8. Standards and accountability

Introduction

8.1 Volume 1 of this Report, *Findings and Conclusions*, explains the Inquiry’s approach to examining the adequacy of the response to BSE, which the Terms of Reference of the Inquiry require the Committee to do. This chapter explains the internal and external scrutiny to which Ministers and civil servants were subject during the period 1986–96.

8.2 Ministers and officials were not able to act entirely as they wished. One MAFF official told the Inquiry that he and his colleagues functioned in an organisation where the key decisions were made by Ministers who were required to operate under the law and answer to Parliament for the decisions and actions they took. Ministers were also accountable to Parliament for the actions of their Departments, and had to explain what they wished to do and why, and answer queries and criticisms. Government actions and decisions could be overturned by the Courts if they exceeded the powers available in primary and secondary legislation, or if they were deemed ‘unreasonable’. The process of decision-making was also subject to independent scrutiny by the Parliamentary Commissioner for Administration (the ‘Ombudsman’). Finally, the ‘Armstrong Memorandum’ and its successor, the Civil Service Code, described the standards of behaviour and action expected of all civil servants, independently of the policies of the Ministers of the day.

8.3 This chapter describes these systems of scrutiny and accountability, which were important in establishing and reinforcing the culture and norms within which civil servants and Ministers worked.

Ministerial accountability

8.4 Constitutionally, Ministers alone were accountable to Parliament for their own actions and also for those of their officials, who were seen as an extension of the Minister, acting on his or her behalf. Officials were accountable up the hierarchy within their Department to the Minister but it was the Minister who informed Parliament about any errors or delays.\(^\text{304}\)

8.5 A Cabinet Office memorandum to the House of Commons Treasury and Civil Service Committee in 1993–94 sought to distinguish ‘accountability’ from ‘responsibility’. Quoting the ‘Armstrong Memorandum’ of 1985 (described in more detail later in this chapter), it stated that:

\[^{303}\text{Note by the Head of the Civil Service: The Duties and Responsibilities of Civil Servants in Relation to Ministers, Hansard, 26 February 1985, col.129, para. 2}\]

\[^{304}\text{An exception to this is the position of the Accounting Officer described below at paragraph 8.17}\]
A Minister is accountable to Parliament, in the sense that he has a duty to explain in Parliament the exercise of his powers and duties and to give an account to Parliament of what is done by him in his capacity as a Minister or by his Department.305

Against this, Ministerial ‘responsibility’:

. . . implies direct personal involvement in an action or decision, in a sense which implies personal credit or blame for that action or decision.306

8.6 On this basis, a Minister would be accountable for the actions of his or her Department but not necessarily responsible for them.

8.7 The Inquiry has taken the view that it need neither adopt nor challenge this constitutional convention. It is not a helpful guide in considering how to assess the adequacy of the response to BSE, whether anyone should be criticised for any inadequacy, and what lessons can be learned and recommendations made for the future.

8.8 Holding Ministers accountable for any inadequacy may provide a means of ensuring the accountability of the executive to Parliament, by requiring Ministers to explain matters to the House, but it cannot provide the Inquiry with a means of considering how decisions came to be taken and actions implemented, or how the process of public administration can be improved. That requires a detailed examination of the precise part played by officials and Ministers, including what information was available to each individual, what Ministers were told by officials, what Ministers told officials, and who in fact was involved in decisions or actions. The story of how BSE was identified, how officials and Ministers considered what to do, and how the various control measures evolved and were introduced, is told in volumes 3 to 11 of this Report. The Inquiry Committee’s summary consideration of what happened and its conclusions are set out in volume 1.

The proper and effective use of powers and resources

Primary legislation

8.9 When a Bill was introduced into Parliament, Ministers had to explain its purpose in a speech in the Second Reading Debate. Generally, the senior Minister introduced a Bill while his or her junior Minister wound up the debate. They might be subject to questions from the Opposition and their own back-bench MPs, and therefore had to be able to explain what problem was being addressed, what solutions were being proposed and how these were embodied in the Bill. They had to demonstrate an understanding of all aspects of the problem and of alternative options for solutions and possible difficulties with the options chosen; and had to be able to explain why they had chosen a certain course.

8.10 Most Bills conferred on Ministers enabling powers to implement further measures administratively or in secondary legislation. Often, this required consultation with bodies representative of those likely to be affected. Again, Ministers, or officials on their behalf, had to explain their proposals, providing enough information to make the consultation meaningful – ie, to enable consultees to comment. They then had to give proper weight to comments received.

