genuine contests with unpredictable outcomes, then like-minded politicians would have to band together in parties to win sufficient strength in Parliament to compete for office. Control of Parliament was vital as the idea of confidence crystallised and it became essential for the governments to retain a notional majority, at least.[4]

It must be borne in mind that the development of the modern conception of ministerial responsibility arose in the so-called Bagehotian/Victorian 'golden age' of Parliamentary government at a time when Cabinets and governments were much smaller and the business of government much less than nowadays. This made it potentially easier in the last century for an administration to be composed of like-minded people around the Cabinet table. Westminster politics and Whitehall government were much more localised and personal affairs in which many of the participants would be known, to some degree, to each other, and were sometimes even related. Ministerial confidentiality and an outward appearance of

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3 Le May, G (1979),*The Victorian constitution*, pp 105-6

4 See SN/PC/2873, *Confidence Motions*, 23 January 2004, http://hcl1.hclibrary.parliament.uk/notes/pcc/snpc-02873.pdf

unanimity helped to prevent or at least minimise political and social embarrassment for the monarch's ministers:[5]

> The point was that the Queen's Government was an entity, and it was self-evident that members of it, junior and senior, should not embarrass one another. What Ministers said or did in public affected one another. Obligations ran two ways: a Cabinet member had a right to expect that his colleagues would defend him, and they in turn had a right to expect that he would not drag them into scrapes. By accepting office, an individual surrendered part of his independence, and consideration for his colleagues was a condition of receiving power; he could not have it both ways. Thus Palmerston, as Prime Minister, could take towards Gladstone, as Chancellor of the Exchequer, an attitude similar to that taken by other Prime Ministers to Palmerston himself, when he was in subordinate office:
>
> '...a Member of the Government when he takes office necessarily divests himself of that perfect Freedom of individual action which belongs to a private and independent Member of Parliament, and the Reason is this, that what a Member of the Government does or says upon public Matters must to a certain degree commit his colleagues, and the Body to which they belong if they by their silence appear to acquiesce; and if any of them follow his Example and express as publicly, opposite opinions, which in particular cases they might feel obliged to do. Differences of opinion between Members of the same Government are unnecessarily brought out into Prominence and the Strength of the Government is thereby impaired,'

The growth of genuinely national politics; the extension of the franchise; the huge increase in the size of government and its business, and the growth of the media could all have led to a diminution or abandonment of a strict doctrine of collective responsibility. In fact these factors have led to the retention of the principle and practice of the doctrine if only to ensure that, in the face of such diversity, ministerial unanimity was a practical device which prevented fragmentation of publicly-expressed opinion by ministers unlikely to be fully conversant with all aspects and ramifications of the full range of public policy. To some extent, the doctrine could be said to be a particular application of the desire of many bodies in the public and private sectors to maintain public unanimity and solidarity among their members on grounds of confidence and effectiveness.[6]

II The convention of collective responsibility

A. Content of the convention

Geoffrey Marshall has identified three strands within the convention: [7]

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5 Le May, pp 109-110

6 See Mount, F (1992), *The British constitution now*, pp114ff

7 Marshall, G. (1989) *Ministerial responsibility*, pp 2-4

> i) *the confidence principle:* a government can only remain in office for so long as it retains the confidence of the House of Commons, a confidence which can be assumed unless and until proven otherwise by a confidence vote.[8]
>
> ii) *the unanimity principle:* perhaps the most important practical aspect is that all members of the government speak and vote together in Parliament, save in situations where the Prime Minister and Cabinet themselves make an exception such as a free vote or an 'agreement to differ'.
>
> iii) *the confidentiality principle:* this recognises that unanimity, as a universally applicable situation, is a constitutional fiction, but one which must be maintained, and is said to allow frank ministerial discussion within Cabinet and Government.[9]

From these broad principles can be suggested a number of practical applications of the doctrine, with varying degrees of constitutional certainty within our political and governmental system.

A minister must not vote against government policy: this is perhaps the most fundamental point of the doctrine as, ultimately, voting strength in the House of Commons is not only the measure of confidence in and strength of a government, but is the test of its very right to exist. A vote is a clear public expression of a minister's support for the government (whatever that minister's personal opinion, expressed or otherwise). An unauthorised, dissenting vote would be expected to lead to immediate dismissal if there were no voluntary resignation. In general, an unauthorised abstention should lead to the same consequences, as maintenance of the doctrine is said to require not just the absence of dissent but the expression of positive support.

A minister must not speak against government policy: this is similar to the previous category, although a speech or other form of expression may not always be as clear cut as a vote. Ministers can always find ways, if they wish, of outwardly expressing 'loyal support' while sending out contrary signals (as in the 1980s 'wet' *v* 'dry' argument) by code words or phrases.[10] Again, there is a general implication of positive support, not simply the absence of dissent. Jennings asserts that 'a minister who is not prepared to defend a Cabinet decision must, therefore, resign.'[11] Further 'from the minister's point of view it means only that [he or she] must ... speak in defence of [the Government] if the Prime Minister insists'.[12]

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8 This is considered fully in SN/PC/2873, *Confidence Motions,* 23 January 2004, http://hcl1.hclibrary.parliament.uk/notes/pcc/snpc-02873.pdf

9 See Cabinet Office, *MinisterialCode: A Code Of Conduct And Guidance On Procedures For Ministers,* June 2001 http://www.cabinet-office.gov.uk/central/2001/mcode/contents.htm para 17

10 Nigel Lawson described an interesting instance in his memoirs when he refused to be a backer of the *Local Government Finance Bill* in 1988 (the 'poll tax' bill for England and Wales) : 'It is virtually unheard of for the Chancellor not to be a backer of a major financial Bill presented by a colleague.... I was of course asked to be one but declined. Nor could I bring myself to make a speech in support of the Poll Tax; although collective Cabinet responsibility obviously prevented me from speaking in public against it' (*The view from No. 11*, 1992, p.584)

11 Jennings, I (1965) *Cabinet government,* p277

12 Ibid p278

All decisions are decisions of the whole government: this does not mean that the identity of the relevant departmental minister is not disclosed. For example, a decision on social security will be obviously, in normal circumstances, the immediate responsibility of the Social Security Secretary. This is recognised in the *Ministerial Code:*[13]

> 16. The internal process through which a decision has been made, or the level of Committee by which it was taken, should not be disclosed. Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government. They are, however, normally announced and explained as the decision of the Minister concerned. On occasions it may be desirable to emphasise the importance of a decision by stating specially that it is the decision of Her Majesty's Government. This, however, is the exception rather than the rule.

This aspect of confidentiality means, for example, that a Minister should not, without authorisation, attribute policies, proposals, arguments or votes to particular ministers or groups of ministers, especially if the motive of the 'leaking' minister is to distance himself or herself from that particular position or to attack or discredit other ministers or their arguments. 'Competitive' leaking by Ministers as in the Westland affair in 1986, or coded ideological arguments as in the Thatcher Government of the 1980s[14] are ways in which dissenting ministers or those involved in policy or other disputes can seek to fight their corner without explicitly breaching collective responsibility.

A former minister must not reveal Cabinet secrets: this extended example of confidentiality clearly has less force than revelations when a minister is still in office. As the Crossman diaries episode in the mid-1970s demonstrated, the time factor is crucial to the enforcement of the doctrine. Ministers who resign can if they wish make a public statement in Parliament, and publish a resignation letter, (or, as with Michael Heseltine in 1986 over Westland, hold a press conference) explaining the reason for their action. Where resignation statements reveal major policy or personal differences in Cabinet they can have serious consequences for the standing of the Prime Minister and the Government (This was especially the case with the resignations of Sir Geoffrey Howe in 1990 and Robin Cook in 2003[15]). And in principle such a revelation of Cabinet discussions requires the Queen's consent through the Prime Minister, because of the Privy Counsellor's Oath.[16]

B. The extended application of the convention

Ministers are bound by all decisions of Cabinet, even those taken in committees (or 'inner Cabinets') of which they were not members and which never reached full Cabinet. Thus

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13 Cabinet Office, *Ministerial Code*, para 16

14 See her memoirs, *The Downing Street Years*, 1993, pp129-132

15 HC Deb vol 401 c.726-8, 17 March 2003

16 See the Radcliffe report on ministerial memoirs, Cmnd 6386, January 1976, para 22

collective responsibility applies even where a minister had no part in the discussion or decision, or 'to decisions of which a minister was not aware at the time but to which he subsequently gave his tacit approval by continuing in office'.[17] Non-Cabinet ministers (and, to the extent described in the *Ministerial Code*, PPSs) will generally be so bound, even if not part of the decision-making process. Traditionally the Budget, a crucial element of government policy, was not subject to Cabinet or wider ministerial discussion, for example. Harold Wilson strongly supported this formulation, claiming that Gladstone's view- that 'the rule I have stated as to the obligations of Cabinet ministers has for its correlation the supposition that they have been parties to the discussion of the subject in the Cabinet'- 'would not be accepted today'.[18] To some degree this can be contrasted with some interpretations of the *individual* responsibility doctrine which assert that where there is or can be no personal knowledge of, or involvement in, the relevant action/decision, there is *accountability* but not (or not always) responsibility in the culpability sense.[19]

This leads to questions of the application of the doctrine when a minister is acting in other political capacities, such as constituency MP, leading party member or even party leadership candidate. During the internal debates in the Labour Government in 1974 over EEC Membership, Tony Benn claimed at a joint Cabinet/NEC meeting on 22 November that 'the Privy Counsellor's Oath was completely incompatible with the principle of Cabinet collective responsibility.... It says that we have a responsibility to be true and faithful servants of Her Majesty, to defend all her pre-eminences against foreign prelates, potentates and so on'.[20] However Harold Wilson was clear that: 'The principle must be strongly upheld that the doctrine of collective governmental responsibility is totally binding on a minister, whatever he is doing or in whatever capacity he may be acting. A minister is a minister, and there can be no derogation from his obligation always to act in that capacity'.[21]

A minister's constituency obligations may at times conflict with ministerial duty or government policy, and the *Ministerial Code* provides some guidance on this point.[22] Again, a minister may seek to use his or her status as an MP to discuss issues which are matters of Government policy or at least under consideration in government. For example, Tony Benn sent a New Year's message to his constituents in December 1974 on the subject of the EEC, stressing that he was writing as an MP not as a minister. This provoked a strong warning from the Prime Minister, reminding the minister that decisions over the proposed 'agreement to differ' had not yet been settled.[23]

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17 de Smith, S A and Brazier, R (1998) *Constitutional and administrative law*, 8th ed, p201

18 Wilson, H (1976) *The governance of Britain*, p74

19 See Research Paper 04/31, *Individual ministerial responsibility of Ministers- issues and examples*

20 Benn, T (1990) *Against the tide : diaries 1973-76*, pp271-2

21 Wilson, H (1976) *The Governance of Britain*, p74

22 See *Ministerial Code*, Section 1 viii: 'Ministers in the House of Commons must keep separate their roles as Minister and Constituency Member' and also Section 6 paras 64-66

23 Tony Benn, *Against the tide: Diaries 1973-76*, pp 288-92; see also J Callaghan, *Time and chance*, p.318

Elections for party leadership can also test the spirit and letter of the doctrine of collective responsibility, as any contest of this sort implies differences of opinion to some degree. As with John Redwood in 1995, a minister may feel it proper to resign to contest an election against an incumbent Prime Minister. Similar considerations may inhibit ministers in office from challenging an incumbent, as in the 1990 Conservative leadership election, but these difficulties may not arise to the same degree when there is no incumbent contesting the election, as in the 1976 Labour case when Harold Wilson resigned.

