

Procedure Committee

Oral evidence: Powers of the House of Commons to call for papers, HC 1904

Wednesday 30 January 2019

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Members present: Mr Charles Walker (Chair); Bob Blackman; Mr Peter Bone; Sir Christopher Chope; Chris Elmore; Sir David Evennett; Helen Goodman; Mr Ranil Jayawardena; Alison Thewliss.

Questions 1-22

Witness

I: The Rt Hon Lord Morris of Aberavon, KG, QC.

Written evidence from witnesses:

– [Add names of witnesses and hyperlink to submissions]

Examination of witness

Witness: Lord Morris of Aberavon.

Q1 Chair: Lord Morris, thank you for coming to this inquiry, which has been convened at quite short notice. We are doing quite a lot of stuff around procedure at the moment, which is useful because we are the Procedure Committee. However, we are looking less at blue-sky thinking and more at the immediate issues coming before us as a result of Brexit.

You wrote a letter to *The Times*. I will read the last paragraph as a sort of introduction: "The probability is that future law officers will limit their written advice to the bare essentials, and only in private conversation reveal any possible qualifications to whatever actions the government is considering. If it was not satisfied with what was public knowledge, the Commons could have considered suggesting that the leadership of the opposition be given the full picture on a privy council basis."

Would you like to add to that introduction and to flesh out your concerns about what happened a few weeks ago?

Lord Morris of Aberavon: Thank you very much for the opportunity to give evidence on what I regard as a very important subject. I was the Attorney General during the war in Kosovo. On slim precedents, I had to provide the legal basis to avert an overwhelming humanitarian disaster. I was the leading counsel for the United Kingdom when, with nine other NATO countries, we had to appear as defendants in the International Court of Justice at The Hague, following a bid by Yugoslavia to stop the bombing.

I had given specific warnings to the Prime Minister regarding the Geneva convention, which we are obliged to implement. Our opponents would have seized on the issues that I had raised with the Prime Minister. The probability is that in the future, as I say in my letter to *The Times*, Attorneys General might economise what they say in writing and add orally to any matter they would not wish to publish. I note the words used in the 15th report of the Public Administration and Constitutional Affairs Committee of this House, which referred to the "chilling effect" that that might have. I cannot improve on those words.

The second point I want to make, briefly, is that the Opposition are entitled to be concerned about any legal advice. There is no precedent—or very limited precedent—for revealing it. That could have been achieved, as I say in my letter, by disclosure on Privy Council terms. I have always assumed—I may be wrong about this—that the reason Leaders of the Opposition and others of a similar rank are made Privy Counsellors is that they can be taken into the confidence of Her Majesty's Government on security matters and matters of that kind.

Q2 Mr Bone: I entirely agree with your analysis of the situation. However, what we found in the House of Commons was that a motion to publish



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was proposed. Her Majesty's Government did not oppose it—they effectively were saying, "It's okay to go ahead with it"—and then at a later stage decided, "Well, we're not going to publish this, even though the Commons has decided we should publish it." Then, of course, we had the debate on whether they were in contempt. I would argue that they quite clearly were in contempt, because they had not opposed the thing in the first place and then refused to comply with it afterwards. The House must decide what should and should not happen. The Government cannot say, "We're not doing it because we don't like it." While there is a strong argument for a convention, or even legislation, we cannot get away from the fact that the Government got themselves into this position by not opposing the Opposition's motion.

Lord Morris of Aberavon: I do not think I can assist you on the procedures of the House. I will confine myself to point 5 and possibly point 6 of your remit. That is a matter that is beyond me, but I can tell you that this is without precedent. I can deal with what might be regarded as precedents in very unusual circumstances. Perhaps it would be more advantageous for me to deal with those rather than with the procedure of the House, in which, although I was in the House for rather a long time, I would not profess to be an expert.

Q3 **Chair:** Is there a problem that needs a solution? I suppose what Peter was driving at is that the Government, in normal terms of trade, would have had a majority and defeated the motion, and we would not be having this inquiry because it would never have seen the light of day, but because the Government did not choose to defeat it—or perhaps could not defeat it, even if it had chosen to—we are where we are. This Committee is in the business of trying to find solutions to this conundrum. In your 42 years' experience as a Member of Parliament and as Attorney General, what do you think the House should consider doing to ensure that this does not become a precedent and embarrass existing and future Governments in a way that Members of Parliament would not want to see them embarrassed—and also, perhaps, put the national interest at risk?