Review of secondary legislation

8.11 As described in Chapter 3, all secondary legislation laid before the House of Commons was subject to (a) examination by the Joint Committee on Statutory Instruments,\(^ {307}\) and (b) the 'negative resolution’ or ‘affirmative resolution’ procedures.

Parliamentary statements, Parliamentary Questions (PQs) and debates

8.12 Ministers had to explain, justify and defend their policies or actions to the House on other occasions. These included:

i. Statements: Ministers might make a statement as part of their plan for communicating a new or revised policy as, for example, Mr John Gummer did when he announced the making of the Regulations that introduced the ban on Specified Bovine Offal (SBO) in human food on 8 November 1989.\(^ {308}\) They might want to explain something which had happened or which they proposed to do, as when Mr Stephen Dorrell and Mr Douglas Hogg made statements on 20 March 1996 following the receipt of advice from SEAC on a possible link between BSE and vCJD.\(^ {309}\) Sometimes they might be pressed by back-benchers to make a statement about some recent event, such as an accident or other emergency.

ii. Parliamentary Questions (PQs): MPs could put forward questions for answer by the relevant Minister. Most were answered in writing but some were answered orally at one of the regular times set aside for this purpose. The Prime Minister had two such times each week, and periods on these and other days were allocated to other Departments on a rolling programme. Only a small number of oral questions could be dealt with on these occasions.

iii. Debates: much of the time of the House of Commons was given over to the various stages in the passage of legislation and to statements and PQs, but some was allocated to more wide-ranging debates. At the beginning of each annual parliamentary session, there was a debate on the legislative programme announced by the Government in the Queen’s Speech. Each day, there were Adjournment Debates, discussions limited to 30 minutes on topics proposed by back-bench MPs from any party. There were also so-called ‘Supply Day’ debates on topics proposed by the front benches of the opposition parties.

\(^{307}\) See Erskine May 1997, p. 591
\(^{308}\) YB89/11.8/1.1
\(^{309}\) M7 tabs 15 and 16
8.13 On all these occasions, Ministers would be briefed by officials. A statement was followed by a period of time at the discretion of the Speaker of the House\textsuperscript{310} (between ten minutes and an hour) for questions to the Minister. In debates, the Minister was expected to respond to the key points made by other speakers. Within limits, the Speaker of the House would give MPs an opportunity to bring up what they believed to be related issues – eg, if a MAFF Minister made a statement about the SBO Regulations, an MP might ask how local authorities were going to implement them and what finances had been provided. The MP whose tabled oral question was being answered had the right to ask the first supplementary question.

8.14 The range of possible topics that might be raised on such occasions, especially in Prime Minister’s Questions, was enormous. Hence, the briefing had to be concise, while also being accurate so that the Minister was not caught out under pressure – for example, by quoting figures that could not be supported. Inevitably, such briefing was defensive, and officials advised their Ministers not to stray from the agreed text. As with Q&A briefs (see Chapter 3), this defensive approach could underplay important doubts and caveats, and could inhibit frank discussion.

**Select Committees**

8.15 Select Committees were a means of enabling Parliament to examine the actions of the executive and call Ministers and officials to account in a more detailed and continuing way than was possible in debate. In 1979, the system was reformed so that separate Select Committees were established to shadow every Department. The MPs appointed to a Select Committee became familiar with the work of the relevant Department. Each Committee had a small secretariat to provide research and administrative support. The aim was to enable the Committees to engage in better-informed consideration of policy matters.

8.16 Each Committee decided which areas of policy it wished to explore and notified the Department accordingly. Usually, the Department and other interested parties prepared written evidence, and the Committee would generally call upon officials, Ministers and others to give oral evidence as well. Ministers giving evidence had to be well prepared to explain their policies and decisions.

8.17 Officials appearing before a Select Committee did so on the basis of a standard protocol, *Guidelines for Officials Giving Evidence to Departmental Select Committees*.\textsuperscript{311} This made it clear that they gave evidence on behalf of their Minister, and were therefore subject to Ministers’ instructions and remained bound by their duty of confidentiality to Ministers. Thus, they did not give their own views but had to follow the line agreed with their Ministers. However, there was one exception to this principle: Accounting Officers (Departmental Permanent Secretaries or Agency Chief Executives) had a personal responsibility for the use of the public funds voted by Parliament to their Departments or organisations, and had to account for their stewardship directly to Parliament (ie, to the Public Accounts Committee).