One past difficulty for a Labour Government was that a number of its leading politicians, including Cabinet and other ministers, had a party base distinct from their Parliamentary identity, through membership of the National Executive Committee. This could cause problems for the maintenance of the outward appearance of ministerial unanimity.[24] There were clear strains early in the 1970s Labour Government. In Cabinet on 31 October 1974 the Prime Minister reprimanded a number of ministers for activity in the NEC he believed to be contrary to collective responsibility, notably over policy on the Simonstown naval base agreement and on EEC renegotiations. He sent a letter to three Ministers - Tony Benn, Joan Lestor and Judith Hart. Wilson commented on this episode in his memoir of the 1974-76 administration:

> I doubt if so strong and unequivocal a minute as this has been issued before - certainly not since - for it differed from usual warnings in treating a refusal to accept the doctrine in full as constituting resignation. There were one or two unsatisfactory and equivocal drafts sent in reply, but I insisted on the exact words of my demand, which in each of the three cases was finally met. [25]

A revealing insight into the reasons for confidentiality as perceived by a Prime Minister can be gleaned from James Callaghan's (confidential) minute of February 1978 on disclosure of the existence of Cabinet Committees.[26] Rodney Brazier outlined the issues contained in the minute:

> The most comprehensive prime ministerial statement of the reasons for secrecy over Cabinet committees is contained in Mr Callaghan's personal minute of 1978, *Disclosure of Cabinet Committees*. Those reasons may be summarized in nine points; brief comments will be offered on each. *(a)* 'The manner of deciding policy questions is essentially a domestic one for any government.' This is a singularly unconvincing, if not coy, reason because Cabinet committees and the like attract legitimate interest as vital aspects of the machinery of government ... (b) 'The status of a decision could be disputed if it were acknowledged to have been reached by a committee rather than by the full Cabinet.'... (c) 'The existence of some committees could not be disclosed for reasons of national security.' Within an understanding of national security somewhat narrower than that

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[24] see generally Ellis, D (1980) 'Collective ministerial responsibility and collective solidarity', *Public Law* No.367 pp377-83. See also 'The British constitution in 1974' *Parliamentary Affairs* 28 (1975) pp116-7

[25] Harold Wilson (1979) *Final term*, p61

[26] reproduced in Turpin, C. (1990) *British Government and the Constitution: cases and materials*, 2nd ed, pp 174-5

> promulgated by the government in recent years, that must be right. (d) 'The absence of a committee on a particular subject, such as poverty, does not mean that the government attaches no importance to it;' (e) 'the existence in particular of ad hoc committees should not be disclosed because they are ephemeral.' Both those points could be fully met by official explanation-and, in relation to the former, by a government's deeds in relation to the subject-matter. (f) 'Disclosure could reveal that sensitive things were under discussion,' and (g) 'that something was in train about which the government was not ready to make an announcement.' Now both points are really indirect ways of saying that publicity would be inconvenient for a government, as MPs and others might want to contribute to the arguments before a policy was agreed. (h) 'Disclosure of standing committees alone would give a misleading picture.' That could, again, be met by explanation, or by disclosure of all committees (national security permitting). (i) 'Any departure from the convention of non-disclosure would be more likely to whet appetites than to satisfy them.' That phrase encapsulates the regrettable view adopted by civil servants and Ministers down the decades that secrecy is the norm, information and explanation the exception.[27]

C. Breaches of collective responsibility

As with the other part of the notion of ministerial responsibility, that of *individual* responsibility,[28] the enforcement of collective responsibility depends as much, if not more, on political realities as on constitutional convention. This involves the numerical strength of the government, the relative position of the Prime Minister and the Cabinet, the Government and Parliament as a whole, the nature and unity of the Cabinet and so on. Traditionally there has been a belief by some that the composition of a Cabinet (and the wider Government) should reflect some or all of the main strands of thinking, and the main political leaders, of the governing party (or parties, of a coalition). This form of 'balanced' Cabinet institutionalises, to some extent, at least the potential for ministerial disunity, which may test the limits of collective responsibility. On the other hand, a Cabinet with (in so far as is human and politically possible) one voice, a Government wholly in the Prime Minister's image, may not guarantee trouble-free government as the excluded ideologies and personalities are unlikely to remain silent for ever.

Some proponents of the concept of Prime Ministerial government, such as the late Richard Crossman and others, suggest that Prime Ministers dominate their Cabinets and therefore dissent is either non-existent or covert. However there are situations when retention of one or more dissident Cabinet ministers is regarded as essential to the Government so that they will have, in effect, some degree of licence to breach some aspects of collective responsibility. For example, Mr Callaghan's opposition to the Labour Government's industrial relations proposals, *In Place of Strife,* was well known in 1968-69, but other than

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27 Brazier, R (1998) *Constitutional Practice,* pp122-3 (footnotes omitted)

28 on which see Research Paper 04/31, *Individual ministerial responsibility of Ministers- issues and examples,* 5 April 2004

removal in May 1969 from the Wilson 'inner Cabinet' (he returned that autumn), he was not dismissed and remained a leading Labour figure, including as Prime Minister in 1976-79.

More recently Clare Short, who was occasionally described in the press as 'the conscience of the government',[29] remained in the Cabinet for two months after she had publicly voiced her concerns about the possibility of a conflict in Iraq, particularly in the absence of a second UN resolution. Despite commenting on the recklessness of the government's policy on Iraq on Radio 4's *Westminster Hour* on Sunday 9 March 2003, she was not dismissed and did not in fact resign until 12 May 2003. In a letter to the *Daily Telegraph* on 11 March 2003 Graham Allen wrote that 'In permitting Clare Short to keep her Cabinet job, the Prime Minister has shown a willingness to put aside the longstanding convention regarding collective responsibility'.

Collective responsibility also implies (at least) that ministers do not trespass without authorisation on the departmental responsibilities of their colleagues and that colleagues, including the Prime Minister, should respect the advice (even if not accepted) of ministers within their departmental policy areas. On the latter point the resignation of Mrs Thatcher's Chancellor, Nigel Lawson, in 1989 is instructive, as he objected to the parallel, and sometimes contrary, source of economic advice to the Prime Minister from Sir Alan Walters. On the former point, ministers will not generally be able, without some political consequence, to 'make policy' in another minister's area, although in certain circumstances the government may feel it prudent to fall in line as if the statement were an authorised statement of government policy, especially if made by the Prime Minister.[30] Similar considerations may apply to ministers 'making policy' in their own department without prior consultation or authorisation:[31]

> It may be said, first, that the Prime Minister is frequently in a position to pledge his colleagues' support, because the only alternative is his own resignation. Secondly, a minister should not announce a new policy without Cabinet consent; but, if he does, the Cabinet must either support him or accept his resignation. Thirdly, a minister ought to be chary about expressing personal opinions about future policy except after consultation; and if the circumstances are such as to pledge the Government, the Prime Minister has real cause for complaint. Any statement in advance of a Cabinet decision is dangerous to the stability of the Government.

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[29] See the *Independent*, 'The Threat of War in Iraq: Short snapped after she saw Blair's critics condemned as self-indulgent', 11 March 2003, for example.

[30] Mrs Thatcher had a reputation for this as party leader and Prime Minister. See, for example, her view of her 'swamped' comment on immigration in 1978: *The path to power*, 1979, pp405-9 and Jim Prior, *A balance of power*, 1986, pp106-7. See also Sir Geoffrey Howe's resignation statement, HC Deb vol 180 cc461-5, 13.11.90

[31] Jennings, I (1965) *Cabinet Government*, 3rd ed, p288. For some examples see Brazier, *op cit*, p.132

D. Collective responsibility- some recent developments

There has been a long running political and academic debate about whether Cabinet decision making has been in decline, particularly in the light of perceived increases in Prime Ministerial powers.[32] This debate has intensified following the Hutton and Butler reports into the lead up to the war in Iraq, and led to speculation about what this might mean for the convention of collective responsibility.[33]

In Clare Short's resignation speech to the House of Commons on 12 May 2003 she gave a critical assessment of the current state of collective decision making:

> In [Labour's] second term, the problem is the centralisation of power into the hands of the Prime Minister and an increasingly small number of advisers who make decisions in private without proper discussion. It is increasingly clear, I am afraid, that the Cabinet has become, in Bagehot's phrase, a dignified part of the constitution—joining the Privy Council. There is no real collective responsibility because there is no collective; just diktats in favour of increasingly badly thought through policy initiatives that come from on high. [34]

Following the Iraq conflict Lord Butler of Brockwell, a former Cabinet Secretary, was asked by the government to conduct a review of the intelligence coverage available on WMD programmes in Iraq and other countries of concern. He was also asked to make recommendations to the Prime Minister on the machinery of government and his report contained the following general comments on government decision-making leading up to the conflict in Iraq:

> 7.4 MACHINERY OF GOVERNMENT
> 606. We received evidence from two former Cabinet members, one of the present and one of a previous administration, who expressed their concern about the informal nature of much of the Government's decision-making process, and the relative lack of use of established Cabinet Committee machinery.
> 607. Two changes which occurred over this period had implications for the application of intelligence to collective ministerial decision-making. One was the splitting of the Cabinet Secretary's responsibilities through the creation of the post of Security and Intelligence Co-ordinator. The latter is able to devote the majority of his time to security and intelligence issues in a way that the Cabinet Secretary, with all the many other calls on his time, could not. It was represented to us that this change was particularly necessary after the terrorist attacks of 11 September 2001. However, the effect is that the Cabinet Secretary is no longer so directly involved in the chain through which intelligence reaches the Prime Minister. It follows that the Cabinet Secretary, who attends the Cabinet and maintains the machinery to support their decision-making, is less directly involved

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[32] See for example Foster, C (2004) 'Cabinet Government in the Twentieth Century' *Modern Law Review* 67(5) p755; Hennessy, P, *The Independent,* 20 May 2000*;* Andrew Tyrie MP (2000) *Mr Blair's Poodle* (CPS) p30 for an overview of the arguments concerning the increase in Prime Ministerial powers.