Lord Morris of Aberavon: I hope you will forgive me for saying that you are now in the realms of procedure in the House, which I did say initially that I was not the best person to advise you on. All I can say is that the precedents for disclosure are very limited. Sir Nicholas Lyell, one of my predecessors, confirmed that he had advised on the Maastricht treaty—this was endorsed by the Foreign Secretary, and I have the dates here—in February 1993, and summarised the advice. Sir Nicholas said specifically that he knew of no precedent for disclosure of the Attorney General's advice to the House of Commons, or to anyone else.

In the case of the Iraq war, Sir Gus O'Donnell, the then Cabinet Secretary, said that, in view of the exceptional nature of the inquiry, given that they were dealing with matters seven years after the event, "without prejudice"—whatever that may mean; I think it's a piece of civil service nonsense in this context—it could be revealed on that occasion. But in the next sentence of his letter to Sir John Chilcot, he emphasised the



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importance of the fact that this was no precedent, and that precedent should not generally be waived, but in those exceptional circumstances he was prepared to do so.

There was controversy then, because Lord Goldsmith had given probably two opinions, and there was some argument about the quality of those opinions. It was very unusual, and Sir John Chilcot took over 10 years, I think, to reach a conclusion as regards the responsibility for the Iraq war. Those are the only two issues that I have come across.

- Q4 **Chair:** I am going to ask you one more question, and it is a hypothetical question. Let's pretend that in 1997, Tony Blair did not have a majority of somewhere in the region of 180—that he had been in a similar position to the current Government—and you had given that advice around Kosovo. If similar circumstances had prevailed in the House as happened a few weeks ago, and you were required to publish your legal advice, what would you have done? I know our current Attorney General is very concerned about where this could lead. If the circumstances were the same in relation to you—the choreography was the same in relation to your advice—what potentially would you have done? Would you have said “No”?

Lord Morris of Aberavon: I don't wish to refer to the details of my advice. In my book, if I can publicise that; I can tell you its price—*[Laughter.]* The Chairman gets 10%. In those circumstances, I would have been extremely reluctant. With the arguments I put forward—and I have not published my advice—my opponent was a very distinguished international lawyer, appearing for Yugoslavia, and he would have made mincemeat of my case. He would have seized upon it. I don't know what conclusion the court would have come to. They never did come to a conclusion on the substance, and then Yugoslavia went out of existence, but that would have been very damaging to my case.

There were nine defendants in The Hague for a week, and I was leading counsel. It would have done damage to my case if my warnings were quoted against me. That is the danger; that is why future Attorneys General—and I cannot emphasise this too much—will economise on the ink and speak orally to supplement their advice. That is what is going to happen. At the end of the day, there are going to be no gainers in this event. They will not put it down in writing.

- Q5 **Helen Goodman:** Thank you for coming to give us evidence this afternoon, Lord Morris. This is really an argument about trust, isn't it? The problem with which we were faced recently was that some Members felt that not producing this advice was about the national interest, and other Members felt that not producing the advice was about political interests. Without some mechanism for seeing the papers, we cannot really get to the root of that.

Could I put it to you that the arguments that you are putting forward today are very similar to the arguments that we heard before we introduced the Freedom of Information Act? Before we introduced it,



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senior civil servants said, "Oh, we won't be able to give Ministers free and frank advice. It is because of the Freedom of Information Act that Tony Blair went over to sofa Government" and all of that. Actually, it has not really turned out like that, and the Freedom of Information Act has been of great use to many citizens on many occasions. What is it about the legal advice that you think puts it in a different category from the general run of public papers covered by the FOI?

Lord Morris of Aberavon: Let me deal with the Freedom of Information Act first. In section 35, there is an exception for this. That is quite clear. Governments have relied on that in the past. The real problem is that the Attorney General and the Law Officers are in the same position as your family solicitor. If you are negotiating to sell your house, enter into a contract, engage somebody or get a job, or whatever, the advice has to be candid and full. The moment it is not candid and full, the public interest is breached. That is the real problem. Over the centuries, the Attorney General has been able to give candid and frank advice to Ministers, knowing it would not be revealed. That is in the public interest, to maintain the rule of law—that Governments are acting properly and legally. That is the comparison. It is exactly the same privilege as a family solicitor has.

Q6 **Helen Goodman:** But it is a false analogy, isn't it? For example, if you are in a dispute and you go to see your family solicitor about something, the solicitor tells you, the family, what the advice is. But we are the public and these negotiations are being undertaken in our interest, but we are not being shown the advice.