\textsuperscript{310} A senior Member of Parliament who is elected by his or her fellow MPs to preside impartially over their proceedings

\textsuperscript{311} . . . known after its original author as “the Osmotherly Rules” – Treasury and Civil Service Committee Fifth Report: The Role of the Civil Service [HC 27-II 1993–94], Volume I, p. xxxv, para. 120
The lawful use of powers and judicial review

Judicial review

8.18 As described in Chapter 4, several witnesses told the Inquiry how the possibility of ‘judicial review’ by the Courts was a factor in the Government’s consideration of how to address BSE. All decisions taken by Ministers and officials were potentially subject to judicial review.

8.19 In 1987, the Treasury Solicitor’s Department and the Cabinet Office produced guidance for administrators, The Judge Over Your Shoulder, about the basic principles of judicial review. This explained that the Courts addressed the question: what power or discretion had been conferred and had it been exceeded? It warned that the Courts had ‘developed a means of extended statutory interpretation which goes beyond the wording of the statute or subordinate legislation itself’. Hence, civil servants could not rely on the words of the statute or their own view of these alone; they also had to take into account the views already expressed by the Courts.

8.20 There were three bases for challenging a decision:

i. Illegality: the opportunities for getting the law wrong [were] potentially very wide indeed. The Courts would look at the purpose and the spirit of the Act in determining whether discretion had been used lawfully. So a power to do something ‘if the Secretary of State thinks fit’ was less wide than it appeared. The decision-maker had to consider the right questions and not take into account irrelevant considerations.

ii. Irrationality (or unreasonableness): ie, all powers and duties had to be exercised reasonably. However, the Courts had indicated that they would not substitute their view of what was reasonable for the decision-maker’s; they purported only to interfere when a decision was ‘so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it’.

iii. Procedural impropriety: ‘whether a person or body affected by a decision has been given a fair hearing’. The guidance noted that Courts were tending to describe this in more general terms as ‘a duty to act fairly’, and that this was ‘difficult to define and would “depend upon the facts and circumstances of the case”.

8.21 The guide drew attention to the need to avoid ‘fettering one’s discretion’. This meant that although it was legitimate to have a policy about how to treat cases so as to be consistent, a Department could not close its mind ‘to the circumstances of a particular case which might lead to the policy not being applied in that case’. Another aspect was bias – even the appearance or suspicion of bias – such as a conflict of interest. The duty to act fairly was further complicated by the doctrine

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312 The Judge Over Your Shoulder: Judicial Review of Administrative Decisions, Treasury Solicitor’s Department in conjunction with the Cabinet Office (MPO) Training Division, 1987, ISBN 0 7115 0130 0 (M11F tab 13), p. 3 para. 6
313 M11F tab 13 p. 4 para. 8
314 M11F tab 13 p. 6 para. 10. The principle is known as ‘Wednesbury unreasonableness’ after a leading case
315 M11F tab 13 p. 9 paras 13–14
316 M11F tab 13 p. 11 para. 17
317 M11F tab 13 p. 11 para. 18
of ‘legitimate expectations’, which were rights ‘over and above rights which derive from express statutory provision’. For example, a party could have a legitimate expectation to be consulted, basing this on case law or on past custom and practice.\footnote{M11F tab 13 p. 12 para. 19}

8.22 The guidance also mentioned what appeared to be a new development, citing a case where the Court would have been prepared to hold the Inland Revenue to an agreement not to use legal powers to pursue a claim for tax:

> It seems now that the courts will be prepared in certain cases to look not merely to the way in which the decision is reached but to indicate what that decision should be . . .

> It is not yet clear what precisely the courts mean by ‘abuse of power’ or how far they will extend its meaning.\footnote{M11F tab 13 p. 13 paras 21–2}

8.23 Other points mentioned were the need to avoid delegating a decision inappropriately to another Department or to an outside body,\footnote{M11F tab 13 p. 14 para. 23} and the fact, mentioned above, that the Courts would not substitute their own views for those of the decision-maker:

> . . . even if the courts do set aside the decision made, it is usually still for the decision-maker, rather than the courts, to make a fresh decision. It can happen that the same decision is reached second time round without taint of illegality.\footnote{M11F tab 13 p. 15 para. 24}

8.24 This guidance was reissued in revised form in 1995,\footnote{Judge Over Your Shoulder: Judicial Review: Balancing the Scales, Treasury Solicitor’s Department in conjunction with Cabinet Office (CPFS)) Development Division, May 1995 (M11F tab 14), pp. 4–5, para. 3} covering largely the same ground as the previous edition and describing what happened in a typical judicial review case. It discussed how powers should be exercised – ie, how to make good decisions – rather than describing how a decision might be challenged, and gave many more examples.

