



**WORKING  
WITH  
PARLIAMENTARY COUNSEL**

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# WORKING WITH PARLIAMENTARY COUNSEL

## INTRODUCTION

- 1 This document sets out, for Government departments—
  - the main services provided by the Office of the Parliamentary Counsel (“OPC”);
  - how departments can get the best from those services (including how best to instruct Counsel in OPC); and
  - what departments are entitled to expect from OPC and what OPC needs from departments in order to be able to help them in the most effective way.
- 2 It is addressed to everyone who is involved directly or indirectly in the work of a departmental team that is instructing Parliamentary Counsel, and also to Counsel themselves.
- 3 Some parts of what follows may be of more interest to departmental lawyers than to others, but even the parts that relate to writing instructions for OPC are also likely to be useful to those who need to know what their lawyers will need to prepare instructions and how they will be going about it.
- 4 The main document is intended to be comprehensive. It does not necessarily need to be read from cover to cover.
- 5 This document is supplemented by an Annex that contains an index of technical terms and abbreviations used throughout the document.
- 6 This document, a summary of this document and a check list for those preparing instructions can be found at -  
<http://www.cabinetoffice.gov.uk/resource-library/working-parliamentary-counsel>
- 7 For Bill teams this document should be read in conjunction with the “*Guide to Making Legislation*” (which is produced by the Cabinet Office to help departments manage their legislative projects). Here is a link to that guide –  
<http://www.cabinetoffice.gov.uk/resource-library/guide-making-legislation>
- 8 OPC welcomes comments on this document. Any suggestions should be sent to John Healy in OPC: [John.Healy@cabinet-office.x.gsi.gov.uk](mailto:John.Healy@cabinet-office.x.gsi.gov.uk)
- 9 This document will be updated from time to time to take account of changes and the output from lessons-learned exercises on projects (see paragraphs 414 to 418).
- 10 It was last updated on 6 December 2011.

## OPC AND ITS FUNCTIONS

### What is OPC?

- 11 OPC is a centrally provided service located in the Cabinet Office. OPC is funded partly by the Cabinet Office and partly from contributions made, according to an agreed formula, by the departments that use its services.
- 12 OPC is headed by the First Parliamentary Counsel and Permanent Secretary (“1st PC”). Stephen Laws, the current 1st PC, will be succeeded by Richard Heaton on 1 February 2012. 1st PC’s deputy, Second Parliamentary Counsel (“2nd PC”), is currently David Cook.
- 13 OPC’s full complement is 65 staff, 50 of whom (including 1st and 2nd PC) are legally-qualified “Counsel” of differing seniorities and grades and 15 of whom provide further support to the work of the Office. The Counsel all have specialist expertise in legislative drafting, and in advising on related matters, such as Parliamentary procedure.
- 14 Counsel are organised into six teams, one of which supports the 1st PC in his role as adviser on certain constitutional matters to the Prime Minister and the Cabinet Secretary. Each team is allocated to the legislative projects of one or more particular departments.
- 15 OPC has a Chief Executive, currently Jim Barron, who is responsible, under 1st PC, for the management of the support staff and for other aspects of the administration of OPC.
- 16 OPC and the Offices of the Parliamentary Business Managers in both Houses constitute the Government in Parliament Group within the Cabinet Office. The Offices of the Parliamentary Business Managers support—
  - the Leader and deputy Leader of the House of Commons;
  - the Leader and deputy Leader of the House of Lords;
  - the Chief Whip in the House of Commons and the other Government whips in the Commons;
  - the Chief Whip in the House of Lords and the other Government whips in the Lords.

### What is OPC for?

- 17 OPC’s main function is to provide drafting services and procedural and other handling advice to legislating departments in connection with—
  - the Bills the UK Government wants prepared for introduction into the UK Parliament;
  - the draft Bills<sup>1</sup> the UK Government wants to be published for pre-legislative scrutiny or other public consultation; and

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1. In this document references to draft Bills includes references to parts of draft Bills. Sometimes the UK Government will wish to publish a set of draft clauses and Schedules, instead of a draft Bill.

- all statutory instruments (“SIs”) that amend primary legislation<sup>2</sup> (including those that make significant non-textual amendments).
- 18 OPC and 1st PC also have additional functions that are not directly related to the preparation or handling of primary legislation or SIs for central Government departments.
- Some counsel (currently two) will be on loan to the Law Commission.
  - One Counsel is lent for two days a week to the Welsh Assembly Government (“WAG”).
  - 1st PC is an adviser on certain constitutional matters to the Prime Minister, the Cabinet Secretary and the officials who work to them.
- None of these additional functions is covered by this document.
- 19 OPC aims –
- to achieve the highest standards, in terms of both quality and timeliness, in the drafting and procedural handling of the government’s legislative programme (including Finance Bills<sup>3</sup>, “handout” Bills<sup>4</sup> and draft Bills for pre-legislative scrutiny or other public consultation)<sup>5</sup>; and
  - to provide the best possible service to Government departments in connection with the other matters on which OPC’s advice or other assistance is sought (in particular, in the vetting and drafting of subordinate legislation).
- 20 Each legislative project (Bill, draft Bill or SI) will be allocated to a team of Counsel. A team for a Bill or draft Bill will consist of at least two Counsel and may consist of more. Sometimes one Counsel will be asked to vet or draft an SI without the assistance of another. Counsel are likely to be involved in more than one legislative project at the same time, sometimes in differently constituted teams. They will explain their other commitments and how they will need to organise priorities.
- 21 OPC’s work on Bills and draft Bills is organised to meet the needs of the Government’s legislative programme, as agreed by Cabinet on the recommendation of the Cabinet Committee on Parliamentary Business and Legislation (known as “PBL Committee”). Ministerial responsibility for the management of the legislative programme rests primarily with the chair of PBL Committee, currently the Leader of the House of Commons, and the other Government business managers (the Leader of the House of Lords and the Chief Whip in each House and their deputies). The Finance Bill is outside the PBL Committee system but still needs to be fitted in with the rest of the programme.<sup>6</sup>
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2. OPC usually deals with SIs by vetting drafts provided by the department. However, OPC has the function of drafting all Transfer of Functions Orders under the Ministers of the Crown Act 1975 (“TFOs”) on instructions provided by the department, and at other times departments may agree that it would make more sense for certain SIs to be drafted in OPC on instructions, rather than vetted.

3. Finance Bills are not submitted to or considered by the PBL Committee and are not subjected to the clearances described in paragraph 275.

4. Handout Bills are Bills prepared for the Government for handing to private members for introduction as private members Bills.

5. OPC has objectives which encapsulate standards that Counsel apply to their own work in the preparation and drafting of legislation: see paragraphs 52 to 54.

6. Exceptionally other financial legislation or emergency legislation may also fall outside the PBL Committee system.

- 22 At official level Counsel work to achieve OPC's aims by establishing close working partnerships with the Bill teams in legislating departments (or with those working on an SI) and their lawyers and also, in the case of Bills and draft Bills, with the Cabinet Office Legislation team (the part of the Economic and Domestic Secretariat in the Cabinet Office that services PBL Committee - see paragraphs [275](#) to [284](#)).
- 23 This document sets out the conditions for enabling these partnerships to work well and for facilitating effective teamwork between all the officials working on a legislative project, including members of OPC.

## SERVICES AVAILABLE FROM OPC

### What does OPC do?

- 24 OPC provides a number of different services in response to requests from departments. Authority given by or on behalf of PBL Committee is required for Counsel to be committed to a particular Bill project<sup>7</sup>. But it is always possible to approach OPC in advance for some preliminary assistance with a project wherever that is sensible eg in order to facilitate the proper planning of the legislative programme. The early involvement of OPC in a proposed project can avoid problems at a later stage.
- 25 In addition, it is common, in order to be able to meet the deadlines for the legislative programme, for it to be necessary in at least some cases to anticipate formal authority from PBL Committee<sup>8</sup> for the commitment of OPC resources to particular tasks.
- 26 A request to OPC for the provision of services should take the form of instructions, but the instructions can be more or less formal, according to the service required and the circumstances. For some matters they do not need to be in writing.<sup>9</sup>

### *Provision of services*

- 27 OPC is able to respond to instructions to do any of the following –
- to advise on proposals for a legislative project;
  - to advise on the planning of a legislative project;
  - to advise on Parliamentary procedure or other handling issues relating to a Bill;
  - to draft a Bill;
  - to draft amendments for a Bill;
  - to draft motions for Parliament (eg programme motions, allocation of time motions, motions for financial and ways and means resolutions etc.);
  - to advise on implementation of an Act;
  - to vet an SI;
  - to draft an SI.
- 28 All of the services that relate to Bills (or draft Bills) potentially constitute different components of the single comprehensive service that OPC provides for every legislative project that is given the go-ahead by PBL Committee, and also for every Bill (principally the Finance Bill) that is not subject to the PBL Committee system. Even the vetting or drafting of any SI may be incorporated in the comprehensive service (eg where implementation involves SIs that make consequential or transitional provision).

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7. Other than those, like the Finance Bill, which are outside the PBL Committee system.

8. In addition, PBL Committee's main decisions on the legislative programme need to be endorsed (with or without modifications) by Cabinet, but it is not usually practicable to await that decision before starting work on a Bill.

9. So it is usual for instructions to draft a Bill to be in writing and relatively formal. Instructions to advise on Parliamentary procedure may be oral or relatively informal, or they may simply be inferred from the continuing relationship between the OPC team allocated to a project and the departmental Bill team.

- 29 OPC is also able to provide particular services separately and, as mentioned above, may be able to do so in advance of a successful bid or other formal authority from PBL Committee. It is important to emphasise that a relationship between OPC and a department on a particular project does not have to begin with instructions to draft. Other services may be needed earlier. Indeed OPC should always be involved in the planning of a legislative project before instructions to draft are delivered.
- 30 The circumstances in which it is necessary or appropriate to ask OPC to vet or draft an SI are specified in more detail in the GLS SI Drafting Guidance which can be found on LION (see paragraphs 2.3.6 onwards in particular –

<http://www.knowledgenetwork.gsi.gov.uk/lion2/areapres.nsf/70601a68a73227d480256e8c004bca59/d9b86035d119cefe80257369005a97d1?OpenDocument>

Any question whether OPC are able, in special circumstances, to take on SI work outside the cases described there should be referred to 1st PC. Usually OPC vets rather than drafts SIs but circumstances may make it more appropriate to ask for the SI to be drafted on instructions.