[33] see chapters by Richard Wilson (Lord Wilson of Dinton) and Sir Michael Quinlan in Runciman, W G (ed.) (2004) *Hutton and Butler: Lifting the lid on the workings of power*

[34] HC Deb vol 405 c.38, 12 May 2003

personally in advising the Prime Minister on security and intelligence issues. By the same token, the Security and Intelligence Co-ordinator does not attend Cabinet and is not part of the Cabinet Secretariat supporting Cabinet Ministers in discharging their collective responsibilities in defence and overseas policy matters. We understand that the Intelligence and Security Committee will shortly review how this arrangement has worked.

608. The second change was that two key posts at the top of the Cabinet Secretariat, those of Head of the Defence and Overseas Secretariat and Head of the European Affairs Secretariat, were combined with the posts of the Prime Minister's advisers on Foreign Affairs and on European Affairs respectively. We believe that the effect of the changes has been to weight their responsibility to the Prime Minister more heavily than their responsibility through the Cabinet Secretary to the Cabinet as a whole. It is right to acknowledge that the view of the present post-holders is that the arrangement works well, in particular in connecting the work of the Cabinet Secretariat to that of the Prime Minister's office. We should also record that it was clear from the departmental policy papers we read that there was very close co-operation between officials in the Prime Minister's office and in the FCO in policy-making on Iraq. It is nonetheless a shift which acts to concentrate detailed knowledge and effective decision-making in fewer minds at the top.

609. In the year before the war, the Cabinet discussed policy towards Iraq as a specific agenda item 24 times. It also arose in the course of discussions on other business. Cabinet members were offered and many received briefings on the intelligence picture on Iraq. There was therefore no lack of discussion on Iraq; and we have been informed that it was substantive. The Ministerial Committee on Defence and Overseas Policy did not meet. By contrast, over the period from April 2002 to the start of military action, some 25 meetings attended by the small number of key Ministers, officials and military officers most closely involved provided the framework of discussion and decision-making within Government.

610. One inescapable consequence of this was to limit wider collective discussion and consideration by the Cabinet to the frequent but unscripted occasions when the Prime Minister, Foreign Secretary and Defence Secretary briefed the Cabinet orally. Excellent quality papers were written by officials, but these were not discussed in Cabinet or in Cabinet Committee. Without papers circulated in advance, it remains possible but is obviously much more difficult for members of the Cabinet outside the small circle directly involved to bring their political judgement and experience to bear on the major decisions for which the Cabinet as a whole must carry responsibility. The absence of papers on the Cabinet agenda so that Ministers could obtain briefings in advance from the Cabinet Office, their own departments or from the intelligence agencies plainly reduced their ability to prepare properly for such discussions, while the changes to key posts at the head of the Cabinet Secretariat lessened the support of the machinery of government for the collective responsibility of the Cabinet in the vital matter of war and peace.

Lord Butler concluded that:

611. We do not suggest that there is or should be an ideal or unchangeable system of collective Government, still less that procedures are in aggregate any less effective now than in earlier times. However, we are concerned that the informality and circumscribed character of the Government's procedures which we saw in the context of policy-making towards Iraq risks reducing the scope for informed collective political judgement. Such risks are particularly significant in a field like

> **the subject of our Review, where hard facts are inherently difficult to come by and the quality of judgement is accordingly all the more important.** [35]

Peter Hennessy suggests that Lord Butler's critique of decision making in the Prime Minister's Office was even more fundamental than his findings directed at the intelligence community:

> The Joint Intelligence Committee of intelligence chiefs and senior officials may have been in error in allowing their customary caution and caveats to be removed as Number 10 helped them to shape the drafting of the September 2002 dossier, but their culpability does not match that which rings out of Butler's paragraph 610 on the failure to use the Cabinet system - the ultimate check and balance of British central government – properly … The language is measured; the judgement is based on Butler's long experience of serving closely five prime ministers (including Tony Blair). Never has there been an indictment to match this of a systems failure at the heart of British government.[36]

However another former Cabinet Secretary, Lord Wilson of Dinton, has countered the view that the Prime Minister has become more presidential or that the system of Cabinet government has been undermined:

> The constitutional conventions surrounding the Prime Minister, including collective responsibility and answerability of individual Ministers to Parliament, have remained robust and unchanged. Different Prime Ministers do the job in different ways and constitutional practice has… proved flexible in finding ways of enabling this to happen while ensuring that conventions are met. If for instance a Prime Minister wants to do business through ad hoc meetings and bilateral discussions this can be done, provided that his or her colleagues are content for this to happen.[37]

Lord Wilson highlights that how the constitutional conventions in this area operate depends to a large degree on the political context at the time:

> A Prime Minister who is strong in Cabinet, party, Parliament and public opinion is likely to have a lot of latitude in the ways in which he or she does business. But the fact that a Prime Minister is weak or strong does not alter the conventions which govern our constitution. If circumstances change, because of an election, a loss of majority in Parliament or for whatever reason, the constitutional checks and balances can always come into operation.[38]

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[35] *Review of Intelligence on Weapons of Mass Destruction: Report of a Committee of Privy Councillors*, chaired by Lord Butler of Brockwell, HC 898, July 2004, pp146-148

[36] Peter Hennessy, 'A systems failure at the heart of Government' *The Independent*, 16 July 2004

[37] Lord Wilson of Denton, 'The Robustness of Conventions in a Time of Modernisation and Change', *Public Law*, Summer 2004, p417

[38] Ibid. p417

III The *Ministerial Code*[39]

The major official guidance on the scope and extent of collective ministerial responsibility is contained in the *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers.* This code was originally known as *Questions of Procedure for Ministers ('QPM'),* which was first made public in May 1992.[40]

The concept of collective responsibility runs through the text of the *Ministerial Code.* The first principle of ministerial conduct that is listed in Section 1 of the Code states that: '(i) Ministers must uphold the principle of collective responsibility'; Para 3 defines Cabinet and ministerial committee business as, in part, 'questions which significantly engage the collective responsibility of the Government, because they raise major issues of policy or because they are of critical importance to the public'. It goes on to state that matters 'wholly within the responsibility of a single Minister and which do not significantly engage collective responsibility as defined above,' need not in general be brought to Cabinet or committee, and advises that 'a precise definition of such matters cannot be given; in borderline cases a Minister is advised to seek collective consideration'. Para 4 states the crucial point that Ministerial (i.e. Cabinet) Committees 'support the principle of collective responsibility by ensuring that, even though an important question may never reach the Cabinet itself, the decision will be fully considered and the final judgment will be sufficiently authoritative to ensure that the Government as a whole can be properly expected to accept responsibility for it'.

The core guidance in the Code is contained in the following passages; headed 'Collective responsibility':

> 16. The internal process through which a decision has been made, or the level of Committee by which it was taken, should not be disclosed. Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government. They are, however, normally announced and explained as the decision of the Minister concerned. On occasions it may be desirable to emphasise the importance of a decision by stating specially that it is the decision of Her Majesty's Government. This, however, is the exception rather than the rule.
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> 17. Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees should be maintained. Moreover Cabinet and Committee documents will often contain information which needs to be protected in the public interest.

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[39] Cabinet Office, *Ministerial Code: a Code of Conduct and Guidance on Procedures for Ministers,* June 2001 http://www.cabinet-office.gov.uk/central/2001/mcode/contents.htm As Section 1 of the *Ministerial Code* sets out, it is not a set of legal rules and its contents must be read in that light.

[40] See Research Paper 04/31, *Individual ministerial responsibility of Ministers- issues and examples,* 5 April 2004 pp 9-10

> It is therefore essential that, subject to the guidelines on the disclosure of information set out in the Code of Practice on Access to Government Information, Ministers take the necessary steps to ensure that they and their staff preserve the privacy of Cabinet business and protect the security of Government documents.
> 18. The principle of collective responsibility and the need to safeguard national security, relations with other countries and the confidential nature of discussions between Ministers and their civil servants impose certain obligations on former Ministers who are contemplating the publication of material based upon their recollection of the conduct of Government business in which they took part. They are required to submit their manuscript to the Secretary of the Cabinet and to conform to the principles set out in the Radcliffe Report of 1976 (Cmnd 6386)

The Code contains specific guidance in this matter for Parliamentary Private Secretaries:

> 46. Parliamentary Private Secretaries are not members of the Government, and should be careful to avoid being spoken of as such. They are Private Members, and should therefore be afforded as great a liberty of action as possible; but their close and confidential association with Ministers imposes certain obligations on them. Official information given to them should generally be limited to what is necessary for the discharge of their Parliamentary and political duties. This need not preclude them from being brought into Departmental discussions or conferences where appropriate, but they should not have access to secret establishments, or information graded secret or above, except on the personal authority of the Prime Minister. While, as Private Members, they need not adhere to the rules on private interests which apply to Ministers, they should, as a general rule, seek to avoid a real or perceived conflict of interest between their role as a Parliamentary Private Secretary and their private interests.

and:

> 48. Ministers should ensure that their Parliamentary Private Secretaries are aware of certain principles which should govern the behaviour of Parliamentary Private Secretaries in the House of Commons. Like other Private Members, Parliamentary Private Secretaries are expected to support the Government in all important divisions. However, their special position in relation to the Government imposes an additional obligation which means that no Parliamentary Private Secretary who votes against the Government may retain his or her position. Parliamentary Private Secretaries should not make statements in the House or put Questions on matters affecting the Department with which they are connected. Parliamentary Private Secretaries are not precluded from serving on Select Committees but they should not do so in the case of inquiries into their own Minister's Departments and they should avoid associating themselves with recommendations critical of or embarrassing to the Government. They should also exercise discretion in any speeches or broadcasts which they may make outside the House, taking care not to make statements which appear to be made in an official or semi-official capacity, and bearing in mind at the same time that, however careful they may be to make it clear that they are speaking only as Private Members, they are nevertheless liable to be regarded as speaking with