Lord Morris of Aberavon: But the Government is acting for you, and has to act properly and basically on the legal position as told to them. If there are any blemishes or weaknesses, they must tell their client. The Government is the client of the Law Officer in that respect. I have suggested that there is a means of having transparency, which I hope the Committee will take fully on board—as I am sure it will—by exchanging information to satisfy a concerned Opposition. I have been in opposition more years than I care for, and I know how anxious I would be to find information, but there is a mechanism for doing it. You have the Leader of the Opposition and maybe two or three others, who are Privy Counsellors. Why are they made Privy Counsellors? It is not just to have the title of "the right honourable", or whatever. It is to ensure that in moments of high national security they can be informed, and act properly and responsibly, on the basis of full information. I would respectfully suggest—I have done so in *The Times*—that the Opposition might well have considered that. Whether it was considered or not, I do not know. I have tried to find out, but I don't know.

Q7 **Helen Goodman:** I think it is a completely reasonable suggestion. But I am still not clear why legal advice to Ministers is any different from other advice that they receive from senior officials.

Lord Morris of Aberavon: Legal advice for the Government is in exactly the same position as the legal advice that you would be entitled to get as



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a private individual. There is no more or less to it than that. That is in order to maintain the rule of law. The occasions it has been waived are few and far between. It is a matter for the Attorney General, who—if I may be very pompous—is described as the guardian of the public interest in this way. That is his job. Public interest, as you will appreciate, is not like the interest of the public—it is the public interest. He has to decide that on all the prosecutions that come to him every day for consideration, as I did. He is in exactly the same position as your family solicitor.

Chair: We have quite a lot of people who want to ask questions, so we will go to Bob next.

- Q8 **Bob Blackman:** Lord Morris, you were in the position of being Attorney General. What was your practice in advising the Government? Would you write a considered legal opinion that the Cabinet could consider, and then answer questions verbally, to get everyone up to speed, or would you give more oral advice, rather than writing it down? What was your practice?

Lord Morris of Aberavon: I always gave written advice, either of my own volition or at the request of the Prime Minister. I never had a face-to-face meeting—I say this in my book—with the Prime Minister on legal matters. I attended war Cabinet as a member of it. Issues were raised then, but normally I put everything in writing, and it is there on the record today. I thought that was right. They were difficult problems; they were not easy problems. We were in a war situation where the precedents were very slim. The two precedents were some of my Conservative predecessors who ensured that Saddam Hussein did not bomb the marsh Arabs. They were fairly passive ones; we were engaged for 68 days—night and day—in bombing. In order to adhere to the Geneva convention, I personally gave my permission every day to each individual bombing raid. That's why they say my hair went white.

- Q9 **Bob Blackman:** Given that that was the practice that you undertook, if that precedent that we had last November had occurred before this and you were thinking, "This advice that I'm going to write down for the Cabinet and the Prime Minister could be revealed in the public domain", what would you have done under those circumstances?

Lord Morris of Aberavon: We're in a very hypothetical situation, but I would be very wary of putting into writing any material that might be revealed thereafter. We are in a very difficult situation. I probably would have put the bare bones in writing, then gone to see the Prime Minister and told him, "Well, look here, there may be other considerations." It never arose, so I cannot really give you an honest answer.

- Q10 **Bob Blackman:** What we are looking at is what the impact will be on future Attorneys General—they might be Labour, Conservative or another party. As they will be learned Members, they will say, "Well, hang on. I've now got to think about whether this could come out in the public domain while we're in the middle of some activity."

Lord Morris of Aberavon: The bottom line, Mr Blackman, is that I



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surmise—it is only a guess—that future Attorneys General will be very loth to put contrary arguments in writing. They will minimise—as I said, they will economise on the ink. They will go to a Prime Minister and take him to one side to say, “But look here, I have told you this much.” You see, the grounds of my advising in Kosovo were slim. I therefore had to do the best I could. According to Mrs Ogata, the UN High Commissioner for Refugees, thousands and thousands of Kosovans were being raped, murdered and removed from their homes. I quoted her advice in my submission to the Court in The Hague. We were in a very difficult position, and I would not like to live through that period again.

- Q11 **Alison Thewliss:** I have a couple of questions on how information should be shared. You mentioned Privy Council terms. I can see that there are about 600-odd members of the Privy Council. Why should these people be afforded information that 650 MPs should not be afforded?

Lord Morris of Aberavon: The 600 members of the Privy Council would never be told. I use that argument only on the basis that the Leader of the Opposition, and probably his senior colleagues, are members of the Privy Council. It would be given to them only on the basis that they have sworn an oath of secrecy not to reveal any advice they give. It would therefore not be a special privilege, but rather taking advantage of the machinery that somebody can be told on special terms. It is not a denial of anybody else’s rights; it is basically building on their particular personal position.