*Management of priorities when providing services*

- 31 OPC is required to give priority to Finance Bills and similar “Budget” Bills and to Bills that have been the subject of successful bids for inclusion in the Government’s legislative programme of Bills and draft Bills. The following priorities also apply in practice –
- Bills already in the House are likely to take the highest priority, because they are usually on timetables that are more inflexible.
  - Bills for presentation and hand-out Bills are given priority over draft Bills.
  - Bills and draft Bills are given priority over SIs.
- 32 Further decisions about priorities are made by 1st PC, who is accountable for the decisions to the Government’s business managers and PBL Committee. In the usual case (where PBL Committee authority is required for work on a Bill), OPC will keep the Cabinet Office Legislation team informed about services provided before authority is granted.
- 33 PBL Committee expects 1st PC to ensure that the highest priority amongst Bills that have been granted a place in the legislative programme is given to the Bills for which the department have prepared a full and realistic delivery plan. Full drafting on a Bill should not begin until there is one.
- 34 It is important to note that the workload of OPC is significantly influenced by four factors.
- The Government business managers usually insist that the vast majority of Bills in the legislative programme must be ready for introduction early in the Session. In a normal year the first week of the Session may be the target date for almost all Bills until comparatively late in the day.
  - Draft Bills for pre-legislative scrutiny normally have a publication target date that will allow a three month consultation period and sufficient time to instruct on and

revise the Bill in response to the consultation before the Bill can be introduced near the beginning of the next Session.

- Finance Bill drafting is subject to a similar timetable. Draft Finance Bill provisions are prepared in time for exposure in the Autumn. The current presumption is that most Finance Bill provisions that can be exposed to early public view will be drafted according to this timetable. All the provisions for the annual Finance Bill then need to be ready for the Budget Statement in the Spring and the early introduction of the Finance Bill shortly after the end of the Budget debates.

- OPC is kept very busy throughout the Parliamentary Session by work on the handling and amendment of Bills in Parliament. There is likely to be intense pressure in advance of each amendable stage; and the stages of “ping-pong” between the Houses - as the Bill approaches Royal Assent - towards the end of the Session can seriously interfere with the preparation of other Bills for the new Session.

35 A consequence of these factors is that Counsel in OPC often take much of their annual leave in Parliamentary recesses, and during the summer recess in particular. This means that planning should usually allow for Counsel to be unavailable for a period during August and September. An OPC team working on a Bill will understand the need to give the departmental team as much notice as possible of their leave plans.

36 The other factor that must always be kept in mind is that drafting takes time and invariably involves several “rounds” of drafting: with, in each round –

- the OPC team providing a draft in response to instructions – possibly after some discussion with the department about the instructions,
- the department then taking time to consider the draft and, if necessary, to consult stakeholders;
- the department responding with comments which, whatever form they take, expressly or implicitly amount to further instructions for additions or other changes; and
- the OPC team then needing more time to consider and possibly discuss the further instructions and to respond with a new draft that starts another round.

### **Why is it important to have the services provided by OPC?**

37 The work of OPC is important for the following reasons.

- Government policy that depends on the enactment of legislation will not be delivered unless the legislation is properly drafted and effective.
- Unless legislation is clearly expressed and simple to apply, large amounts of both public and private resources can be wasted on undesirable litigation.
- Proposals for legislation are at the heart of Parliament’s business and of the democratic process, with Government Ministers spending much of their time in both Houses defending and explaining the policy and wording of Government Bills.
- The drafting of primary legislation sets both the context (by providing the powers) and the standard (by example) for the drafting of all other legislation, including, in particular, SIs.

- The way legislation is structured and expressed is essential to the preservation of a stable constitutional relationship between Parliament and the courts. It is important that the way legislation is drafted does not debase the coinage of communication between Parliament and the courts, eg through obscurity or the inclusion of extraneous, unnecessary matter.
- 38 The need to ensure that legislation is both effective and clear is made particularly important by the fact that, once an Act has received Royal Assent, it is likely to take at least two years to get an amending Act through - eg should it be necessary to correct anything that was not right when the Act was passed. Acts of Parliament are “aimed” at their targets, in the sense that they are launched at Royal Assent in a form that will either succeed or fail to achieve the desired outcome. Once launched they cannot then be “steered” to the target.
- 39 The need to preserve a stable constitutional relationship between Parliament and the courts means that Counsel will always have an eye on a Bill’s long-term consequences for the health of the statute book, and the appropriate distinction between the legislative function of Parliament and the interpretative role of the courts. It is a responsibility of Counsel to protect the integrity of the legislative process, so that the judiciary’s settled understanding of the process and this distinction are not disturbed.
- 40 The Government’s interests are not served by meeting the short-term interests of one Bill in a way that might undermine the effectiveness of the whole process for the future.

#### **How are services obtained from OPC?**

- 41 A request to OPC for the provision of services should be made to 1st PC unless it relates to a project that is in progress and has already been allocated to a particular Counsel.
- 42 The departmental legal adviser will wish to be involved in the request. However, it does not follow that all subsequent dealings with OPC have to take place through the department’s lawyers. The department should make arrangements with the Counsel allocated to their work, and with their own lawyers, about the most suitable lines of communication with Counsel on different topics.
- 43 The initial request to OPC for services for a particular project should begin by setting out –
- the nature of the whole project and its likely scale;
  - anything that is known about the timetable and deadlines that are likely to apply to the project as a whole; and
  - the department’s understanding of the current status of the project in the programme and its importance to the Government.
- 44 This is because it is much better for 1st PC and the relevant team leader to have as much information as possible to facilitate a determination of –
- the size of the OPC team that will eventually be needed to handle the project;
  - when Counsel will need to be available to work on it; and
  - the experience that will be needed by the Counsel allocated to the team.

- 45 It is also important, in the interests of the department as well as OPC, that any predictions that are made about the things mentioned in paragraph 43 are as realistic and as accurate as possible. Projects often run into difficulties if they are planned on the basis of over-optimistic assumptions about the resources needed to complete them, or about the deadlines for instructions that it will be possible to meet in practice. Difficulties of this sort can have a seriously disruptive effect both on the project in question and on other projects.
- 46 Similarly, wherever a request for a particular service is sent to OPC in connection with a project on which work has already begun, it should always be made clear - unless it already is - both whether there is a deadline that applies to the provision of the service and (if so) what it is.
- 47 The initial request for a service should give contact details for the officials who are involved in the instructing process and their availability. There should always be someone available to answer questions in the period immediately following the delivery of instructions, when the allocated Counsel are likely to be trying to get to grips with them. These contact details of team members should be kept up to date with prompt information about any changes. Counsel accept an obligation to reciprocate with prompt information about their own contact details and availability.
- 48 More guidance is given below about what should be included in the instructions for the provision of particular services (see paragraphs 131 to 274 for instructing on a Bill).

## **WORKING METHODS - GENERAL PRINCIPLES**

### **Working in partnership**

- 49 As part of the Cabinet Office, OPC is signed up to the compact governing cross-departmental working. It is expected that departments will embed the principles set out in the compact in the way they work with OPC. The compact can be found at –
- [http://www.civilservice.gov.uk/assets/compact\\_tcm6-3997.pdf](http://www.civilservice.gov.uk/assets/compact_tcm6-3997.pdf)
- 50 The compact sets out the principles that govern cross-departmental working; and they are principles which are particularly relevant to the partnership between drafters in OPC and instructing departments.
- 51 The partnership between the team allocated to a project in OPC and the departmental team should make the best use of the strengths of each. In the joint enterprise both need to rely on the other, to recognise their respective strengths and to work together to take advantage of them. The working methods should also avoid any unnecessary duplication of effort in the department and in OPC.

### **OPC's responsibilities and strengths**

- 52 OPC has objectives which encapsulate standards that Counsel apply to their own work in the preparation and drafting of legislation. These are objectives for legislation which OPC shares with the other offices in the Government in Parliament Group: the Office of the House of Commons Business Managers and the Office of the House of Lords Business Managers.
- 53 For Acts our standards are represented by the following objective –
- “Primary legislation for which we are responsible will, when enacted, meet the following standards, striking an appropriate balance between them where necessary.
- It will be effective for implementing the policy of the Government in the manner intended by Ministers.
  - It will be as clear as possible, so as to minimise the risk that litigation will be needed to determine its meaning.
  - It will be framed in a manner that both facilitates its explanation by Ministers in the context of their wider policy proposals and minimises the risks of any unintended, adverse effect on the construction of other legislation or on the established constitutional relationship between Parliament and the courts.
  - It will set a good example, in terms of effectiveness, consistency and drafting generally, to legislative drafters throughout Government.”
- 54 For Bills our standards are represented by the following objective –

“Primary legislation for which we are responsible will, when introduced into Parliament or published in draft, meet the standards above to the greatest extent practicable in the circumstances and will do so at least so far as necessary to ensure that the introduction

or publication at that time strikes an appropriate balance between –

- the risks of delaying introduction or publication; and
- the risks that a failure to meet those standards at that stage will have an adverse effect on –
  - the management or handling of the legislation’s passage through either House, or of the consultation about it;
  - the management of the legislative programme generally or of the Government’s other Parliamentary business; or
  - the communication or implementation more generally of the policy to which the legislation relates.”

55 The responsibilities of Counsel may appear at times to create a tension between their own objectives and the immediate objectives of the department.