8.25 The actions of civil servants in all parts of the United Kingdom were potentially subject to judicial review in this way. The grounds on which judicial review might be sought were ‘substantially the same’ in Scotland as those in England and Wales, but the mechanics were ‘significantly different’ in Scotland.\footnote{M11F tab 14 p. 27 paras 35–6} The grounds were also the same in Northern Ireland, with minor but not significant procedural differences.

The Parliamentary Commissioner for Administration (the PCA or ‘Ombudsman’)

8.26 The PCA was appointed by statute to investigate complaints by individuals who felt they had suffered injustice as a result of maladministration by a Government Department. The PCA was accountable to Parliament and complaints

had to be routed to him or her through an MP, in acknowledgement of the interest of Parliament in the relationship between individual citizens and the executive.

8.27 The PCA did not interpret the law, but investigated whether a Department had acted correctly and fairly in carrying out its own interpretation of the law. Complaints about government policy, the investigation of crime, commercial matters or those involving international relations, did not fall within the PCA’s remit.

8.28 Guidance produced in 1995 for civil servants explained what the PCA could investigate and how the investigation would be carried out. This took the positive approach of offering guidance on good administration, rather than cataloguing what constituted maladministration. As it said:

The lessons are often simple:

- treat people fairly and consistently
- when giving advice, make sure it is correct and that you keep a record of all significant telephone calls and other conversations
- deal with things promptly
- if something goes wrong, investigate objectively, and if it is clear that the fault lies with the public authority, apologise sincerely and offer appropriate redress
- follow laid down procedures
- if procedures do not work, get them changed!
- when introducing new procedures or schemes plan carefully and, where practical, run pilot tests in advance to make sure systems work and staff are properly trained.

8.29 Well before this guidance was produced, staff at all levels, especially those working in areas dealing with the public, would have been familiar with what was expected as good administrative practice. Senior civil servants sought to impress on their staff the need to avoid generating complaints to the PCA. For example, Mr (now Sir) Richard Packer told the Inquiry that in 1993, as Permanent Secretary of MAFF, he had issued a note of guidance to staff following a case referred to the Ombudsman in which ‘action had fallen short in certain respects of the sort emphasised in this note’.

The constitutional role of the civil service

8.30 The role of the civil service – to advise Ministers of successive administrations on policy options and to implement their decisions – was underpinned by the
principles of impartiality, neutrality and objectivity. These rested largely on
convention and precedent. The relevant statutory provisions were restricted to
affirming, for example, that civil service appointments would be on merit and that
their recruitment would be based on fair and open competition.

8.31 In the 1980s, following the Ponting case\(^\text{327}\) and the Westland affair,\(^\text{328}\) there
was considerable debate about the nature and extent of civil servants’ duty towards
Ministers. In 1985, Sir Robert Armstrong, then the Head of the Civil Service and
Secretary to the Cabinet, drew up guidance on *The Duties and Responsibilities of
Civil Servants in Relation to Ministers*, often known as the ‘Armstrong
Memorandum’. It said that:

Civil servants are servants of the Crown. For all practical purposes the
Crown in this context means and is represented by the Government of the
day . . . The civil service as such has no constitutional personality or
responsibility separate from the duly elected Government of the day. It is
there to provide the Government of the day with advice on the formulation
of the policies of the Government, to assist in carrying out the decisions of
the Government, and to manage and deliver the services for which the
Government is responsible . . . The civil service serves the Government of
the day as a whole, that is to say Her Majesty’s Ministers collectively . . . The
duty of the individual civil servant is first and foremost to the Minister of the
Crown who is in charge of the Department in which he or she is serving.\(^\text{329}\)

It continued:

The determination of policy is the responsibility of the Minister (within the
convention of collective responsibility of the Government for the decisions
and actions of every member of it). In the determination of policy the civil
servant has no constitutional responsibility or role distinct from that of the
Minister. Subject to the conventions limiting the access of Ministers to
papers of previous administrations, it is the duty of the civil servant to make
available to the Minister all the information and experience at his or her
disposal which may have a bearing on the policy decisions to which the
Minister is committed or which he is preparing to make, and to give to the
Minister honest and impartial advice, without fear or favour, and whether the
advice accords with the Minister’s view or not. Civil servants are in breach
of their duty, and damage their integrity as servants of the Crown, if they
deliberately withhold relevant information from their Minister, or if they
give their Minister other advice than the best they believe they can give, or
if they seek to obstruct or delay a decision simply because they do not agree
with it. When, having been given all the relevant information and advice, the
Minister has taken a decision, it is the duty of civil servants loyally to carry
out that decision with precisely the same energy and goodwill, whether they
agree with it or not.\(^\text{330}\)