> some of the authority which is attached to a member of the Government. Generally they must act with a sense of responsibility and with discretion; and they must not associate themselves with particular groups advocating special policies.[41]

Because ministers are generally MPs, questions can arise as to their two roles as constituency Member and minister. These are dealt with in section six of the Code which covers the general ethical requirement for ministers to separate the two roles, and gives advice on Ombudsman cases and constituency or other deputations on, say, proposed school closures, or public events such as planning inquiries. Ministers will not use the usual Parliamentary opportunities, such as PQs, adjournment debates, petitions or private Members' bills, to pursue constituency issues. Although the Code states that ministers should be able to represent their constituents' interests the guidance emphasises that they should avoid public expressions of personal (as opposed to constituents') views whenever possible:

> 69. Ministers are free to make their views about constituency matters known to the responsible Minister by correspondence, leading deputations or by personal interview provided they make clear that they are acting as their constituents' representative and not as a Minister. Particular problems arise over views expressed on planning applications and certain other cases involving exercise of discretion by Ministers (e.g. on school or hospital closures, highway or power station inquiries) in which representations intended to be taken into account in reaching a decision may have to be made available to other parties and thus may well receive publicity. Ministers are advised to take particular care in such cases to represent the views of their constituents rather than express a view themselves; but when they find it unavoidable to express a view they should ensure that their comments are made available to the other parties, avoid criticism of Government policies, confine themselves to comments which could reasonably be made by those who are not Ministers, and make clear that the views they are putting forward are ones expressed in their capacity as constituency MPs. Once a decision has been announced, it should be accepted without question or criticism. It is important, in expressing such views, that Ministers do so in a way that does not create difficulty for Ministers who have to take the decision and that they bear in mind the Government's collective responsibility for the outcome. Ministers should also take account of any potential implications which their comments could have on their own Departmental responsibilities.

The Code also provides guidance on the presentation of policy. Ministers should consider whether a proposed white or green paper 'raises issues which require full collective Ministerial consideration' through Cabinet. Any Command Paper containing a 'major statement of Government policy' should be circulated to Cabinet beforehand, a rule which applies 'even when no issue requiring collective consideration is required' [para 94].

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[41] see generally, Ellis, *op cit*, p.391

Specific guidance is applied to ministers' speeches:

> 97. Ministers cannot speak on public affairs for themselves alone. In all cases other than those described in paragraph 69 they speak as Ministers; and the principle of collective responsibility applies. They should ensure that their statements are consistent with collective Government policy and should not anticipate decisions not yet made public. Ministers should exercise special care in referring to subjects which are the responsibility of other Ministers. Any Minister who intends to make a speech which deals with, or makes observations which bear upon, matters which fall within another Minister's responsibilities should consult that Minister.
> 98. The Prime Minister should always be consulted before any mention is made of matters which either affect the conduct of the Government as a whole or are of a constitutional character. The Foreign and Commonwealth Secretary should always be consulted before any mention is made of matters affecting foreign and Commonwealth affairs, relations with foreign and Commonwealth countries and the political aspects of the affairs of dependent territories. Ministers wishing to refer in a speech or any other public statement to economic policy or to proposals involving additional public expenditure or revenue costs should in all cases consult the Chancellor of the Exchequer or the Chief Secretary. Ministers wishing to refer to defence policy should in all cases first consult the Secretary of State for Defence. Ministers wishing to discuss or refer to Northern Ireland should in all cases first consult the Secretary of State for Northern Ireland.

Similar advice is given for radio and television broadcasts [para 103] and for press articles [paras 105] on the implications of collective responsibility. Ministers are prohibited from writing and publishing 'a book on their Ministerial experience' [para 107]. Rules and guidance on works by former ministers are considered in section VII of this Paper. Ministers can contribute to party and other related political publications (without payment), although if the topic concerns another department that minister must be consulted. While Ministers are not prohibited from forms of writing - literary, fictional, musical etc - 'which do not draw directly on their Ministerial experience' [para 109], and, when assisting academic research or market opinion survey, by interview or questionnaire, for example, they 'should bear in mind the possibility that their views may be reported in a manner incompatible with their responsibilities and duties as members of the Government' [para 110].

Ministers are advised 'to ensure that they do not become associated with non-public organisations whose objectives may in any degree conflict with Government policy and thus give rise to a conflict of interest'. They should not act as patrons of pressure groups or bodies wholly or partly government funded, but subject to the above, they can participate in a charity, although they should ensure, before involvement in any fundraising activity, 'they do not place, or appear to place, themselves under an obligation as Minister to those to whom appeals are directed'. This also applies to the giving of support for petitions and the like [para 121].

IV Free votes

The two main ways in which the normal rules of collective responsibility as regards ministerial unanimity are suspended are the 'free vote' (or 'open question') and the 'agreement to differ'. Although there may be occasions where the two concepts may appear to merge into each other,[42] the basic difference appears to be that a free vote is one where there is no stated Government policy on the issue and therefore the question of dissent by some ministers does not arise, whereas an agreement to differ is a situation where the Government has adopted a policy but has allowed ministers to dissent publicly from that policy to some degree.[43]

Free votes are nowadays most commonly recognised in issues of conscience, for example social, moral or religious questions such as capital punishment, abortion or gay rights, or Private Members' Bills, or in certain votes on changes to parliamentary procedure. But free votes may also be used as a device to avoid a Parliamentary defeat, or any serious consequences of a defeat.[44] A free vote, in particular circumstances, may be a recognition of a significant split within Government or its Parliamentary party, an attempt to construct a large cross-party majority,[45] or a desire to avoid having to devise and announce a Government policy on a difficult issue.

This Paper is concerned with the collective responsibility of ministers, and by extension, of the Government side of the two Houses. The official Opposition and the other parties may allow free votes in similar circumstances, as the Conservative leader Michael Howard did on the Government proposals to change the law to allow same-sex couples the same legal rights as married people[46] (Shadow ministers are also, generally, subject to their own form of collective responsibility, an issue beyond the scope of this Paper).[47] This can influence the decisions of Government (as can the Government's influence the Opposition's decisions) especially where there may be significant intra-party dissent on both sides or where the Government has a small or no majority in the Commons.

Another complicating factor is that an issue (especially if the subject of a bill) may not be subject to the same freedom at all stages of its Parliamentary proceedings. A free vote may be allowed on the principle of a bill at second reading, but the measure whipped

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42 As in the 1977 direct elections episode, discussed in the next section.

43 The latter concept is discussed fully in the next section.

44 Other examples may be refusal by the Government to whip or vote, to render a defeat, in their view, meaningless; or to debate an issue on a technical rather than a substantive motion.

45 as in the vote on the principle of EEC entry in October 1971; see Richards, P. G. (1972) *The backbenchers*, p68

46 See speech by Alan Duncan on second reading of the *Civil Partnership Bill (HL) 2003/04* at HC Deb 12 October 2004 c182

47 Donald Dewar, when serving as the Opposition Chief Whip in 1996 wrote that the principle 'must apply to the Shadow Cabinet as certainly to the Cabinet.... The idea that collective responsibility in government is somehow different to collective responsibility in Opposition is a nonsense.... Labour is a government-in-waiting. It follows we must behave like a government-in-waiting.' : *Guardian*, 17 April 1996

thereafter, or a bill may be subject to a whip but a free vote allowed on particular provisions within it.

V 'Agreements to differ'[48]

Perhaps nothing demonstrates the conventional nature of the unwritten UK constitution better than the few examples of authorised waiver, for strictly limited periods, of the doctrine of collective responsibility. When questioned about this in 1977, the Prime Minister, James Callaghan, said, 'I certainly think that the doctrine should apply, except in cases where I announce that it does not'.[49] This demonstrates that the terms, duration and enforcement of the arrangement are a matter, ultimately, for the Prime Minister.

Some have argued, in effect, that as an agreement to differ is itself a collective Cabinet decision, such an apparent split between fellow ministers is not a *breach* of collective responsibility, but an exercise and product of it. For example, in the 1932 debate on the agreement to differ on tariff policy the Lord President, Stanley Baldwin, declared that 'we have collective responsibility for the departure from collective action'.[50] In his evidence to the court in the case of the Crossman diaries,[51] the then Cabinet Secretary, Sir John Hunt said: 'I would not regard [the 1975 EEC referendum] as breaching collective responsibility because this was a decision by the Cabinet as a whole to waive collective responsibility on one particular issue for a limited time. It was not a decision which any Minister took unilaterally ...'[52]

Following the Government's announcement of its intention to hold a referendum on the EU Constitution questions over Cabinet 'agreements to differ' have arisen again. Tony Benn, a leading figure in the 1975 Cabinet's agreement to differ on the EEC referendum, is reported to have asked the Prime Minister whether ministers would be able to 'speak and vote in accordance with their convictions' on the planned EU Constitution referendum. In a letter replying to Tony Benn the Prime Minister explained that:

> It is the Government's stated policy that a treaty which reforms the EU to ensure that it works more effectively with ten or more new members is desirable. It would therefore be peculiar for ministers to campaign in a referendum opposing such a move.[53]

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[48] see generally, Silkin, A (1977) 'The agreement to differ of 1975 and its effect on ministerial responsibility', 65 *Political Quarterly* 48

[49] HC Deb vol 933 c. 552, 16 June 1977

[50] HC Deb vol 261 c.535, 8 February 1932

[51] *Attorney-General v Jonathan Cape* [1976] 1 QB 752; see section VII below

[52] Young, H (1976) *The Crossman Affair*, p84

[53] 'Party line 'has no place in EU vote'', *Times*, 4 May 2004

In the following section the three most recent 'agreements to differ', over Tariff policy in 1932, on the EEC referendum in 1975, and on the issue of direct elections to the European Assembly in 1977, are considered in more detail.