- 1st PC and all the other Counsel share a responsibility to the Government to deliver the legislative programme as a whole. This involves a close working relationship with PBL Committee and the Cabinet Office Legislation team. They also have a close working relationship, and an organisational link<sup>10</sup>, with the Government Parliamentary business managers and their officials. Responsibility for the programme may mean make it necessary for Counsel to draw attention to respects in which that responsibility conflicts with what is wanted for a particular Bill. It also means that 1st PC may have to deploy Counsel in a way that gives priority to the programme over the immediate interests of a particular Bill.
- The Counsel in charge of a Bill has a responsibility to brief the Law Officers as members of the PBL Committee on matters of legal policy to which a Bill may give rise, including matters involving the rule of law, retrospectivity and matters involving fundamental rights and freedoms including those arising under the European Convention on Human Rights (“ECHR”)<sup>11</sup>. This responsibility extends to amendments in the House requiring PBL Committee clearance.
- In this context, Counsel in OPC also have a particular responsibility to do their work in a way that protects the integrity of the statute book and of the legislative process generally (see paragraphs 37, 39, 40 and 52 to 54). The need to protect the process and to secure the effectiveness of legislation more generally may sometimes conflict with what is wanted for a particular Bill.
- Counsel in OPC are advocates within the system for the policy of the government to make legislative proposals and legislation accessible both to Parliamentarians and to the ultimate users of the statute book. This includes a responsibility to promote clear legislation written in plain language that can be easily understood, meets the five principles of good regulation<sup>12</sup> and, in particular, does not result in unnecessary litigation (see paragraphs 52 to 54).
- Counsel’s relationship with the Public Bill Offices (“PBOs”) in the two Houses enables Counsel to offer advice to the department on any matter that is likely to cause difficulty with the House authorities, but equally requires Counsel to be candid with the House authorities about such matters.

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10. See paragraph 16 above.

11. These are now generally covered in the ECHR memorandum the department must prepare for PBL Committee and agree with Law Officers two weeks before the meeting (and if the matter is settled between the department and the Law Officers, OPC will not seek to revisit it before PBL Committee).

12. See, in particular – <http://www.bis.gov.uk/bre>

- 56 These different responsibilities are a strength of the system. Although they may create tensions with immediate departmental interests, they enhance the process and improve the output. Counsel can advise the departmental team about dealings with the business managers, with PBL Committee and the Cabinet Office Legislation team that provides its secretariat and with the Law Officers.
- 57 The most experience of Bill work to be found anywhere in Whitehall is in OPC. Departments are able freely to draw on this experience. Different departmental teams will be more familiar with the process than others. It is helpful for an instructing department to make clear, at an early stage, the extent of the additional help with the process they think they will need from OPC.
- 58 These are the things Counsel in OPC are able to bring to a legislative project.
- They have plenty of experience of how legislative projects are planned and managed. They can help departments set realistic timetables for a project, and they can advise on the management of priorities and risk. They can advise on when instructions can be delivered in instalments in advance of Ministerial decisions and when the whole process will have to await a particular decision.
  - They have special expertise in the analysis of the structure and content of legislative proposals. This enables them to detect the sort of inconsistencies or flaws in a legislative scheme which will put the scheme at risk when the legislation reaches the courts.
  - One of the challenges for those new to legislation is managing the freedom which the doctrine of Parliamentary sovereignty provides to the legislator. Counsel in OPC are able to assist departments to understand how best to use this freedom and to appreciate the parameters within which it can be exercised.
  - They also provide an outside, critical perspective. They have a challenge function and set out, by questioning, to help departments test their proposals, and so avoid the problems that can arise subsequently either in Parliament or in the courts. As a project develops, there are risks from getting too close to it, particularly the risk of losing the original clarity of direction as competing objectives have to be reconciled. Counsel in OPC are sometimes in a better position to be able to spot difficulties of this sort.
  - They have considerable experience and technical expertise when it comes to crafting the wording to produce clear, simple and unambiguous propositions that fit into the structure of the existing law.
  - They share common drafting standards and practices which have been developed and tested within the community of drafting experts that constitutes OPC.
  - Their familiarity with Parliamentary procedure enables them to structure legislation to fit the requirements of Parliamentary debate and to comply with the rules of procedure.
  - Counsel in OPC have access to a large body of learning about legislation and about the procedure and practice within government and in Parliament that applies to legislative proposals.
  - They also have ongoing business relationships with the officials in both Houses (particularly in the PBOs), with the officials in the Cabinet Office Legislation team and with the officials who work to the Government's business managers.
  - They also have working relationships with the Office of Scottish Parliamentary Counsel in Edinburgh, the Office of Legislative of Counsel for Northern Ireland in

Belfast and the Legislative Counsel for Wales. (See paragraphs 119 to 126 and 247 to 250).

## **Departmental responsibilities and strengths**

- 59 The department are responsible for the policy and for providing the OPC team with instructions, and generally for briefing Ministers and ensuring that they are asked to take the necessary decisions in good time. OPC recognises that the department contribute particular strengths to a legislative project.
- 60 The strengths (on which the OPC team will rely) that are brought to a legislative project by the departmental Bill team include the following.
- The departmental lawyers will have specialist knowledge of the existing law<sup>13</sup> and of the difficulties of applying it in practice.
  - Other departmental officials can contribute further front-line knowledge of how the existing law works in practice, and how it is likely to work in future.
  - Departments have the evidence on which to base proper policy-making and they have the knowledge of the factual background. (See paragraphs 61 to 74 for more about Counsel's role in policy-making.)
  - The department are likely to be more familiar than members of the OPC team with the political context of a legislative proposal. They will know their Ministers' minds and they will be informed about the likely reactions of other Government departments, the devolved administrations, Government backbench members, the Opposition, members of the House of Lords, stakeholders outside Government and Parliament, and the public.
  - The departmental officials are themselves likely to be users of the legislation that is being prepared, and they will certainly have to brief their Ministers to defend it in Parliament: they can bring the users' perspective to commenting on drafts.
  - The department have a perspective over the whole project. A legislative project is often only part of a larger project to implement a policy proposal.
  - The department will have provided the specialist skills and resources needed for the management of the Bill project.
  - The department will have the benefit of input from members of the departmental team who are not focusing on the Bill (eg those who will be implementing it when it becomes an Act).

## **Role of Counsel in relation to policy-making**

- 61 In the context of the different strengths of the OPC and departmental teams, questions sometimes arise about the role of Counsel in policy-making. It is important for departments to understand what is likely to be the default position of the OPC team. It will be one of cautious detachment.

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13. Counsel in OPC are specialists in legislation. Although 1st PC, when creating a team, will usually try to allocate at least one drafter who has some previous experience of the area of law in question or of related issues, the OPC team still has to rely on the instructing team to provide a clear introduction to the structure and practical operation of the relevant existing law.

- 62 It may be possible, however, in the case of a particular project for something different to be worked out between the OPC team and the departmental team where that seems appropriate.
- 63 Even in their normal default role, Counsel will often be able to make a significant contribution to policy-making. Their professional expertise and experience can help them to identify and test the consistency and coherence of different policy options, to analyse proposed legislative structures and to identify factual permutations, avoidance possibilities and technical solutions for particular problems. Their insight into the Parliamentary process and into the practice of the courts when interpreting and applying legislation may also be of value in this process. So they may be able to draw attention to a proposal that is likely to attract particular difficulties either in Parliament or the courts.
- 64 One way in which Counsel can sometimes help departments is by pointing out that innovative or direct legal solutions about which a department might otherwise have felt inhibitions are permissible and draftable after all. This is why it is often helpful to involve Counsel in a project early on, and why instructions should explain the reasoning behind a decision to reject an apparently attractive or obvious solution.
- 65 Departments need to establish an understanding with Counsel that enables both Counsel and the department to know the contribution to policy-making which the department expect from Counsel and would like. Counsel and the department then need to respect the agreed parameters.
- 66 Where a greater than usual contribution to policy-making is sought from Counsel, there needs to be a clear understanding that enables the department to know in what capacity points are being made at different times - viz when Counsel are giving authoritative advice and when they are merely adding a perspective as a fellow team member.
- 67 So, for example, where a Counsel identifies an uncatered for permutation in the instructions, that should not be taken as necessarily constituting policy advice that the permutation must be dealt with. It is likely to be no more than advice, given in the Counsel's "challenge" role, that the permutation needs to be thought about in the context that will result from the Bill.
- 68 So, whether to make provision for a permutation identified by Counsel is a question of policy. It will depend on the circumstances whether Counsel can contribute any experience or expertise to making that decision, and whether a contribution is wanted by the department. Counsel may want to point out the impact of dealing with the permutation on the simplicity of the legislative scheme. But that is unlikely to be determinative. The decision may also depend on matters of which Counsel has no knowledge eg an assessment of risk based on a knowledge of practice on the ground. Assessing the risk and how to deal with it is an area where it will be appropriate for the departmental team to deploy their particular strengths.
- 69 The principle is that Counsel will attempt, so far as possible, to help the department wherever Counsel's specialist perspective or obligation to the integrity of the statute book is relevant. Counsel will be careful not to arrogate policy-making functions to themselves, particularly in areas outside the area of their specialism. Counsel may be willing to go further than this; but they will not wish to accept an invitation to participate in policy-making where its acceptance would put at risk their ability to

discharge their primary function of securing the robustness of the policy by the provision of independent challenge. The value of such challenge is a significant part of the justification for involving Counsel in the process. Where Counsel feel the need to hold back on these grounds, they will explain their reasons to the department.

- 70 Counsel's expertise is obviously likely to be more useful to policy-making where the policy is directed primarily at a legal outcome, rather than at a practical one. Clearly, all Bills are supposed to produce legal outcomes; but in the case of some they merely provide the framework for facilitating the implementation of policy by practical means, while, for others, the legal outcomes are the main point of the exercise.
- 71 Even where purely legal outcomes are sought, it is still comparatively rare for drafting considerations to dictate a particular policy solution. Where a decision has to be made about the correct balance in policy making between comprehensiveness and simplicity, that is likely to involve an element of policy judgement, as well as drafting. Most solutions are draftable, even if the result in some cases may be presentationally unacceptable. So a drafter is rarely going to be able to answer the question "Which policy is easier to draft?" in a way that will facilitate the policy-making process.
- 72 Departments are sometimes uncertain about whether elements of the detail of the policy are for them or for Counsel to determine eg on the form of enforcement or of Parliamentary control for SIs. However matters of technical detail of this sort which involve a choice are all ultimately matters of policy for the department. Counsel will certainly be able and willing to contribute to the decision on the detail by identifying both the options and some or all of the factors that the department will wish to take into account in choosing between them; but it is for the department and their Ministers to make the decision about what is wanted.
- 73 All these considerations mean that Counsel are likely to doubt the legitimacy of straying beyond the challenge role without an express invitation, and are likely to feel more comfortable and more useful when confining themselves to that role. On the other hand, departments should feel able to ask Counsel for whatever help they need.
- 74 Finally and importantly, Counsel will always accept a responsibility to contribute what they can to the solution of the problems they themselves have identified.<sup>14</sup>

### **Other points on policy development**

- 75 A number of points about policy development generally are worth making and have been highlighted in the lessons learned exercises carried out at the end of Bill projects—
  - It is important not to underestimate the time it takes to develop policy to the level where departmental lawyers and the OPC team can produce a satisfactory draft.
  - There needs to be a timetable for Ministers to make the policy decisions that will enable drafting to progress, and it is wise to start early.