- Q12 **Alison Thewliss:** To expand on that, if a Committee in Parliament could be asked to look at that advice and say, “Well, we will look at that advice on terms of confidentiality on legal advice,” would that be acceptable?

Lord Morris of Aberavon: We are in a very hypothetical situation. The greater the extent of the publication of the advice, the greater the danger there is of it being made public. That was the problem on some of the occasions where there has been revelation—where there have been leaks. There were leaks regarding the advice on Maastricht, and there was a lot of academic discussion as regards the propriety of what I had advised on Kosovo. That was one of the reasons I put it in a narrative form in my book. Certainly, my actual advice was never published.

- Q13 **Chair:** Am I right in thinking it is the House of Commons’ duty to hold the Government to account, not its legal advice to account? That is your concern—that Parliament wants to hold the legal advice to account, not the Government who are acting on that advice.

Lord Morris of Aberavon: I pray in aid again the machinery that I suggested. There was and is a machinery that could have been used to satisfy the Leader of the Opposition and his immediate colleagues. If I may answer the lady who asked a previous question, his colleagues would have to rely on him to ensure that he acted in accordance with what he had been told and that he was not misleading his own colleagues. I think we could rely on that situation.

- Q14 **Mr Jayawardena:** I agree with your argument, but may I probe it a step further? The Prime Minister has said that in phase two of our Brexit



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negotiations, she wants to involve Parliament more, confidentially, by providing information to Committees. Is it the correct extension of your argument that the way to do that would be to have Committees of Privy Counsellors so that information could be shared confidentially, or is there another mechanism that could be used in that respect, and indeed, as an alternative to what you are suggesting?

Lord Morris of Aberavon: Whether it is a Committee or individuals is a matter to be decided in those circumstances. I have been a Member of the Opposition for longer than I wish to remember, and if there is concern about the validity of advice, there is a genuine reason for the Opposition to want to know if there is any weakness in it, but I have spelt out the dangers of making that public when other interests are also concerned.

- Q15 **Chris Elmore:** The first question I had has been asked by Alison; I just want to ask about when you were shadow Attorney General. I assume you were a member of the Privy Council from the minute you were appointed as the shadow Attorney General, whenever that was. On the advice you were given, do you think there was a positive relationship between yourself as shadow Attorney General and the Attorneys General you worked with? Did the usual channels work on the advice that you were being given on, I assume, a regular basis on the various events that you were advising Leaders of the Opposition on throughout your time in the Commons? I am trying to understand how Privy Council terms works and whether there have been occasions when it has failed miserably, regardless of which party is in government.

Lord Morris of Aberavon: I think I was a Privy Counsellor for rather a long time before I became shadow Attorney General, and I have the record of being shadow Attorney General for 18 years, which is not a matter to be proud of. There was a close relationship between Sir Nicholas Lyell, Sir Patrick Mayhew and myself, particularly on Irish matters. I well recall that I was certainly told—I remember the name of the individual, but I will not say it—about a deportation matter, and I was privileged in the legal sense with information when I was shadow Attorney General. They were few and rare occasions, but the machinery was there, and the relationship between the Law Officer and the shadow Law Officers was obviously quite close for all the time I remember.

- Q16 **Sir David Evennett:** I have two quick points. There may be 650 Privy Counsellors, but very few would be advised of particular information if there is relevance. I want to put on the record that it is not everyone—all 650—getting it. I certainly would not want to be bothered on everything because it is not relevant.

My main point is that lawyers normally like to put things in writing rather than give oral advice, because that is always open to dispute. If you were not able to write something down because it would be published subsequently, would you not be worried that giving oral advice would also not be good, because what you actually said to whomever could always be disputed?



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Lord Morris of Aberavon: You can give oral advice. Presumably you would see the Prime Minister with her private secretary there, so there would be less room for dispute, although of course it could be disputed. I agree entirely that there are dangers with giving oral advice, but that will be the inclination of future Law Officers. With respect, that is what I think the House has to face: that there will be less inclination to be full, frank and candid, in accordance with what has been termed by the rule of law.

I have just been handed the evidence given by the director-general of the Attorney General's office in a case from five or six years ago, which is absolutely worth reading. I recommend it to the Committee. It is from the case of *Savic v. the Information Commissioner*, dated 16 December 2015. It was sent over to me when I requested guidance as regards the position to date. She sets out—much better than I ever could—in a 10-page document the rationale for this period. I hope Committee members will avail themselves of it. There was certainly no restriction when I was handed the copy this morning. I have looked at it very closely and have been tremendously impressed by the quality of the advice.