A. Some illustrative examples of agreements to differ

1. Tariffs policy (1932)

The first official 'agreement to differ' occurred in 1932 because of disagreements in the National Government between Conservative ministers and their coalition partners over tariff reform. In the October 1931 general election the coalition candidates agreed not to stand in opposition to each other despite the clear split over tariffs. After the election, four members of Cabinet disagreed with the decision to impose a general tariff and proposed to resign.[54] The Prime Minister, Ramsay MacDonald, persuaded them not to do so by offering to allow them to express their disagreement publicly. The dissenters demanded that they be free to speak and vote against any tariff proposals, that MPs have the same freedom and that the whips not exert any influence to persuade Members to support the Government line.[55] The official terms of the 'agreement to differ' were published in *The Times* of 23 January 1932:

> The Cabinet has had before it the report of the Committee on the Balance of Trade, and after prolonged discussion it has been found impossible to reach unanimous conclusion on the Committee's recommendations.
> The Cabinet, however, is deeply impressed with the paramount importance of maintaining national unity in presence of the grave problems that now confront this country and the whole world. It has accordingly determined that some modification of usual Ministerial practice is required and has decided that Ministers who find themselves unable to support the conclusions arrived at by the majority of their colleagues on the subject of import duties and cognate matters are to be at liberty to express their views by speech and vote.
> The Cabinet, being essentially united on all other matters of policy, believes that by this special provision it is best interpreting the will of the nation and the needs of the time.

This novel constitutional situation was debated in both Houses. In the Commons on 8 February, on a no-confidence motion,[56] George Lansbury, Leader of the Opposition, claimed that 'there can not be any such thing as a collective conscience' and demanded that the dissenting ministers 'tell us whether they would both speak and vote against the Government if by so doing they would turn the Government out'.[57] He said he was not against a

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[54] They were Lord Snowden, Lord Privy Seal (National Labour); Sir Donald Maclean, President of the Board of Education; Sir Archibald Sinclair, Scottish Secretary; and Sir Herbert Samuel, Home Secretary (all Liberals).

[55] see I Jennings, *Cabinet government*, 3rd ed, 1965, pp 279-81

[56] 'That this House can have no confidence in a Government which confesses its inability to decide upon a united policy and proposed to violate the long-established constitutional principle of Cabinet responsibility by embarking upon tariff measures of far-reaching effect which several of His Majesty's Ministers declare will be disastrous to the trade and industry of the country': HC Deb vol 261 cc515-630, 8 February 1932

[57] HC Deb vol 261 c515, 8 February 1932

permanent change to the constitutional theory of collective responsibility, or that there should never be any exceptions to the general rule. For the Government, Stanley Baldwin said that the British constitution was a 'living organism' whose flexibility was beneficial to the country, and surveyed the history of Cabinet responsibility. The fact that the Government was a 'National' rather than a party one, and one with a huge majority (of 493), meant that the usual constitutional conventions of collective responsibility were not at stake: 'The fate of no party is at stake in making a fresh precedent for a National Government. Had the precedent been made for a party Government, it would have been quite new, and it would have been absolutely dangerous for that party'.[58] He continued:

> Is our action constitutional? Who can say what is constitutional in the conduct of a national Government? It is a precedent, an experiment, a new practice, to meet a new emergency, a new condition of things, and we have collective responsibility for the departure from collective action. Whatever some ardent politicians may think, it is approved by the broad common sense of the man-in-the-street. The success or failure of this experiment will depend on one thing only, and that is the spirit in which it is conducted. I have every hope, I have every desire, that that spirit - I know the taunts which will be levelled at us - will be found equal to the task, that this experiment may be so conducted that it may prove successful, and that the judgment of future generations will be that the House of Commons by the vote tonight took a step of wisdom and common sense.[59]

The motion was rejected by 39-438.[60] Arthur Silkin concluded that the dissenting ministers 'refrained from making any general criticism of the National Government's policy until they all resigned over the decision to give effect to the Ottawa agreements on imperial preference on September 28, 1932'.[61]

Jennings considered the effect of the 1932 precedent:

> The question was not left open. It was decided by the Cabinet, and the whips were put on. The procedure was not, therefore, in accordance with precedent. Logically, there is something to be said in its favour. It cannot be expected that a body of able ministers can agree about all questions all the time. Particularly is this so with a Coalition Government. Frequent resignations involve frequent party splits, and party splits lead to short and weak Governments which in turn lead to distrust of the democratic system. Yet this argument, logical as it seems, is fallacious. Both logic and experience show that, under the party system, resignations need not be frequent. A Cabinet that is agreed upon fundamentals can compromise upon incidentals. A party Cabinet is normally agreed on fundamentals; if it is not, as in 1845 and 1885, the time has come for a new

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58 HC Deb vol 261 c534, 8 February 1932

59 HC Deb vol 261 c535, 8 February 1932 and see also the winding up speech of the Attorney-General, cc 618-626

60 see also the Lords debate on 10 February 1932, HL Deb vol 83, cc 519-560; and the debate on 4 February in which Sir Herbert Samuel's speech caused disquiet among Conservative Members, HC Deb vol 261 cc 315-335

61 *op cit*, p.67. See also T Wilson, *The downfall of the Liberal Party 1914-1935*, pp 369-76

> alignment of parties. Coalitions, unless they are merely part of the process of remoulding party alignments, are necessarily unprincipled. The party system is the real protection of democracy. Party Governments are strong Governments. An 'agreement to differ' in order to maintain a coalition is an attempt to break down the party system and to substitute government by individuals for government by political principles. No harm was done by the precedent of 1932 provided that it is not regarded as a precedent. The dissenting ministers, having swallowed the camel of a general tariff, strained at the gnat of imperial preference and resigned within eight months. The position of the Prime Minister, presumably, was no longer 'embarrassing and humiliating', for he held it for nearly three years longer. [62]

2. 1975 EEC Referendum

Perhaps the most familiar instance of the twentieth century agreements to differ is that over the referendum of June 1975 on EEC membership. Europe had caused divisions within as well as between the two major parties, and the Labour Government had come into office in 1974 pledged to renegotiate the terms of UK entry and to allow the people to vote on the outcome, either by referendum or general election. Three Senior Cabinet Ministers - Michael Foot, Tony Benn and Peter Shore - wrote to the Prime Minister in late November stating that 'Ministers will have very deep convictions that cannot be shelved or set aside by the normal process of Cabinet decision-making ... The only solution might be to reach some understanding on the basis of 'agreement to differ' on this single issue and for a limited period'.[63]

In a statement on 23 January 1975 the Prime Minister, Harold Wilson, announced that a referendum would be held before the end of June, once the outcome was known and the Government had made its recommendation, and stated:

> When the outcome of renegotiation is known, the Government will decide upon their own recommendation to the country, whether for continued membership of the Community on the basis of the renegotiated terms, or for withdrawal, and will announce their decision to the House in due course. That announcement will provide an opportunity for the House to debate the question of substance. That does not, of course, preclude debates at any earlier time, subject to the convenience of the House.
>
> The circumstances of this referendum are unique, and the issue to be decided is one on which strong views have long been held which cross party lines. The Cabinet has, therefore, decided that, if when the time comes there are members of the Government, including members of the Cabinet, who do not feel able to accept and support the Government's recommendation; whatever it may be, they will, once the recommendation has been announced, be free to support and speak

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62 *op cit*, p.281 (footnotes omitted)

63 Jenkins, R (1980) *Tony Benn: a political biography*, p219; Tony Benn (1990) *Against the tide: diaries 1973-76*, pp274, 283

> in favour of a different conclusion in the referendum campaign. [HON. MEMBERS: 'Oh!'][64]

The Opposition Leader, Edward Heath, noted that in that 'unique operation and a major question of our time the Government are not going to maintain collective responsibility'. He asked several questions [cc 174-78]:

> If his Government are not to maintain responsibility, how will the Government make their recommendation to the House over what the attitude should be towards the situation of the so-called renegotiation? Will the Government set out the number of members of the Cabinet who support the recommendation and those who are opposed to it? Will the Government publish the names of the members of the Cabinet, who are on each side, or does he undertake to make a recommendation which will include freedom for them to decide to make no recommendation? Perhaps the Prime Minister will elaborate on the course he proposes to follow.

The Prime Minister replied [c.1750]:

> The right hon. Gentleman said that a major constitutional question had been raised by what I have announced. This matter has divided the country. People on both sides of the question hold their views very deeply, very sincerely and very strongly. That applies both in this House and in the country. Indeed, the Liberal Party has such a division as well. There is undoubtedly a very deep and serious division in this House. Contrary to the pledges which were given during the 1970 General Election campaign, the British people were not given the right to decide. We are repairing that omission; and in the circumstances, while there may be differences about the Common Market, there is no division on this side of the House, or in the Cabinet, on the major issue of the referendum. That is why I believe it right to take this step in this unique situation.

On 7 April, Mr Wilson set out the guidelines for the agreement to differ, as approved by the Cabinet:

> In accordance with my statement in the House on 23rd January last, those Ministers who do not agree with the Government's recommendation in favour of continued membership of the European Community are, in the unique circumstances of the referendum, now free to advocate a different view during the referendum campaign in the country.
> This freedom does not extend to parliamentary proceedings and official business. Government business in Parliament will continue to be handled by all Ministers in accordance with Government policy. Ministers responsible for European aspects of Government business who themselves differ from the Government's recommendation on membership of the European Community will state the

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[64] HC Deb vol 884 c. 1746, 23 January 1975. See also Benn, *op cit* p305, and Barbara Castle, (1980) *The Castle diaries 1974-1976*, pp287-92

> Government's position and will not be drawn into making points against the Government recommendation. Wherever necessary Questions will be transferred to other Ministers. At meetings of the Council of Ministers of the European Community and at other Community meetings, the United Kingdom position in all fields will continue to reflect Government policy. I have asked all Ministers to make their contributions to the public campaign in terms of issues, to avoid personalising or trivialising the argument, and not to allow themselves to appear in direct confrontation, on the same platform of programme, with another Minister who takes a different view on the Government recommendation. [65]

This was immediately tested by a speech in the Chamber by Eric Heffer, the Minister of State for Industry, on 9 April during a debate on the Government's decision to approve the continued EEC membership of the UK.[66] He believed that 'the guidelines of the Common Market are as unacceptable as the guidelines on the question of ministerial discussion in the House' [c.1332]. Although there was a free vote and Mr Heffer said he was speaking 'as the member for Liverpool, Walton', the speech breached the stated guidelines. He was immediately dismissed, the Prime Minister writing to inform him that 'your deliberate decision to speak against the Government's motion in today's debate, although you had been informed of the Cabinet's decision that ministers who dissented from the Government's recommendation should not speak in the debate, makes it impossible for me to retain you in the Government. I am therefore informing the Queen that you have ceased to be a minister and I shall recommend a new appointment in due course.'[67] According to press reports Mr Heffer was fully aware of the consequences of his action: 'I expected the Prime Minister to do it. I spoke in the debate knowing what the consequences of my actions could be. I wished to demonstrate my opposition to a licensed freedom.[68]