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14. For a more detailed discussion of the relationship between the role of Counsel and policy formulation, see the lecture "Giving effect to policy in legislation - How to avoid missing the point" by Stephen Laws [2011] SLR.

- If policy involves agreement with other departments (eg the Ministry of Justice on the creation of criminal offences and the imposition of criminal or civil penalties) extra time for that will be needed.
- Time needs to be allowed for securing collective agreement to the policy through the relevant Cabinet committee
- It is necessary to keep an open mind throughout. Sometimes the process of development may require a change of track at a relatively late stage.
- Some Bill teams have found it useful to hold challenge sessions with members of the Bill team seeking to test the evidence base for the policy, whether it stands up to criticism and whether it will meet its objectives.
- The matters that will need to be taken into account in the various impact assessments that will have to be produced should be kept in mind from an early stage and should inform the policy making process.

### **Importance of good communications**

76 The principal and essential requirement for an efficient partnership between Counsel and a departmental team is good communications. This involves the acceptance of reciprocal requirements both the department and for Counsel.

#### *Requirements from the department*

77 Here is what the department need to do –

- to make clear what service they want from Counsel;
- to ensure that Counsel understands the political, legal and factual context in which they are making their proposals and how any legislative proposals are to fit into any wider implementation plan not involving changes to the law;
- to ensure that their legislative intentions are clearly explained to Counsel in sufficient detail to enable Counsel to give effect to them without having to improvise on policy matters;
- to be frank about what compromises have been made, and how conflicting objectives have been reconciled, in the process of preparing instructions;
- to explain why policy options that Counsel might think provide a neater solution have been discarded. It is particularly important that the department should mention any ideas they have rejected on the basis of assumptions about drafting issues;
- to read the drafts provided by Counsel critically and very carefully so as to check that Counsel has properly understood their intentions;
- to supplement the results of that exercise with a response to any commentary provided by Counsel with the draft;
- to remember, when commenting on a draft, that it will have to be understood without Counsel's commentary when it has been enacted;
- not to take for granted that Counsel has understood their wishes or the political context in which a provision is required;

- to comment on a draft by explaining what they want the draft to do and what they think it may not do, rather than by asking what its effect is - as a preliminary to deciding what they want it to do<sup>15</sup>;
- to alert OPC to any comments in Parliament or any PQs that specifically relate to the technical aspects of the drafting of the Bill.

*Requirements from Counsel in OPC*

78 Here is what Counsel in OPC need to do –

- to let the department know promptly which Counsel are allocated to a project.
- to keep the department regularly informed about the progress of the work in OPC on the project;
- to be willing to predict when drafts should be expected and to explain as soon as possible if the timetable appears to be slipping and why;
- to make sure that what the department have said about what they want is clear and has been understood, and to question anything in the instructions that causes doubt;
- to communicate the department's policy, as understood, in an unambiguous legislative form, and to explain in a commentary where decisions have been made about what was meant by the department;
- to explain how the draft works and why a particular drafting approach has been adopted whenever the department ask<sup>16</sup>;
- not to volunteer explanations or require the department's endorsement of drafting decisions for which the drafter needs to take responsibility (See paragraphs 260 to 265 below);
- to consider the department's comments with an open mind, alert to the possibility that Counsel and the department may be at cross purposes or that a seemingly bad point may actually be prompted by a thought that represents a good one.

*Requirements from both the department and Counsel*

79 It is important that Counsel and the department keep each other informed, at the earliest opportunity, of any matter affecting the planning and deadlines for a legislative project, including –

- the diversion of team members in the department or OPC onto other tasks, or their potential diversion onto other tasks;
- the availability at different times of all relevant contacts in the department and OPC, and their contact details;
- other risks affecting the delivery of instructions or of drafts;
- the expected times of PBL Committee, presentation and of different stages of a Bill in each House;

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15. An attempt to draft for a policy that is uncertain is likely to produce a draft that is unclear.

16. It is only appropriate to volunteer an explanation of drafting decisions (for which Counsel needs to accept responsibility) where it is necessary to do so to check that the instructions have been properly understood or, more rarely, where there are other reasons why an explanation would help the department to do their part of the job on the Bill.

- all serious proposals for additions to the contents of the Bill or for omissions and subsequently for Government amendments.

Sometimes Counsel is the first to hear about something, and often it is the department who hear first. So there needs to be a system for the OPC team and the departmental team to keep each other informed.

## **WORKING METHODS FOR SPECIFIC BILL PROJECTS**

### **BILLS AND DRAFT BILLS**

#### **Introduction to working with OPC on a Bill project**

- 80 This section deals in more detail with working with an OPC team on a Bill project (whether it is a Bill for presentation or initially only a draft Bill for publication as part of a consultation exercise).
- 81 What follows assumes that the department will have established a “departmental team” with different officials carrying out the roles of –
- policy officials - the officials led by one or more “policy leads” who advise Ministers on the policy that is being implemented (in whole or in part) by the Bill;
  - Bill team officials - the officials usually led by the “Bill team manager”<sup>17</sup> who are responsible for the planning, administration and implementation of the project that will result in the Bill or draft Bill (or of the wider project of which the Bill forms a part); and
  - departmental lawyers - the officials who give legal advice to both policy officials and Bill team officials and who are responsible for producing the drafting instructions for Counsel in OPC.
- 82 In the case of a small Bill, at least two of these roles may overlap in the same individual. Sometimes, in the case of a big Bill, the department may also think it sensible to set up an “implementation team” before the Bill has completed its passage through Parliament. Sometimes the Bill team will co-ordinate the work of everyone working on the Bill in the department; often it is convenient for a department also to ask a particular lawyer to co-ordinate the work of all the lawyers working on the team and to exercise some strategic exercise over the legal issues arising on a Bill.
- 83 Generally speaking it has been found desirable, when setting up a Bill team, to allow room for flexibility in roles and to strive to preserve continuity of membership throughout the preparation and passage of the Bill.
- 84 Sometimes, the subject-matter of a Bill will occasionally require more than one department to provide the policy officials, and they will be supported by departmental lawyers from the different departments. In those circumstances, even where the subject matter of the Bill is evenly split, it is usual and helpful for one department to take the lead when it comes to planning the Bill, and for the Bill team manager and his or her team to be appointed with the need for cross departmental working particularly in mind.

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17. It is important that every Bill project has an official in the department who fulfils the role of project manager for the Bill. In the past this role was often played by the lead lawyer on the Bill but it is now very common (except for small Bills) for the department to appoint an official who is neither a lawyer nor one of the policy officials interested in the Bill to run the project, and then to give that official a team. It is important for a close working relationship to be built between the Bill team manager and the OPC team on the Bill. The earlier a bill team manager is appointed the better the project is likely to run.

- 85 If instructions on a particular topic are to come from outside the department with primary responsibility for the Bill (eg for provisions relating to Wales or for just a small number of clauses), it is important to ensure that there are clear arrangements about the channels of communication with OPC, and that the OPC team is aware of what they are.

## Preliminary matters

### Initial contact

- 86 On the first occasion that a service is required of OPC in connection with a Bill project the instructions should be sent to 1st PC. Sometimes when advice or other service is sought at an early stage, 1st PC or 2nd PC, will provide the service pending the allocation of an OPC team.
- 87 Either 1st PC (or 2nd PC) or the Counsel allocated to lead the OPC team will let the department know, as soon as possible after the request is received, who is dealing with a particular request.
- 88 OPC aims to respond to each new request within a week, with some initial information about how it is being dealt with, and by whom.
- 89 When the leader of the OPC team has been identified at least one other Counsel will be added to the team, possibly immediately. Things work very much better if the OPC team can be identified from the beginning, rather than have to be added to or changed later as the work on a project unexpectedly expands or is prolonged.
- 90 It is often difficult or impossible to speed the delivery of a Bill by adding Counsel to the OPC team late in the day. And the need for a coherent approach to Bill drafting, as well as other practical considerations, mean that - depending on the subject-matter - there are also practical limits on the size of the OPC team that can work on a single Bill.

### An initial meeting

- 91 When a team in OPC has been allocated to a Bill project, it is useful for that team to have an initial meeting with the departmental team (including, in particular, policy leads, lead departmental lawyers and the Bill team manager).
- 92 The purposes that can be served by this meeting include—
- enabling the departmental team and the OPC team to meet each other and to establish/confirm what each is expecting of the other;
  - establishing the necessary ground rules for communications between the OPC team and the departmental team - see paragraphs 76 to 79;
  - establishing how - in other respects - business will be conducted between the department and OPC (eg the officials who will deal with the OPC team on different matters and the matters about which it would be for Counsel alone to deal with the House authorities);
  - clarifying how relations with the devolved administrations are going to be handled (see also paragraphs 119 to 126 and 247 to 250);

- enabling the departmental team to explain, and to answer questions about, the political and policy background to the project and how the Bill fits into any project for the implementation of a wider policy in which the Bill is to perform a facilitating role;
- confirming the timetable for the instructions, and for drafting the Bill (eg whether the instructions are to be delivered in instalments and, if so, in what order);
- enabling Counsel to advise on what would be most helpful so far as the structure, form and contents of the instructions are concerned;
- to enable Counsel to explain how the work will be organised and timetabled in OPC;
- enabling the departmental team and the OPC team to discuss the risks that are likely to affect the delivery of the Bill according to the planned timetable, and how those risks can best be managed.