Q17 **Sir Christopher Chope:** The need for the Law Officers to be independent, and to be seen to be independent, is a fundamental part of our constitution. I was in Peter Rawlinson's chambers, and I remember when he was appointed Solicitor General, and then, in due course, Attorney General. In those days, the convention was that Law Officers were knighted on appointment, in the same way as High Court judges are, in order to demonstrate that they are above and beyond patronage.

More recently that has not happened, which means that there can be seen to be pressure on the Law Officers not to be as independently minded as they might otherwise have been, because if the time comes when they get sacked, they may be denied the knighthood that, in the old days, would have been theirs as a right from the outset. Do you think it would be a good idea, at a time when the independence of the Law Officers is perhaps being questioned, to reinstate the convention that Law Officers should be knighted on appointment?

Lord Morris of Aberavon: That is well beyond my pay grade. I got my knighthood in 1999.

Q18 **Chair:** Which was not on appointment.

Lord Morris of Aberavon: No. I think I am right in saying—we are getting into a very difficult field—that John Major stopped the Lord Mayor of London being knighted on appointment; they were knighted at the end of their tenure instead. I certainly got mine when I had been released from office. I was in Brittany at the time enjoying a few days' leave when I got the message that the Prime Minister was going to recommend me. I do not understand it really. I did not investigate.

Q19 **Chair:** Going back to your suggestion about the Leader of the Opposition being briefed, what would be the mechanism to regulate that? I know you do not want to get involved in procedural matters, but no Government would want the Leader of the Opposition basically camped out in the



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Prime Minister's office, deciding that he or she wanted access to whatever they wanted access to, almost without discrimination. There needs to be a mechanism to somehow limit the appetite of the Leader of the Opposition for getting hold of every paper that it pops into their head they want to see.

Lord Morris of Aberavon: Before the Government can decide what they intend to show the Opposition, the aim should be to satisfy the Opposition that the advice published by an Attorney General or Law Officer is full, frank and a true reflection of the content. I would not have thought that there was any practical difficulty with that. It obviously will be limited to what is essential for the occasion. I cannot visualise any difficulty—no more than on security matters. I suspect that in the period that the Leader of the Opposition has been leader, he will have been apprised of security matters, as all Leaders of the Opposition that I know have been apprised of security matters, quite outside this particular field.

Chair: Right. Does anyone have any more questions? That has been incredibly helpful.

- Q20 **Helen Goodman:** It has been very helpful. The examples you gave, Lord Morris, were from the Kosovo war and Northern Ireland. Obviously, those are areas where national security and the work of the Law Officers overlapped. To be clear, your point is not confined to areas where national security arises, is it? Your point is across the board.

Lord Morris of Aberavon: Across the board, yes. The fundamental point is that wherever the Opposition are in doubt about the frankness of what has been revealed or put in the public domain as regards legal advice, they might avail themselves of being told on Privy Council terms matters that perhaps should not be in the public domain.

- Q21 **Chair:** On the basis that legal advice should be somewhat privileged between the person providing it to the client, which in this case is the Government.

Lord Morris of Aberavon: I adhere to the convention, fully. The exceptions that I have looked at very carefully and dealt with earlier have been very small exceptions. Usually, they were dealt with by summarising what was in the opinion of the Law Officers, and that has, in fact, satisfied the Opposition.

- Q22 **Sir Christopher Chope:** What is the sanction against a Privy Counsellor who divulges information that he or she has received on Privy Council terms?

Lord Morris of Aberavon: I have no idea. There have been occasions where someone has lost their membership of the Privy Council, I suspect. If you cannot rely on a Privy Counsellor, who can you rely on?

Chair: The Leader of the House, I have just been reminded, is President of the Privy Council, so she might be best placed to answer that question when we next see her.



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Sir Christopher Chope: We have a situation in this House at the moment where the Member for Peterborough was in breach of her oath or affirmation at the time she was appointed as a Member of this House. She has now been convicted, yet we seem to be absolutely impotent to do anything about it. That is why I asked whether there have been any sanctions in such a situation.

Chair: I think our witness has made it clear that this is not an area on which he feels he would like to speculate. Lord Morris, thank you very much for coming to see us. Hopefully that was not too painful for you. It was certainly enlightening for us. It was a pleasure having you here.

Lord Morris of Aberavon: It was Sir Patrick Hastings, I think, who said, "To be the Attorney General is to be in hell." [*Laughter.*] That was 1923.