\(^{327}\) The (unsuccessful) prosecution under the Official Secrets Act 1911 of a senior civil servant who had revealed to an MP
information (some of it originally classified ‘confidential’) about British action in the Falklands conflict, and defended himself
on the basis that it was in the public interest to have done so

\(^{328}\) The leaking of two documents about the Westland Helicopter Company which, at the time, was the subject of Cabinet-level
discussion and disagreement about the choice between two ‘rescue packages’, one European, the other American. The
circumstances of the leak suggested that civil servants had been involved, possibly on the instructions of Ministers

\(^{329}\) *Hansard*, 26 February 1985, cols 128–9, paras 2–3. This was restated unchanged in the revised version of the Memorandum
issued on 1 December 1987, except that ‘duly elected’ was replaced in the later version by ‘duly constituted’

\(^{330}\) *Hansard*, 26 February 1985, col. 129, para. 5. This was restated unchanged in the 1987 version
8.32 There was some criticism of the Memorandum because of its apparent emphasis on the absolute nature of the duty owed by civil servants to the Government of the day and to their departmental Ministers; and because of the absence of any similar statement about the obligations of Ministers towards civil servants, in particular about what they might properly ask officials to do for them given the presumption of civil service impartiality, neutrality and objectivity. This view of the ‘Armstrong Memorandum’ was countered in a Cabinet Office memorandum to the Scott Inquiry, which was quoted in the Report (November 1994) of the Treasury and Civil Service Committee on The Role of the Civil Service:

... the Armstrong Memorandum cannot be given the interpretation that a civil servant has no duties except to the Government of the day... civil servants have a number of [other] duties including, like any other citizen, a general duty to obey the law and to deal honestly. They may also have specific professional duties... equally they may have dictates of conscience which are individual to them. The Armstrong Memorandum fully recognises that all these exist and is indeed designed to give guidance on what to do if civil servants feel that they are being given instructions which conflict with them.

8.33 Having considered this memorandum and other evidence, the Treasury and Civil Service Committee recommended that:

i. a new Civil Service Code should be drawn up;

ii. this should incorporate a new appeals procedure to strengthened and independent civil service commissioners, which would be available to a civil servant who was asked to do work which he or she believed to be incompatible with political neutrality; and

iii. this should be done by statute and a new Civil Service Act introduced accordingly.

8.34 The Government accepted the need for a new Civil Service Code, including a right of appeal to independent civil service commissioners, and such a code came into effect in January 1996. It maintained the position that civil servants were servants of the Crown, which meant in effect servants of the Government of the day, and that it was to the Ministers of that duly constituted Government that civil servants owed their duties. But this was set in the context of a broader duty on civil servants to act ‘with integrity, honesty, impartiality and objectivity’. The Code also said that it should be seen ‘in the context of the duties and responsibilities of Ministers’, which included:

i. the duty to give Parliament and the public as full information as possible about the policies, decisions and actions of the Government, and not to deceive or knowingly mislead Parliament and the public; and

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331 The Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions, which reported in 1996
334 The Civil Service: Taking Forward Continuity and Change, Cm 2748, January 1995, p. 4, para. 2.7. This set out how the proposals in the White Paper Continuity and Change (Cm 2627, July 1994) would be taken forward, taking account of the Select Committee’s Report
335 Civil Service Code, January 1996, para. 1
ii. the duty not to use public resources for party political purposes, to uphold the political impartiality of the Civil Service and not to ask civil servants to act in any way which would conflict with the Civil Service Code. 336

8.35 Thus the Code explicitly recognised the reciprocal nature of the duties laid on civil servants and Ministers. It also set out what a civil servant should do if required to act in a way which:

i. was illegal, improper or unethical;

ii. was in breach of constitutional convention or a professional code;

iii. might involve possible maladministration; or

iv. was otherwise inconsistent with the Civil Service Code. 337

First, the official should report the matter internally under the procedures laid down in his or her Department’s own guidance for its staff. If the response was not reasonable, he or she might report the matter in writing to the Civil Service Commissioners. Where a matter could not be resolved in a way which the civil servant concerned could accept, the Code was clear that ‘he or she should either carry out his or her instructions, or resign from the Civil Service’. 338

8.36 The Code formally recognised that civil servants had broader responsibilities to the public and Parliament as well as to their departmental Ministers. However, it was published less than three months before the end of the period with which the Inquiry is concerned. Although the issue of the role, duties and behaviour of civil servants was a matter of public debate throughout that period, 1986–96, it was the ‘Armstrong Memorandum’ which during that time constituted the formal guidance to civil servants.

336 Civil Service Code, para. 3
337 Civil Service Code, paras 11–12
338 Civil Service Code, para. 13