- 93 This meeting may be held before instructions have been delivered or before the OPC team have had an opportunity to get to grips with them. It is not necessary for questions to have arisen on the detail of the instructions.
- 94 It is usually more helpful for this meeting to be held in addition to, and separately from, the first of the regular meetings that will be held by the Cabinet Office Legislation team for the purpose of monitoring progress on the Bill. Those meetings serve a different purpose and although they serve a useful regular point of contact between Counsel and the departmental team, they are not the best place to address issues that arise between the OPC team and the departmental team about how their partnership should work.

### **Briefing Ministers on the work of OPC**

- 95 The drafting of a Bill is much more than a straightforward technical process that can be performed relatively quickly once the main outlines of the policy have been resolved. It is an intellectual and creative process, not a mere translation into formal wording. There is a risk that departmental officials, wishing to reassure Ministers that everything is under control, will inadvertently communicate a misconception about this.
- 96 Drafting almost any Bill takes time and nearly always at least 3 rounds of drafting (see paragraph 36): with the drafters commenting on the instructions and the department asking for modifications of the resulting draft. For a large Bill it is not unusual to need as many as 8 or even more successive drafts of the Bill.
- 97 Each round takes time for OPC. It will take at least a couple of months for a normal sized OPC team to produce a first draft of a medium sized Bill - even assuming that they are free to give all their time to it. And it is rarely possible for a department to consult and turn round comments on a draft in less than 10 working days. Sometimes when collective Ministerial decisions are required or outside stakeholders have to be consulted, it may take much longer. Planning for each round also needs to allow for time for the OPC team to respond to a set of comments, and that will depend on how extensive they are.
- 98 For this reason, it is important that Ministers are briefed on how time consuming the drafting process will be.

99 It may be convenient for an opportunity to be found by the department for the Counsel in charge of a Bill to be introduced at an early stage to the Minister who is taking the lead on it. This draws attention to the fact that the drafting process has begun and may be waiting upon decisions. It also gives the Counsel in charge of a Bill an opportunity to hear, first hand, what the Minister wants from the project and to explain to the Minister –

- the work that is involved;
- how it is going to be carried out;
- the nature of the services being provided by OPC to the Minister;
- what is important about them; and
- what is needed to make the project a success.

This can help to facilitate understanding when Counsel have to identify drafting issues or constraints that emerge later in the process.

### **Involving Counsel in Bill team training**

100 The initial meeting between the departmental team and the OPC team will normally involve only the core of the departmental team - those who will be involved in regular contact with OPC; but it is useful for everyone working on the departmental team to understand what Counsel's role is, and to have an opportunity to learn from them about Bill work.

101 So it is usual, soon after the shape of a forthcoming legislative programme becomes clear, for the National School of Government to arrange a series of seminars for new Bill teams. The OPC team which is allocated to a Bill normally contribute to the event for the Bill to which they have been allocated.

102 The lessons learned exercises that have been run on Bill projects have shown how important it is to ensure that everyone who is working on a Bill has received training on the process.

103 Counsel will frequently offer to contribute to training events for the Bill team. Sometimes it is useful to run refreshers on different aspects of the process as the time for them draws near eg preparing explanatory notes, getting the Bill through committee, the second House and “ping pong”. A department should feel free to ask members of the OPC team for their Bill to do things of this sort.

### **Scoping and planning a project**

104 There are two distinct stages to planning a Bill project –

- The first stage is to decide what should go in the Bill and how it should fit into the legislative programme so far as both timing and theme are concerned.
- The second stage is to plan how that Bill will be produced against the timetable set for it.

105 OPC can contribute to both stages of the planning in one or more of the following ways—

- making an assessment of the scale of the drafting task for each of the different components proposed for the Bill;
- advising on how the project will fit for OPC into the preparation of the legislative programme as a whole;
- contributing to an assessment of the risks for the production of the Bill against a particular timetable;
- advising on the taking of steps to avoid or mitigate those risks.

106 At both stages the essential thing to remember is that Bills, or rather the Acts they become, can achieve only one thing and, as such, can therefore have only one objective - to change the law. Changing the law can itself only achieve a limited number of things, as follows—

- it can establish new institutions and reorganise existing ones and it can confer capacity on them to act in particular ways;
- it can confer powers to do things where there were previously no powers;
- it can affect behaviour by requiring conduct of a particular kind or by modifying the consequences of inaction;
- it can affect behaviour by prohibiting conduct of a particular kind or by modifying the consequences of action;
- it can regulate the making of determinations and the exercise of discretions;
- it can regulate and set conditions for each of the above.

To an extent too an Act of Parliament may also be enacted to produce, indirectly, a cultural change: a change in the way people think and feel (eg about the social acceptability of certain sorts of conduct). What is clear is that the law's only tools for effecting cultural change are those set out above, coupled of course with the respect for the law that already exists, at least amongst the law-abiding.

107 The planning for a Bill project can often be assisted by a recognition of the sort of project that is being attempted.

108 Sometimes the contents of a Bill will be wholly dictated by the need to give effect to a single particular policy, perhaps as part of a larger scale policy project. The Bill will consist of a series of legal propositions all directed at securing a single coherent outcome.

109 More often than not a Bill will consist of a number of changes of law that are needed for one or more particular policy objectives, coupled with a number of other changes that it is convenient to associate with the first set of changes, either because they relate to the same subject-matter or have a similar theme, or just because the Bill provides a legislative opportunity to tidy up a particular area of business. It is also common to have a Bill that contains a number of unconnected and diverse contributions to a single major problem.

110 It is important when planning a Bill project to ensure that the project is going to be deliverable at a time and in a form which will—

- fit with the rest of the legislative programme and meet the requirements of the business managers; and
- meet the policy and political objectives of departmental Ministers.

111 These two do not always lead to the same conclusions; and problems are often caused by over-optimistic assessments of how the two can be brought in due course to coincide.

112 Risks that need to be assessed include, in particular –

- the risk that it will be difficult to obtain collective agreement to components of the legislative scheme;
- the risk that attempts to add new topics to the Bill will be made at a late stage;
- the risk that the process of securing collective Ministerial agreement or a consultation with outside stakeholders will result in major changes of policy;
- the risk that the detail of the policy will require longer to work out than expected;
- the risk that the introduction of the Bill before it is ready will –
  - embarrass both the departmental Ministers and the business managers, with the Bill being justifiably criticised as “half-baked”; and
  - involve an excessive number of Government amendments in the House, to the detriment of the legislative programme as a whole<sup>18</sup>.

113 These risks are greater if they materialise at a late stage; and it is a feature of legislation that these risks – and the risk that they will arise late in the day – tend to be greater the more controversy surrounds the relevant component of the policy and also, often, the more important it is as part of the policy story.

114 However, it is also worth remembering that the political importance of a provision may not always mean that it is important for the structure of the drafting. It is always sensible, where instructions are being delayed for a particular decision, to consult Counsel about whether the decision really does have to be made before the instructions on related matters can be tackled.

115 A number of general points about project planning have emerged from the lessons learned exercises that have been run on Bill projects. Points that have been made from experience by departmental Bill teams have included the following –

- It is advisable to have project plan from as early as possible and it should identify the scope of the project and, if there is a risk that the scope might expand the principles on which that should be allowed to happen.
- The plan needs to be integrated into the other commitments of the department, so that priorities can be assessed and allowed for.
- It is also advisable to plan in a similar way for each Parliamentary stage of the Bill.
- It is important on a larger Bill for all the different officials with an interest in different particular policy components of the Bill to work together to secure

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18. The legislative programme proceeds with the co-operation of the Opposition parties and back benchers so long as the fund of good will available to the business managers across the programme is not exhausted by the use of too much debating time for Government tidying up. It is this factor that means that one under prepared Bill can have an impact on the ease with which other Bills can complete their Parliamentary stages.

consistency between the different components and to co-ordinate the different intended outcomes.

- There also needs to be a realistic plan for implementation that can be referred to as the Bill progresses<sup>19</sup>.
- Last minute additions carry a high risk because of the shortage of time to analyse and challenge what is proposed.
- Plenty of time and other resources needs to be committed to the production of the documents that need to be produced alongside the Bill and to the same timescale, such as the ECHR memorandum, the explanatory notes, the handling strategies etc.

### **Planning for Bills for pre-legislative scrutiny**

- 116 Where a Bill is being prepared for publication and consultation, with pre-legislative scrutiny, it is important that the planning for the Bill should take account of the amount of work that the management of the consultation will involve. If work on the Bill is postponed to be done between publication and presentation to Parliament later in the year, it needs to be recognised that the work on the consultation may distract from that work. It needs to be programmed in and the resources needed for it need to be reserved.
- 117 If the intention is to use the OPC team to continue to work on the Bill while the consultation is progressing, this needs to be mentioned early, so that that team is not diverted onto other work.
- 118 Similarly, it needs to be recognised that there may be comparatively little time between the close of a consultation and the time when a revised Bill needs to be ready for introduction. This too needs to be recognised in the planning.

### **Scotland, Northern Ireland and Wales**

- 119 As part of the policy formulation process, the departmental team will need to keep in close contact with their opposite numbers in the UK offices which work with the devolved administrations and, as appropriate, as appropriate with the devolved administrations themselves. In the case of Scotland the Office of the Scottish Advocate General (“OSAG”) will always have an interest from the UK perspective in proposed changes to the law affecting Scotland, and the department will need to work closely with them, from an early stage, before instructions are prepared.
- 120 In addition, the OPC team will have opposite numbers in Scotland, Wales and Northern Ireland. The arrangements under which Counsel in OSPC and the legislative counsel in Northern Ireland and Wales are involved in UK legislation are different in each case.
- 121 SPC(UK) is the team of drafters in OSPC designated to work on UK matters. Some of the Scottish Parliamentary Counsel in SPC(UK) may also work on other matters to the

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19. The House of Lords Committee on the Merits of Statutory Instruments has expressed the hope that all departments will routinely produce and publish plans for secondary legislation to be made in consequence of a new Act. (para 22 13th Report 2007-08) <http://www.publications.parliament.uk/pa/ld200708/ldselect/lmerit/70/7005.htm>

Scottish Executive. Occasionally other drafters in OPC are allocated to help SPC(UK); but when they do so, they also don a UK hat and work to OSAG (and, hence, to the UK Government) on that matter. Scottish Parliamentary Counsel working to OSAG will provide technical advice and assistance to OPC on the Scottish aspects of any drafting which extends to Scotland (whether the subject matter is devolved or reserved). On policy matters they will normally expect Instructions from OSAG. In most cases, of course, the matters on which they are instructed will have been the subject of consultation between the Scotland Office and the Scottish Executive.