A Labour backbencher, Michael English, asked the Speaker if the announced guidelines were a contempt and breach of privilege, because they restricted ministerial freedom to participate in Parliamentary proceedings. He pointed out that such a restriction did not apply in the 1932 situation:

> It is the law of the country that Members of Parliament have not merely a right but a duty to express in this House their opinions and to be protected in ways in which they would not be outside this House. They are protected, for example, against defamation by absolute privilege.
> It is the principle of the procedures of this House that a Member may come here and say what he chooses. Normally, members of the Government do not do that, but in this case they are to be allowed to do so outside this House. I cannot

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[65] HC Deb vol 889 c. 351W, 7 April 1975. Several dissenting Ministers had issued a statement at a press conference on 23 March explaining their reasons for disagreeing with the Government's recommendation: *Keesings*, 1975, p.27137. See also Mr Wilson's written answer of 20 March, HC Deb vol 888 c.471W; Benn *op cit* pp339-56 and Castle, *op cit*, pp347-9

[66] HC Deb vol 889 cc 1325-32, 9 April 1975

[67] *Keesing's*, 1975, p.27140

[68] *Times* 10 April 1975

> imagine a more complete derogation from the rights of this House than to say that its Members may speak outside it but not in it.[69]

However the Speaker ruled that 'in general, I think that arrangements made within political parties in this House would be unlikely to raise questions of contempt or privilege. Also, the Chair must be careful not to appear to be trying to interfere in such arrangements'. He believed that the guidelines meant that 'the new element is freedom to dissent in the country, not any change in the normal practices in this House'.[70]

The Prime Minister clearly set the limits of the 'agreement to differ' when, in response to a PQ, he stated that it would end 'on 5 June, when the referendum poll has been closed'.[71]

As already noted, the 'agreement to differ' caused difficulties for the normal conduct of Government and, especially, Parliament.[72] For example, the 7 April guidelines envisaged the transfer of relevant PQs from dissenting to other Ministers.[73] Tony Benn, when answering questions, would sometimes resort to the device of quoting 'the views of the Government on this issue'.[74] Peter Shore, responding to a question from Norman Tebbit on 5 May, explained that 'When I am speaking from the Dispatch Box I am reflecting Government policy as a whole, except when I am clearly reflecting my own policy as the Secretary of State for Trade'.[75]

Perhaps the most interesting instance of public Parliamentary dissent was the Early Day Motion put down by the dissenting Ministers on 18 March, the day of Mr Wilson's statement on the outcome of negotiations (and *before* the 7 April guidelines). It welcomed the referendum and urged all Members to campaign for withdrawal:

> That this House welcomes the referendum; believes that only by the consent of the British people can the supreme issue of membership of the Common Market be settled; further believes that it is the true interest of the British people to regain the essential rights which permanent membership of the Common Market would deny them, namely the right of democratic self-government through their own elected Parliament, the right to determine for themselves how they impose taxes and fix food prices, the right to pursue policies designed to ensure full employment, and the right to seek co-operation and trade with other nations in a world-wide framework; and therefore urges Right honourable and honourable

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69 HC Deb vol 889 c 1018, 8 April 1975

70 9 April 1975 c.1238

71 HC Deb vol 892 c. 65W, 13 May 1975

72 see Silkin, A (1977) 'The agreement to differ of 1975 and its effect on ministerial responsibility', 65 *Political Quarterly* 48, pp69-73

73 See Nicholas Ridley's point of order on 21 April, HC Deb vol 890 cc980-2, and Michael Heseltine's question to Tony Benn the same day, c.973. The dissenters were listed by Mr Wilson in a written answer on 20 March, HC Deb vol 888 c.471W

74 see, for example, HC Deb vol 890 c.973 and c.199W, 21 April 1975

75 HC Deb vol 891 c.999

> Members to campaign for the withdrawal of the United Kingdom from the Common Market, and to invite their fellow-citizens to join them.[76]

There were a number of differences between the 1932 and 1975 cases. Arthur Silkin described the differences as he saw them:

> Superficially alike as the two 'agreements to differ' were, there were important differences between them. In 1932, dissident Ministers were allowed to make their disagreement known from the Treasury Bench itself. In 1975 this procedure was not officially permitted, the Prime Minister's explanation for this being that in 1932 the only opportunity for dissident Ministers to make their views known was through a debate in the House whereas the decision to hold a referendum in 1975 enabled Ministers who opposed the Government decision to campaign publicly in favour of withdrawal from the EEC. In practice, as we shall see shortly, this restriction was easily circumvented by the dissentients. Secondly, none of the dissident Ministers in 1932 had any departmental responsibility for issues connected with the official area of disagreement; this was palpably not true of 1975. Thirdly, the area of the 1975 disagreement was in practice broadened, at any rate while the referendum campaign was in progress, to cover issues extraneous to the EEC, whereas the differences arising out of the 1932 agreement appear, with the one possible exception already mentioned, to have been limited to the area for which these special arrangements had been made, that of protective tariffs. There was, however, a fourth difference, possibly of greater potential significance than the others. Whereas the 1932 arrangements covered Ministers of different parties, who were, at least in original intention, united for a limited purpose and duration, those in 1975 concerned members of the same political party. It therefore sanctified the idea that Ministers of the same political party could publicly disagree over important issues, even though admittedly for a limited duration, still remaining Ministers.[77]

3. 1977 European Assembly Direct Elections

By an Act of the Council of Foreign Ministers in 1976, EC member states agreed to try to implement legislation for direct elections to the European Assembly to take place in Spring 1978. The UK promised its 'best endeavours' to do so, and the Labour Government promised legislation in the November 1976 Queen's Speech. Little happened due to party and Parliamentary pressures until the 23 March 1977 no-confidence vote led to the Lib-Lab pact to preserve the Government in office. The Government reaffirmed its promise to introduce legislation on direct elections in that session and the Prime Minister, James Callaghan, said that the Government would recommend a form of voting system following consultations on its White Paper to be published the following week.[78] He promised that 'whatever the final recommendations on these matters, it will be subject to a free vote of

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[76] *Common Market referendum*, EDM 355 of 1974-75, 18 March 1975

[77] Silkin, A (1977) 'The agreement to differ of 1975 and its effect on ministerial responsibility', 65 *Political Quarterly* 48 pp68-9

[78] Cmnd 6768, 1 April 1977

both Houses of Parliament. As far as the Government are concerned all hon Members will be entitled to vote in any way that they think fit'.[79] According to Tony Benn, the Prime Minister announced that there would be a free vote for Cabinet ministers on the bill at Cabinet on 26 May.[80]

On 16 June, when challenged by Mrs Thatcher about reports that collective responsibility was being suspended over the direct elections legislation, the Prime Minister said, famously, that 'I certainly think that the doctrine should apply, except in cases where I announce that it does not'.[81] When asked by Arthur Lewis if the 'agreement to differ' extended to permitting dissident ministers to support or sponsor anti-bill organisations, Mr Callaghan said that the question was 'hypothetical'.[82]

When the bill was published, the Government announced that it was recommending a regional list system of voting. Concluding his Second Reading speech the Home Secretary, Merlyn Rees, said 'I commend to the House the Bill and the Government's recommendation of the regional list system'.[83] For the Opposition, John Davies attacked the Government's delays in bringing forward the bill: 'But no one believes - and the Prime Minister has not sought to have us believe - that it is the Government's intention that the Bill should be passed into law this Session. The final humiliation for the Government, who integrally attached themselves to a Queen's Speech in which they declared their intention to introduce this legislation, is that there is now a relapse into the public fragmentation of the Cabinet before our eyes' [cc 164-5]. The Second Reading was carried 394-147, but six Cabinet Ministers (Messrs Foot, Benn, Shore, Booth, Orme and Silkin) and 25 other members of the Government opposed the bill, and it made no further progress that session.

A substantially similar bill was introduced the following session and the Prime Minister said, during the Queen's Speech debate, that the Government believed itself bound by its Community obligations and undertakings, 'and that therefore we must proceed ... There will be a free vote for Government supporters on the method of voting'.[84] Tony Benn's diaries quote Michael Foot as saying that there would be a three-line whip on the Second Reading, although *Keesing's* refers only to a two-line whip.[85] Dissident ministers were expected to do no more than abstain. In the second reading on 24 November the junior Home Office Minister, Brynmor John confirmed that there would be a free vote on the voting system: 'In a constitutional matter of this importance we believe that to be right and proper'.[86] It was given a second reading, with seven Cabinet Ministers - the six earlier dissenters and Mr Millan - and 20 other members of the Government abstaining.

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79 HC Deb vol 928 c.1307, 23 March 1977; See Tony Benn, *Conflict of interests: diaries 1977-80*, pp.85-91
80 Tony Benn *op cit* pp153-4
81 HC Deb vol 933 c. 552, 16 June 1977
82 HC Deb vol 934 c. 934W, 4 July 1977
83 HC Deb vol 934 c.1261, 6 July 1977
84 HC Deb vol 938 c. 32, 3 November 1977
85 Benn, *op cit*, p.241; *Keesing's*, 1977, p.28873
86 HC Deb vol 939, 24 November 1977 c.1771

The next significant test of Cabinet dissension was the vote on the regional list voting system on 13 December. Mr Rees reminded the House that 'the Government favour the regional list system, but Government supporters will have a free vote on the issue'.[87] The proposal was defeated 319-222. On 26 January 1978 a guillotine motion was passed 314-137, with four Cabinet Ministers - Orme, Benn, Shore and Silkin - defying, according to *Keesing's*, a two-line whip.

The 1977 example is thus a more complex case than the 1932 and 1975 episodes, partly because it covered two issues - the principle of direct elections as expressed in the passage of the legislation, and the voting method to be used - and also because of the protracted period it covered, over two sessions and two bills. On the 1976-77 bill, it appears that, on the principle of the bill, there was a free vote but within overall Government support for its measure. This can perhaps be regarded as an 'agreement to differ', as can the different situation in the 1977-78 bill where the whip - whether two- or three-line - was imposed and ministers were apparently not permitted to vote against, although they could abstain.