- 122 SPC(UK) will work closely with OPC in the production of provisions which are to have effect in Scots law. Where separate or different provision is required for Scotland, SPC(UK) very often provide a draft for incorporation by OPC into a Bill to be placed before the Westminster Parliament. They will also assist OPC where the provisions of a Bill have to be framed in such a way as to exclude need for a legislative consent motion in the Scottish Parliament.
- 123 The relationship between OSAG, SPC(UK) and OPC is close and both the OPC team and OSAG will be happy to advise in any case about how matters should be handled.
- 124 The Office of Legislative Counsel work to the Northern Ireland Executive and have to give priority to its work. However, subject to that, they provide assistance to OPC, at a purely technical level, on the integration of UK statutes relating to devolved and non-devolved matters into Northern Ireland law. This may sometimes involve drafting specifically Northern Ireland provisions. When Northern Ireland Counsel work on a UK Bill, they do not work to the Northern Ireland Office unless arrangements have specifically been made to that effect with the Northern Ireland Executive; and so, on matters of policy, they generally look to officials in the Northern Ireland departments (rather than the NIO) for their instructions.
- 125 There is a member of OPC, currently Nigel Rendell, who works for some of his time with the Welsh Legislative Counsel and therefore to WAG; but he also works on UK matters the rest of the time. At the moment, neither Nigel nor other Welsh Legislative Counsel are involved on a regular basis on behalf of the UK Government with Welsh aspects of UK legislation. Other Welsh legislative counsel work exclusively to WAG. Nigel may be consulted from the UK perspective by members of OPC and also by the Wales Office about legislative matters affected by Welsh devolution. Arrangements are in place for ensuring, when there are consultations of this sort, that UK questions are referred to someone other than Nigel if, after consultation with WAG, there appears to him to be a sufficiently real potential for a conflict of interest to arise.
- 126 Sometimes, when a matter relates to a Welsh matter the department, in consultation with lawyers in the Wales Office, may ask lawyers in WAG's legal service to instruct OPC directly on that matter. This is likely to be where the expertise is in WAG and the matter is one on which WAG and the UK Government have reached an agreed policy position. When that happens, Legislative Counsel in Wales are not directly involved and the instructions will be treated as if they were delivered on behalf of the relevant UK department. Correspondence and drafts from OPC will be copied to the departmental and the Wales Office contacts, who should also have been copied the instructions and been identified in them.

## **Advice on instructing**

- 127 As mentioned above, Counsel in OPC are often able to give the department guidance about the best way to instruct them. This document sets out below some general guidance on how to prepare instructions to draft, and also on the form of instructions. But not every case is the same and sometimes the department will be unsure how to proceed in the circumstances.
- 128 For example, in the case of a Bill wanted in an unusual hurry, it may be desirable to discuss with Counsel how best to speed up the normal procedures. Or it may be helpful to ascertain how much background it is useful to provide to an OPC team who may already be familiar with the area of law concerned.
- 129 Questions also often arise about the extent to which it is possible or sensible to instruct on a contingent basis, in advance of ministerial or collective decisions.
- 130 Departments in any degree of uncertainty about how to instruct in a particular case should approach the leader of the OPC team allocated to the Bill for advice.

### **Instructions to draft**

#### *The purpose of the instructions*

- 131 The starting place for all instructions is that a Bill can do only one thing. It can change the law (see further paragraph 106). The author of instructions should keep this and the discussion in that paragraph constantly in mind.
- 132 The purpose of instructions to draft a Bill, or the provisions for a Bill, is to give the OPC team everything they need to produce a draft. The intended readership for the instructions is limited to the OPC team, and they will be known to the author. At the very least, the author will know, from this note what the main characteristics and needs of the likely reader are.
- 133 The governing principle when drafting instructions should be to structure them and to decide their contents on the basis of what is likely to be most useful to the OPC team to whom they will be delivered. When the department are sure they know who the OPC team are, what is known about them should be taken into account.
- 134 It is not necessary to produce arguments to convince the OPC team of the virtues of the policy, and any temptation to minimise known difficulties with it should be avoided. On the other hand, the OPC team is likely to have an interest in, and should be told, how the argument for the policy will be presented and how it is thought any difficulties with it can be overcome.
- 135 The authors of instructions should put themselves in the shoes of the drafter and ask what they would need to know if they were drafting the Bill.
- 136 The task of preparing instructions is not at all easy. In an ideal world the policy needs to be thoroughly thought through and analysed and then presented in a coherent and structured way to the OPC team. The better the instructions the better the Bill will be, the more value Counsel will be able to add and the less time will be needed for the

drafting stage. Short-cuts taken at the instructing stage can lead to delays at the drafting stage that are much longer than the time saved by the short-cut.

- 137 However, Counsel do know that this is all much easier to say than to do. The conditions for preparing instructions are seldom ideal, and it is not unusual for compromises to have to be made to cope with the pressures of the timetable, or a delay in decision-making. Where this is the case, it is important to discuss the problems with Counsel and to agree the best way to deal with them. There are very considerable gains for the department, as well as Counsel, if everyone can get as close to the ideal as is humanly possible.

*A single document*

- 138 Instructions to draft a Bill, or provisions for a Bill, should consist of one, single document containing a clear articulation of everything the department want the Bill to do, and of why they want the Bill to do it.
- 139 The authors of instructions often annex a number of documents to their instructions: eg the White Paper and other consultation or background documents, and that can be useful. However, instructing teams should assume that Counsel will start by reading the instructions and will treat them as containing a complete and comprehensive description of what is required, and, in the event of any incompatibility, as prevailing over everything else Counsel has been sent.
- 140 Sometimes a drafter may have time to read into the subject by perusing the background information before turning to the instructions. It is much more common for drafters to have to get into the subject as quickly as possible, and to use the instructions to provide, as they should, the best route into the topic. In those circumstances, Counsel may not have an opportunity to turn to the background information at all, or certainly not until much later. The best use of the background information for Counsel is often to use it, if there is time, once the drafting has settled down, for testing whether an eventual draft fits the original context and every bit of the policy story.
- 141 Where documents accompany the instructions, the instructions should explain what their relevance is to the instructions; and, in case of White Papers etc, they should acknowledge (either specifically or in general terms) any departure in the instructions from the published proposals that might otherwise confuse Counsel.
- 142 Unnecessary and serious delays to a project can be caused if Counsel is asked to ensure that the draft is consistent with a whole range of documents (eg licences or contracts) that are bundled with the instructions. If that is what the instructions require in the case of a particular provision of the Bill, they should include an express request to that effect, together with an appropriate commentary. Counsel's objective will always be to make the draft fit the instructions. A great deal of time can be wasted seeking to work out to what extent (if any) accompanying documents are intended to supplement the instructions or are inconsistent with them.
- 143 The need to produce a single document is subject to what is said below about—
- instructing in instalments (see paragraphs 146 to 152); and
  - reliance on references to outside legal sources and the attachment of copies of legal sources (see paragraphs 188 and 194).

*The form of the document*

- 144 OPC is sometimes asked how to format instructions and there is still some outdated guidance about this around Whitehall. Here are some hints and tips about what most drafters find helpful—
- For reference purposes it is helpful if both the pages and paragraphs of any instructions sent to OPC are all numbered or lettered. Numbered and lettered paragraphs are easier to refer to than unnumbered or bulleted paragraphs.
  - If the document is lengthy, headings and a table of contents are also helpful.
  - Instructions are easier to read if they are typed in 1.5 or double spacing, in a legible 12 point font and with margins wide enough to facilitate the noting of comments and questions.
  - Wherever possible, instructions should be delivered in electronic form by email with electronic copies of the accompanying documents, or web links to them. An electronic copy of the instructions facilitates the creation of an electronic archive for the Bill in OPC, which can prove invaluable at later stages.
  - It is not necessary to send hard copies of instructions delivered by email. But it is still helpful to send a copy for each member of the drafting team of any document that cannot be provided electronically or by way of a web link.
  - Instructing departments who send instructions only by email should take responsibility for ensuring that emailed instructions have arrived in OPC and follow up any failure by OPC to respond promptly to the receipt of instructions.

- 145 If the department are already in touch with the allocated drafter, the first set of instructions may be sent directly to that drafter. In other cases instructions should be addressed to 1st PC.

*Instructions in instalments*

- 146 Ideally, all the instructions for a Bill should be delivered at the same time. The OPC team is unlikely to be able to start work on everything at once, but it is easier for a drafter to begin to develop the structure for a Bill after having read through all the instructions.
- 147 On the other hand, this is rarely the most sensible way to deliver instructions in practice. Both instructions and Bills tend to be required against deadlines that are shorter than ideal. In those circumstances it is unhelpful to hold back instructions in order to be able to deliver everything together. Instead, it is better to help the OPC team to get on with the work of drafting as soon as possible by delivering the instructions in instalments as they become ready.
- 148 However, delivering instructions in instalments is only helpful where work can start immediately on the instalment in question. For this to be possible, the drafters have to be free of other work and the instructions have to be capable of being worked on independently of the instructions that are still to come. Ideally, the provisions to be drafted have to be discrete both in the sense that they can be understood without reference to the instructions that are still to come and in the sense that their detail and structure are not contingent on what is still to come.
- 149 There are questions of degree here about how dependent one set of provisions is on

another before it ceases to be sensible to deliver one set of instructions before the other. Other factors to be considered are the extent and impact of any delay in the delivery of the instructions that could be delivered in an early instalment.

- 150 Ultimately the test of what is sensible is whether the risks from instructing in instalments (including the risk that the drafts may need to be reworked in the light of subsequent instructions) outweigh the advantages of making some early progress on at least part of the Bill.
- 151 How this balance is to be struck in a particular case is something that can usefully be discussed with the OPC team, who may be able to express a view about how easy it would be to accommodate future decisions on possible policy options.
- 152 Where instructions are delivered in advance of other instructions, it is important always to include information about how future decisions may affect the drafting (eg if instructions are delivered on a GB topic for England in advance of instructions on the same topic for Scotland, it would be appropriate to point out that references to the Secretary of State in the English instructions may well need to incorporate references to the Scottish Ministers for Scotland.)

*Instructions that are contingent on future policy etc. decisions*

- 153 The position is the same – and the balance that has to be struck is similar – where the question arises whether instructions should be delivered before every aspect of the proposed policy has been finally settled. Both the impact and the likelihood of future policy decisions need to be assessed in striking the balance. Can drafting sensibly proceed in advance of the policy decisions and, therefore of course, in advance of the instructions to give effect to them?
- 154 Some matters may be fundamental to the way a provision is drafted. Others, though very important from a policy point of view, may be relatively insignificant from a drafting point of view. (So, for example, the question how a particular activity to be authorised by a Bill should be funded may remain unsettled until late in the day, but that may have no effect on the drafting of the main provisions authorising the activity.)
- 155 The likelihood that the selection of a particular option under consideration would involve a significant amount of wasted work may be high or low. Often it is impractical or unwise to delay instructing just because a high impact but unlikely policy option is still theoretically in play. And the likely impact of any proposed delay is a further factor that may need to be considered.
- 156 As with instructing in instalments it will often be useful to consult the Counsel in charge of the Bill in OPC when considering how to assess the balance.

*Instructions in narrative form*

- 157 Instructions need to be in narrative form. That means that they should explain what is wanted, not try to set it out in the form of a draft.
- 158 OPC does not welcome “instructions in the form of a draft”; but it is important to explain why that is. It is not a demarcation matter. It is because the drafter needs instructions that do not inhibit the proper performance of the drafter’s functions.

- 159 The difficulty for a drafter with instructions in the form of a draft is that they say no more about what they are trying to do than what would actually be achieved if the draft were enacted. If it is a good draft, it will do the trick. But there is no way of telling if it has done what it was trying to do. If instructions in the form of a draft contain even a minor drafting error, that could seriously mislead the person instructed. So a drafter needs to have the department's intended outcomes explained in a way that can be used as something against which the OPC draft (when there is one) can be tested.
- 160 In many ways, the task of writing clear instructions is as skilled as the drafting of the Bill. The narrative form does not justify any departure from a rigorously accurate analysis of what is required.

*Instructions on different topics may require different approaches*

- 161 Different topics may require instructions that put different emphases on different matters. And different drafters may have different approaches to the task or have different preferences when it comes to instructions. The department can discuss all this with the allocated OPC team. More attention needs to be given to certain matters in some cases than in others.

*Matters that affect the drafter's approach*

- 162 The drafter of primary legislation has the privilege of being able to work with a blank sheet of paper. EU law and the ECHR apart, the existing law is not a constraint except so far as it is the policy to retain it. However the parameters within which drafters in practice exercise their free hand to give effect to the policy derive from a consideration and balancing of a number of competing matters.
- 163 The author of instructions should keep in mind these matters. So far as possible the instructions should provide the drafter with the material needed to facilitate the striking of the right balance of all the matters mentioned in the following paragraph.
- 164 The following are the main matters that drafters in OPC take into account when considering how to structure a Bill, and how to word it –
- the necessity to produce a provision that is effective to implement the policy;
  - the value of readability and clarity and their contribution to effectiveness;
  - the contribution of simplicity to readability and clarity;
  - the value of certainty where it conflicts with simplicity;
  - the claims of the different audiences for the Bill;
  - the potentially incompatible interests of those who will read the Bill to understand how the law would operate in a particular area and of those who will be applying its provisions to particular cases;
  - the competing interests of those who want to know how the law is changing and of those who want to know the result of the change;
  - the defensibility of the Bill's wording by Ministers in Parliament;
  - the way in which debate on the Bill will be structured in Parliament;
  - the extent to which provisions of the Bill will be controversial during its passage;

- the likelihood that the Bill will need to be amended during its passage;
- the need for the Bill’s provisions to be consistent with the political case for it;
- any likely effect on the interpretation of the Bill’s provisions of the principles of the rule of law and the demands of fairness;
- the potential for the use of avoidance devices to circumvent the Bill’s provisions;
- the tendency to turn septic of provisions of Bill that are not legally necessary.

### **The structure of drafting instructions**

165 Usually the best structure for a set of instructions is as follows. Lawyers will recognise this as containing all the elements of the so-called “mischief rule” of statutory interpretation: “the rule in *Heydon’s Case*” (1584) 3 Co Rep 7a<sup>20</sup>.

- A brief introduction setting out—
  - the factual and political context in which legislation is being proposed;
  - the general purpose of the changes that are being proposed; and
  - the principal reasons for legislating.
- A description of the relevant existing law and of its application in practice.
- A description of the respects in which, and extent to which, the existing law prevents the implementation of the department’s policy (“the mischief”).
- A full description of the legal changes to which the Bill is to give effect in order to provide a remedy for the mischief (“the remedy”).
- A description of the incidental and supplemental provisions needed to support the remedy.
- A discussion of any Parliamentary or other handling issues relevant to the drafting.
- Housekeeping matters.

166 At the core of this proposed structure is the following analysis—

- This is something we want to happen.
- This is why it cannot happen without legislation.
- This is how we think the law needs to be changed in order for it to happen.

The first two bullets constitute the mischief and the third constitutes the remedy. With entirely new legal structures, however, the first and last steps merge and the middle one seems to go without saying. Nevertheless it is still important for the team preparing the instructions to ask themselves: “Is legislation the only way this can happen?”<sup>21</sup>

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20. “For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: (1). What was the common law before the making of the Act? (2). What was the mischief and defect for which the common law did not provide. (3). What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, (4). The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.” per Lord Coke.

- 167 The proposed structure works for a single set of instructions on only one topic or for instructions for a whole Bill or for instructions about a part of a Bill dealing with a collection of related topics.
- 168 The person preparing the instructions has to decide which elements of this structure should be set out for the whole Bill and which topic by topic, for different sets of topics or for different parts of a topic. This is something that it will sometimes be useful to discuss with the OPC team. The test is whatever is most helpful to that team in the circumstances. And the circumstances might include not only the degree of connection between the different topics in the Bill but also eg whether different drafters are likely to be working on different parts of the Bill.
- 169 So, for example, it may be helpful sometimes to set out in one place all the existing law relevant to several different topics, even when the mischief to which that law gives rise, or the proposed remedies, are dealt with topic by topic. On the other hand, a Parliamentary handling issue (eg the question whether the contents of the Bill will mean that amendments on another controversial subject will be within the scope of the Bill) may best be raised either in relation to the particular proposal that is thought to trigger the scope problem or in relation to the Bill as a whole.
- 170 Even where everything is dealt with topic by topic, there should always be a brief introduction for the whole Bill. This may be separate from the introduction for the instructions on each topic. In these cases the introduction for each set of instructions on a topic should supplement the general introduction so far as that is necessary, not repeat it.
- 171 The following paragraphs deal in more detail with each element of the structure.

#### A. *The introductory section of the instructions*

- 172 This should be relatively short. Neither the author nor Counsel should exhaust their energies on the non-effective parts of the instructions. The most effort should go into the analysis and explanation of what substantive legal changes are required.
- 173 However it is helpful to a drafter before reading the detailed instructions –
- to understand the factual and political background to the proposal to legislate;
  - to have a general idea of where the instructions are leading;
  - to know Ministers' priorities for the legislation and the case that will be put for it.
- 174 In addition to these matters the introductory section should also contain the following –
- a paragraph introducing the devolution issues that are likely to arise in connection with the Bill (see also paragraphs 247 to 251);

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21. Just occasionally there may be a non-legal reason why legislation is necessary. The most common example is where a provision is needed to “frank” expenditure for the purposes of the PAC concordat of 1932 (see Managing public Money [http://www.hm-treasury.gov.uk/d/mpm\\_annex2.1.pdf](http://www.hm-treasury.gov.uk/d/mpm_annex2.1.pdf)) on something constituting a new service (see ibid. [http://www.hm-treasury.gov.uk/d/mpm\\_annex2.5.pdf](http://www.hm-treasury.gov.uk/d/mpm_annex2.5.pdf)). This is sometimes called a “Baldwin agreement” provision.

- if the Bill is likely to give rise to significant EU or ECHR issues, a warning about these;
- any conventions that have been adopted in the instructions (eg acronyms or abbreviations or labels used for particular concepts);
- any information about whether the instructions are contingent (eg on collective agreement, Ministerial decisions, consultation inside or outside Government), and about any risk that they will change;
- any other information about the current state of the project.

175 Any detailed discussion of devolution, EU or ECHR issues should be left until they can be described in the context of the provisions to which they relate.

#### *B. The description of the existing law*

- 176 The starting point for every piece of legislation is that the existing law prevents the implementation of the proposed policy. The instructions need to set out why that is. Also new law always needs to be integrated with the parts of the existing law that are not to be changed.
- 177 The instructions need to set out all the relevant existing law and that means describing both the law that impacts on the policy proposal and the law in the context of which the new proposal will have to operate.
- 178 However, what needs to be set out will depend very much on the nature of the proposed policy and the other circumstances. Those who are writing instructions need to make judgements about what will be most useful to the drafters in the context of what the instructions are asking for the Bill to do.
- 179 As mentioned in paragraph 60, the OPC team relies on the department for specialist knowledge of the relevant area of law. Someone in the OPC team may already have some knowledge of the law in question, but the assumption, unless Counsel in charge of the project otherwise specifies, should be that the drafters are coming to the relevant area of law for the first time and are not familiar with it. Even if that is not the case, it is a valuable discipline for everyone to start from first principles when preparing instructions.
- 180 It is very important to describe not only the legislative provisions and relevant common law rules and case law that are relevant, but also (where appropriate) to give examples of how all that operates in practice. If there is a divergence between law and practice or there is anything otherwise potentially surprising about the practical operation of the existing law, that too should be spelled out.
- 181 The author of instructions should consider if it would be relevant and helpful to the drafter to provide some history of statutory provisions that are being described eg by setting out their origin and the Acts that have amended them. If the provisions have been consolidated a number of times and originate in an old Act, that is something that it may be helpful for the OPC team to know. Sometimes the drafter may be helped by having an explanation of why a previous round of amendments occurred (eg following a court decision). It may assist to identify respects in which the way an existing statutory provision has been applied or construed in practice diverges from what is

thought to have been originally intended.