VI Leaks

> "You know the difference between leaking and briefing. Leaking is what you do and briefing is what I do."[88]

A particular instance of breach of Cabinet or ministerial confidentiality is the unauthorised disclosure, or 'leak'. As discussed earlier, confidentiality fulfils at least two functions. It maintains the outward appearance of ministerial unanimity, traditionally regarded as a politically vital factor in the British system of government and adversarial politics, and it is part of the system of government secrecy thought to be necessary for effective administration.

The relationship between Prime Minister and Cabinet is crucial to the concept of confidentiality because it is the Prime Minister who can determine the boundaries of secrecy which must be obeyed by other ministers, within and outwith the Cabinet. Just as ministers have a degree of discretion in what official information they can make public in some way, ultimately this operates within express or implied parameters applied by the Prime Minister.

The question of ministerial confidentiality is part of the wider issue of 'open government' and involves matters such as official secrets legislation. Although this issue is largely outside the scope of this Paper, many commentators agree that confidentiality is enforced for

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87 HC Deb vol 941, 13 December 1977 c.304

88 James Callaghan, evidence to the Franks Committee on s2 of the *Official Secrects Act 1911*, Cmnd 5104, vol 4, 1972, p.187

political and administrative reasons by political sanctions rather than formal legal sanctions such as the *Official Secrets Act 1989*, the Privy Counsellor's Oath or breach of confidence.[89] The confidentiality 'rules' set out in the *Ministerial Code* have already been considered in the general context of the convention that government decisions are decisions of the whole government. The section headed 'Collective Responsibility' begins: 'The internal process through which a decision has been made, or the level of Committee by which it was taken, should not be disclosed', and continues that frank ministerial discussion 'requires that the privacy of opinions expressed in Cabinet and Ministerial Committees should be maintained. Moreover Cabinet and Committee documents will often contain information which needs to be protected in the public interest. It is therefore essential that, subject to the guidelines on the disclosure of information … Ministers take the necessary steps to ensure that they and their staff preserve the privacy of Cabinet business and protect the security of Government documents'.[90] The introduction of Freedom of Information legislation from January 2005 will necessitate some changes to this aspect of the document but the legislation does contain exemptions from disclosure covering policy advice in Government, subject to a public interest test.[91]

As Ellis has described the position, 'the unattributable leak whilst being exceptionally annoying to ministers has, nevertheless, established itself as a complement to the rigid precepts of collective responsibility'.[92] Gordon Walker claimed that 'an inevitable concomitant of collective responsibility was the disclosure of internal Cabinet affairs'.[93] He distinguished the 'leak' from 'the true state secrets - such as the details of a budget, a decision to devalue, military or security matters. These have been scrupulously observed; apart from Dalton's inadvertent disclosure [of the 1947 Budget details], the only example of a breach of security was the betrayal by J H Thomas of budget secrets in 1936'. He continued:

> Thus the doctrine of collective responsibility and the unattributable leak grew up side by side as an inevitable feature of the Cabinet in a mass two-party system. In every Cabinet the leak will be deplored and condemned; but it is paradoxically necessary to the preservation of the doctrine, of collective responsibility. It is the mechanism by which the doctrine of collective responsibility is reconciled with political reality. The unattributable leak is itself a recognition and acceptance of the doctrine that members of a Cabinet do not disagree in public.
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> Salisbury was right to describe collective responsibility as a *constitutional* fiction. Its maintenance is constitutionally essential. If members of a Cabinet publicly attacked one another, a Cabinet based on a system of two disciplined parties

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89 See Brazier, R (1999) *Constitutional practice*, 2nd ed, pp 120-7

90 Para. 16 and 17, Cabinet Office, *MinisterialCode:A Code Of Conduct And Guidance On Procedures For Ministers*, June 2001 http://www.cabinet-office.gov.uk/central/2001/mcode/contents.htm

91 See House of Commons Library Research Paper forthcoming *Freedom of Information: Implementation*

92 Ellis, D (1980) 'Collective ministerial responsibility and collective solidarity', *Public Law* 367, p379

93 Walker, G (1972) *The Cabinet*, rev ed, pp27-8

> could not be sustained. The leak is the price paid for the maintenance of a constitutionally necessary doctrine.[94]

James Callaghan's famous succinct distinction between leaking and briefing has already been noted and Brazier has explained the political realities behind leaks:[95]

> From time to time Ministers will want their views publicly known so as to distance themselves from any Cabinet decision with which they do not agree: they may thus let their supporters know their views, and perhaps mobilize opinion against that decision: to do so they make an 'unattributable leak', they 'brief' - it comes to the same thing. This has taken place for decades. For such a leak to happen a journalist will be given information on the condition that he does not reveal its source. The Minister's purposes are served and the journalist gets his story: it is a symbiotic relationship which has the advantage that the public is better informed than otherwise might be the case.
>
> Prime Ministers work with the Westminster Lobby system, to which journalists are accredited and through which the Downing Street Press Secretary can twice a day put the Prime Minister's version of events on an unattributable basis. This is 'briefing', the more respectable form of 'leaking' - after all, the Lobby is formally organized, has rules, and even officers, keeping sources secret on their words as gentlemen.
>
> A day rarely passes without some item in the newspapers giving details of Cabinet or Cabinet committee business which could only have been obtained by a leak. Leaking is periodically and hypocritically condemned by Prime Ministers and Ministers; sometimes leak inquiries are set up under the Cabinet Secretary; civil servants and Ministers are questioned; usually nothing comes of them.

A leak by a dissenting minister may be regarded, in a sense, as the unauthorised public face of the entitlement of Cabinet ministers to have their dissent recorded in the Cabinet minutes. Note that the *Ministerial Code* states that 'the record of Cabinet and proceedings is limited to the conclusions reached and such summary of the discussion as is necessary for the guidance of those who have to take action. The Cabinet Office are instructed to avoid, so far as practicable, recording the opinions expressed by particular Ministers'.[96] The consequences of a leak may depend on its nature and the political context, [97] and may give rise to a leak inquiry, as in, for example, the Westland affair in 1986. In the Westland affair, the fact that the leak was of the Solicitor-General's letter was material, given the special nature of Law Officers' advice.[98] It was also apparently understood that a leak inquiry by the Cabinet Secretary was desirable or even essential because of this factor and because there were

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94 Ibid. p32

95 See *Constitutional Practice*, p.124-6

96 Cabinet Office, *Ministerial Code* para 13

97 For an interesting analysis of this issue see Nicholas Ridley (1991) *My style of government: The Thatcher years*, pp 48-53, and Norman Fowler (1991) *Ministers decide*, pp59-63

98 Cabinet Office, *Ministerial Code* para 22 and 23

reported threats of resignation by the Law Officers if one was not instituted. The inquiry is described in the Defence Committee's report on Westland.[99]

VII Ministerial memoirs

Collective responsibility has been taken to mean that the obligation of confidentiality should subsist even once a minister leaves office. This has been challenged by the flood of memoirs, diaries, authorised biographies and media contributions from politicians, from former Prime Ministers downwards. The most famous episode in modern times is the publication of Richard Crossman's diaries.[100]

Crossman was a Cabinet minister in Harold Wilson's Government in the 1960s and had continued to keep a full and detailed diary begun in Opposition. He died before it could be published, but extracts were later published in the *Sunday Times* and his executors wished to publish the full work. The newspaper had published extracts in full notwithstanding deletions sought by the Cabinet Secretary when, in accordance with usual practice, the work had been submitted to him.[101] The Attorney-General then sought injunctions to prevent further publication. The case, in 1975, turned on whether Cabinet secrecy was enforceable by law. The Lord Chief Justice, Lord Widgery, examined the Attorney-General's argument for confidentiality in the public interest, believing that this could have application in national security cases or where 'in the short run (for example, over a period of weeks or months) the public interest is equally compelling to maintain joint Cabinet responsibility...'[102] He then considered the nature of the convention of collective responsibility:

> It is convenient next to deal with Mr. Comyn's third submission, namely, that the evidence does not prove the existence of a convention as to collective responsibility, or adequately define a sphere of secrecy. I find overwhelming evidence that the doctrine of joint responsibility is generally understood and practised and equally strong evidence that it is on occasion ignored. The general effect of the evidence is that the doctrine is an established feature of the English form of government, and it follows that some matters leading up to a Cabinet decision may be regarded as confidential. Furthermore, I am persuaded that the nature of the confidence is that spoken for by the Attorney-General, namely, that since the confidence is imposed to enable the efficient conduct of the Queen's business, the confidence is owed to the Queen and cannot be released by the members of Cabinet themselves. I have been told that a resigning Minister who wishes to make a personal statement in the House, and to disclose matters which are confidential under the doctrine obtains the consent of the Queen for this purpose. Such consent is obtained through the Prime Minister. I have not been told what happened when the Cabinet disclosed divided opinions during the

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99 *Westland Plc: The Government's decision-making*, 4th report, HC 519 of 1985-86, July 1986, paras 190-216; see also Linklater, M and Leigh, D (1986) *Not with honour*

100 see Hugo Young, (1976) *The Crossman affair*

101 see the Prime Minister's answer on 15 November 1974, HC Deb vol 881, cc 271-4W

102 *Attorney-General v Jonathan Cape*, [1976] 1 QB 752, p768

> European Economic Community referendum. But even if there was here a breach of confidence (which I doubt) this is no ground for denying the existence of the general rule. I cannot accept the suggestion that a Minister owes no duty of confidence in respect of his own views expressed in Cabinet. It would only need one or two Ministers to describe their own views to enable experienced observers to identify the views of the others.....
> The Cabinet is at the very centre of national affairs, and must be in possession at all times of information which is secret or confidential. Secrets relating to national security may require to be preserved indefinitely. Secrets relating to new taxation proposals may be of the highest importance until Budget day, but public knowledge thereafter. To leak a Cabinet decision a day or so before it is officially announced is an accepted exercise in public relations, but to identify the Ministers who voted one way or another is objectionable because it undermines the doctrine of joint responsibility.[103]

He concluded that there had to be a time limit on the obligation of confidentiality for the enforcement of the Convention. Ten years, as in Crossman's case regarding the first volume of his diaries, was too long:

> In the present case there is nothing in Mr. Crossman's work to suggest that he did not support the doctrine of joint Cabinet responsibility. The question for the court is whether it is shown that publication now might damage the doctrine notwithstanding that much of the action is up to 10 years old and three general elections have been held meanwhile. So far as the Attorney-General relies in his argument on the disclosure of individual ministerial opinions, he has not satisfied me that publication would in any way inhibit free and open discussion in Cabinet hereafter.[104]

The case therefore accepted the principle of a legal obligation of Cabinet secrecy but that application would depend on the time period involved between Cabinet meeting/decision and its disclosure. It led to the establishment of a Committee of Privy Counsellors under Lord Radcliffe, which reported in 1976.[105] The Committee supported the notion of Cabinet confidentiality as preserving the necessary confidence to allow the effective transaction of its business, but also recognised the effect of the passage of time on the need for secrecy and also the public interest in publication of information on the workings of government. This suggested to the Committee that ministerial memoirs 'occupy an area in which compromises of principle are called for on each side'.[106] They proposed 'three working rules as to the reticence due from an ex-minister':[107]

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[103] *Ibid.* p770
[104] *Ibid*. p771
[105] Cmnd 6386. See HC Deb vol 888 cc 549-50, 21 March 1975
[106] Cmnd 6386, para 41
[107] Cmnd 6386, paras 56-57

> 56. We are able to extract from the considerations as to confidentiality that we have now laid out three working rules as to the reticence due from an ex-Minister. We will phrase them as follows:
>
> *(a)* In dealing with the experience that he has acquired by virtue of his official position, he should not reveal the opinions or attitudes of colleagues as to the Government business with which they have been concerned. That belongs to their stewardship, not to his. He may, on the other hand, describe and account for his own.
> *(b)* He should not reveal the advice given to him by individuals whose duty it has been to tender him their advice or opinions in confidence. If he wishes to mention the burden or weight of such advice, it must be done without attributing individual attitudes to identifiable persons. Again, he will need to exercise a continuing discretion in any references that he makes to communications received by him in confidence from outside members of the public.
> *(c)* He should not make public assessments or criticisms, favourable or unfavourable, of those who have served under him or those whose competence or suitability for particular posts he has had to measure as part of his official duties.
>
> 57. These obligations of reticence are not owed merely or even primarily to the individuals whose opinions, advice or qualifications are involved. They are public duties. They cannot therefore be released by the consent of such persons. The rules themselves and the general principle of which they are only the exponent are far-reaching and their application to the needs of particular sets of circumstances will often prove to be matter of debate and will call for sympathetic adjustment.

The report then considered the problem of enforcement, bearing in mind the Crossman Diaries litigation (noted above). It rejected a legislative solution as inappropriate, especially in view of the high offices the potential authors had held. However there was a need for 'some working procedure that will be both widely understood and easy to operate'.[108] Ministers should be made clearly aware of their obligations, through guidance from the Prime Minister in the *Ministerial Code.*

Every ex-ministerial author should submit a full text in advance to the Cabinet Secretary ('a critical and objective eye'). This would reassure fellow ministers of consistency in the application of the 'rules'. The Cabinet Secretary, acting at the request, and on behalf of the Prime Minister, would offer comments and tender advice, but was not a censor, as there would be no legal authority for this advisory role. If there was any objection by the Cabinet Secretary to a part of the text on national security or diplomatic grounds, 'it is in our opinion the positive duty of the author to give way to it... These are not matters upon which in the last resort he is at liberty to set his judgment against the official view', although the author would have a right of reference to the Prime Minister. 'But that should be the end. The

[108] para 70

Prime Minister's decision should be accepted as final'.[109] In other situations, the ultimate responsibility must be the author's, taking carefully into account the Cabinet Secretary's views, and informing the latter of his or her proposal to proceed with publication. The Committee rejected any type of tribunal of, say, Privy Counsellors to decide such disputes.

The report recognised that the time factor was 'the critical element', but that it arose differently in different cases.[110] Whereas security or similar concerns have their own timeframe, the problem of confidentiality of relationships, between ministers or between ministers and officials, is one which is enduring, not simply relating to the particular instances documented in a proposed text. Anonymity of official advice should be preserved during the service life of that official. The Committee noted that they had dealt mainly with books, and that a variety of other situations, such as media appearances, press interviews/articles or public lectures/debates could give rise to similar issues. They concluded that 'all we can say is that [the author] must do the best he can according to the circumstances'.[111] They recognised that it would be wrong and unrealistic 'to suggest that those taking part in the central processes of government should not keep diaries', but believed that their existence creates 'special difficulties' for 'the proper confidences of government'. They stated that 'it is not the making of a diary that matters: it is the timing of its publication', and suggested that diarists should make testamentary provisions to ensure adherence to the proper conventions.

The Prime Minister accepted the report's recommendations in full during his announcement of its publication. The *Ministerial Code* states that:[112]

> 18. The principle of collective responsibility and the need to safeguard national security, relations with other countries and the confidential nature of discussions between Ministers and their civil servants impose certain obligations on former Ministers who are contemplating the publication of material based upon their recollection of the conduct of Government business in which they took part. They are required to submit their manuscript to the Secretary of the Cabinet and to conform to the principles set out in the Radcliffe Report of 1976 (Cmnd 6386)

VIII Access to a previous Government's papers

As with the issue of ex-ministerial memoirs or diaries, access to the papers of a previous administration by former or current ministers raises similar questions of continuing confidentiality. The *Ministerial Code* contains the following guidance:[113]

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[109] para 79

[110] As recognised in the law on access to public records, such as the '30-year-rule'. See the Wilson committee report, *Modern public records*, Cmnd 8204, March 1981

[111] Report, para 97

[112] Cabinet Office, *MinisterialCode* repeated in para 107 which is primarily concerned with publications while in office

[113] Cabinet Office, *MinisterialCode*

> Cabinet documents
> 19. Ministers relinquishing office without a change of Government should hand over to their successors those Cabinet documents required for current administration and should ensure that all others have been destroyed. Former Ministers may at any time, and subject to undertakings to observe the conventions governing Ministerial memoirs, have access in the Cabinet Office to copies of Cabinet or Ministerial Committee papers issued to them while in office.
> 20. On a change of Government, the outgoing Prime Minister issues special instructions about the disposal of the Cabinet papers of the outgoing Administration.
> 21. Some Ministers have thought it wise to make provision in their wills against the improper disposal of any official or Government documents which they might have retained in their possession by oversight.

The Freedom of Information legislation will have some relevance here as public records, including Cabinet documents, will be made available on request unless they fall within one of the exemptions specified in the Act and the public interest in refusing disclosure is greater than the public interest in releasing information. The public interest in favour of release will increase in force the older the records become.

Other than in the memoirs/diaries context, the issue can be thrown into sharp focus when there is an inquiry into some controversial aspect of public policy. There was much discussion of the question of access by the Franks Inquiry into the Falklands in 1982-83 when former Prime Ministers expressed their concern about the availability of the papers of their administrations, especially if their permission were not sought.[114] Mrs Thatcher said that the question of access was one reason why that Inquiry was composed of Privy Counsellors. The access given to the Hutton and Butler inquiries to Government internal documents and advice highlights how conventions can be dispensed with when considered necessary.[115]

The issue of access was discussed in detail by Lord Hunt of Tanworth, a former Cabinet Secretary, in a 1982 article. He emphasised that the guidance was convention not law, because in law all government records are Crown property, and the government 'could, theoretically dispose at will of the papers of a former administration'.[116] The conventions reconcile two potentially conflicting requirements - the need for preservation for administrative and historical purposes and the need to prevent ministers from making unfair political capital at the expense of their predecessors. Hunt claimed that the convention applies to Cabinet papers 'without exception and if any question of releasing them to third parties arises, the consent of the Queen is always sought'. More generally the convention

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[114] 'Access to preceding Cabinets' papers in the United Kingdom', *Parliamentarian*, April 1983, pp 86-7

[115] For background on Hutton and Butler see Library Standard Note SN/PC/2599 *Investigatory Inquiries* at http://hcl1.hclibrary.parliament.uk/notes/pcc/snpc-02599.pdf

[116] Lord Hunt of Tamworth 'Access to previous Government's papers', 1982 *Public Law* 514, p515; also reprinted in G Marshall, *Ministerial responsibility*, 1989, pp72-76

applies to the papers of ministers and advice of officials. He listed three categories of papers generally excepted from the convention:

> (i) Papers which, even if not publicly available can be deemed to be in the public domain, *e.g.* letters sent by former Ministers to trade associations, trade unions, etc., or to Members of Parliament about constituency cases, or to members of the public.
> (ii) Papers, other than genuinely personal messages, dealing with matters which are known to foreign governments, *e.g.* messages about inter-governmental negotiations.
> (iii) Written Opinions of the Law Officers, which are essentially legal rather than political documents.[117]

However continuity of administration means that a new administration can not always be required to start with a totally clean sheet. The aim is 'to provide new ministers with all the information they need without politically embarrassing former ministers - but there is no neat formula other than common sense for applying it'. He attempted a formulation of the relevant aspects of the convention - although he emphasised that, like all conventions, the 'rules' on access were not static - based, in part, on the debate on the appointment of the Franks Review:

> (i) Current Ministers may not see the Cabinet papers of former Ministers of a different political party. Nor may they see other papers (except in a few well-defined categories) giving the unpublished views or comments of their predecessors or the advice submitted to them.
> (ii) Current Ministers may normally see the papers of former Ministers of the same political party provided the need to do so arises in the course of their current ministerial duties. There could be exceptional circumstances in which it might be appropriate first to seek the agreement of the former Prime Minister concerned.
> (iii) Before affording access to the Cabinet papers or other ministerial documents of a previous Government (whether of the same political party or not) to anyone not otherwise entitled to see them, the current Prime Minister would seek the agreement of the former Prime Minister concerned or, if he were not available, the current leader of his party. [118]

Furthermore, since documents of a previous Administration are retained in Government departments subject to these conventions, it follows that:

> (a) Former Ministers may have access to, but not retain, any documents which they saw when in office;
> (b) officials have a duty to provide present Ministers with all relevant information about departmental policy or past events subject to not disclosing the

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[117] *Ibid.* pp515-6
[118] *Ibid.* pp517-8 and see HC Deb vol 27 cc469, 8 July 1982 for debate on the appointment of the Franks Review.

> personal views or comments of previous Ministers or the advice submitted directly to them.[119]

Guidance is being formulated by the Department of Constitutional Affairs in respect of the impact of Freedom of Information on these traditional conventions.

[119] *Ibid.* pp518