- 182 It is important to tell the OPC team about any recent developments affecting the law being described and to draw attention to anything in the pipeline (eg relevant SIs in preparation, other Bills that are or will be operating in the same area of law, any pending litigation on a point of relevance).
- 183 It is also important to remember to keep the OPC team up to date with things which might affect the drafting or the project more generally and happen after the delivery of the instructions.
- 184 It is essential to tell the OPC team whatever the department know about any Law Officers' advice that relates to the background law or to the matters to be dealt with in the Bill, and also to disclose anything they know about the contents of any other legal advice given by or within Government or pending litigation that could be relevant.
- 185 Care is needed to avoid the trap of taking the existing law for granted. Very often the analysis of the existing law for the purposes of changing it will throw up uncertainties about what it currently provides, technical defects or other surprises. It may be necessary to deal with these in the Bill or to find some other way of resolving them first. The new provisions will need to be built on sound foundations. Generally, what needs to be set out will depend very much on the nature of the proposed policy and the other circumstances. Those who are writing instructions need to make judgements about what will be most useful to the drafters in the context of what the instructions are asking for the Bill to do. They should seek to avoid the provision of irrelevant detail.
- 186 Equally care needs to be taken to avoid the trap of including material that is of no relevance just for the sake of being comprehensive. It is a waste of the instructing team's time and energies to produce a lengthy description of legislation or case law if it will have no impact on the drafting. The inclusion of material that is not relevant can also be distracting and confusing for the OPC team. This needs to be balanced with the need of the OPC team to have a good overview of the legal landscape into which the new provisions will be fitted.
- 187 It frequently happens that the description of the background law is written in advance, and sometimes delivered, before the policy is settled. That is not a bad thing if it speeds up the process. But, if there is an opportunity, it is important to revisit this part of the instructions when the policy is settled so that the drafters are not confused by the importance attached in the original draft to something that is no longer relevant.
- 188 It is not necessary to summarise or paraphrase every statutory provision that is thought to be relevant. And a statement of some common law rules can legitimately rely on a cross reference to a relevant text book. It is a waste of effort to copy out what can easily be looked up. Counsel will read the original text of any legislation or academic text that the instructions say is relevant background. But it is helpful for the instructions to identify exactly which parts of the legislation or book are relevant. The drafter may go back to read the rest later; but the instructions should lead the drafter to the nub of the matter.
- 189 What drafters find helpful when referred to sources for the existing law is something that, in particular, does all the following –

- facilitates a more rapid understanding of the structure of a relevant statutory scheme, case or relevant text;
- identifies subtleties in the way the existing law is constructed, interpreted or operated in practice;
- draws attention to any known areas of doubt or conflicting decisions or opinions affecting the interpretation of the provisions or law in question;
- identifies the provisions and the issues that are particularly relevant to the changes of law that are going to be made by the Bill.

190 So, for example, a set of instructions for amendments of a licensing scheme might outline the structure of the scheme by identifying as such—

- the provision that imposes the prohibition - commenting on any notable features of the prohibition and of the definition of the prohibited activity;
- the provision that deals with applications and when a licence can be refused/must be granted and the duration of a licence;
- the provisions that cover renewal, revocation and variation of licences;
- the provisions from which the grounds on which a licence can be refused are derived and perhaps commenting on how they have been construed in practice (eg do they have to relate to the licensed activity or do they include general grounds eg criminal record etc.);
- what enables conditions to be imposed by a licence and whether there are special arrangements for modifying them;
- the current understanding of the restrictions on what can be included in conditions and the legal basis for that;
- the legal basis on which fees are charged for licences etc.;
- the provisions that enable provisions of licences to be enforced, including any special powers or unusual requirements.

Sometimes there may also be something relevant to the whole scheme that ought to be mentioned eg a judicial decision in which numerous different elements of the licensing scheme came under scrutiny, even if it does not seem relevant to any of the proposals from the department.

191 Similarly, where describing an Act, it is helpful to point to any important definitions or other provisions of general application (extent, powers to make SIs etc.) or to describe other structural features of the Act that will enable the OPC team more quickly to find their way about it.

192 Whatever is said about a provision of an Act should be either to put it in context or to explain it. It will only be confusing if the instructions seek to paraphrase it.

193 It is unnecessary to describe in detail provisions that are not relevant or provisions that will be superseded by the new proposals. Provisions to be repealed need to be commented on only so far as—

- the way they have operated in the past affects replacement proposals; or
- transitional provision is going to be required in connection with their repeal.

In each case the description should concentrate on the aspects of the existing provision

that are relevant to the new proposals or that are going to require transitional provisions.

- 194 It is not necessary to provide the OPC team with copies of legislation that is referred to in the instructions. A web link to any EU legislation should be provided, and it is helpful to do the same for SIs and legislation of the Scottish Parliament or the Northern Ireland or Welsh Assembly.

*C. The description of the mischief*

- 195 This section of the instructions should describe why it is necessary to legislate.
- 196 Different circumstances will require this section to be prepared in different ways, according to what seems likely to be most helpful to the OPC team.
- 197 Where some new structure is required, this section will be relatively straightforward, amounting to no more than a relatively detailed description of the objective of the legislation, for which there is as yet no legal provision. Nevertheless it is useful to keep in mind, that even a request for an entirely new structure is only necessary if there is nothing in the existing law already that it would be practicable to use for the same purpose or to the same effect.
- 198 An example of such a case would be something along the following lines –  
“The Government wishes to establish a new body to carry out functions in relation to X/to take over some of the functions of the A body in relation to X and to carry out some new functions. Provision needs to be made for the winding up and dissolution of the A body. Various provisions will need to provide for the establishment and governance of the new body and it will need to be given the powers and duties that are set out below.”
- 199 In other cases, this section of the instructions will involve more analysis. An example might be where the department want a regulator to control a certain sort of activity under licensing powers. The existing mechanisms used by the regulator eg the power to set conditions and the power to modify conditions may present obstacles to what the department intend. In such a case the instructions would set out the department’s objective and would then explain how the existing mechanisms are inadequate to achieve it, or prevent it.

*D. The description of the proposed remedy*

- 200 This section of the instructions logically follows on from the previous section, but often it may be more convenient to interweave the two. What is important is to ensure that the correct analysis underlies the operative part of the instructions: the part that is actually asking for draft provisions.
- 201 The description of the remedy should be detailed and specific. It should set out all the things that need to be achieved by way of addition to or other amendment of the law. What is required is a clear articulation of how things should be different after the provision has been enacted and comes into force.
- 202 The department should then describe the substance of any specific changes to existing

law that they think need to be made to bring that about, and they should explain, where it may not otherwise be clear, why they think those changes will have that effect.

- 203 This description should concentrate on the substance, not on the wording or the mechanics of the proposed change.

*Reasons for the proposed changes*

- 204 If the department has views about the best mechanism for making the change it should explain what they are and the reasons for them. It is also acceptable to refer to existing precedents that are thought to have the effect that is intended, or even to refer to a form of words that has been considered as capturing the required test or concept. However, none of these things should be done alone without further instructions describing exactly what it is thought the adoption of the particular precedent or form of words would achieve.

*Use of precedents and agreed formulations*

- 205 Departments should be aware that instructions in the form of “We should like the Bill to make provision along the lines of Schedule 1 to the P Act” are not helpful. They amount to instructions in the form of a draft (see paragraphs 158 and 159). What such instructions require the drafter to do is to decide what Schedule 1 does, to translate that into the context of the proposals in the Bill and then to decide if the best way to achieve that is to reproduce the provisions of the Schedule.
- 206 The first two parts of that job should already have been done by the department in deciding to adopt Schedule 1. The results of that work need to be set out in the instructions so that the OPC team can check the team’s conclusions against the department’s and produce the right result in the third stage of the work.
- 207 Departments should also be aware that very severe difficulties can be caused by the recommendation of a form of words during a review or consultation. It is common to find, on analysis, that the form of words fails to have the meaning it was thought to have. It is desirable to avoid becoming committed to a form of words unless it has been fully tested in the drafting process. If a department does become committed to a particular formulation, it is very likely that they will subsequently have to find ways to retreat from the commitment.

*Describing the options considered*

- 208 If several different ways have been considered for producing the desired effect, the instructions should spell out why the chosen option has been preferred to the others. This is particularly important if the drafter is likely to think that one of the rejected options would be more straight-forward. Instructing teams should not however be persuaded into wasting effort on detailed descriptions of rejected options.
- 209 Also, if the department’s policy and the choice of remedy have resulted from a compromise or any other attempt to reconcile or synthesise different positions, it is important to be transparent about the process in the instructions. Counsel in OPC are sensitive to the analytical inconsistencies that are capable of being produced by that process and will be better able to help with finding answers to them if their origin is clear.

- 210 Sometimes a compromise may result in a tension between the substance of what is wanted and the way it is presented. This is always likely to cause problems for the drafter, whose job is to make the substance as clear as possible. The instructions should seek to identify any underlying tensions of this sort. It may be necessary to discuss with the drafter how they are best resolved. The process of resolving this sort of issue can be time-consuming and so it is best addressed early. This can be difficult when it first emerges from concessions to be made at a late stage of a Bill's passage.

*Setting out the detail*

- 211 All the detail that involves a policy decision needs to be spelled out.
- 212 So for the creation of a criminal offence, the instructions need to spell out not only the acts or omissions to be forbidden and the mental element of the offence, but also the proposed penalty and any other incidental matters that need to be covered, such as jurisdictional or evidential matters or consents to prosecution. If defences are wanted for a criminal offence, they too should be set out; but there is bound to be a question to be answered about where the burden of proof should fall and about the nature of the burden. There is complex case law about what compatibility with the ECHR requires in this respect.
- 213 A request for a power to make subordinate legislation needs to spell out not only the intended width or scope of the power and how the department propose to use it, but also whether it is to be exercised by regulations, order or rules etc, the Parliamentary control to which the exercise of the power is to be subject and the supplemental, incidental, transitional and consequential powers that will be needed, and why. It is difficult to give satisfactory instructions on a power unless a very clear idea of how it will be exercised has been formed.
- 214 In the description of the detail the authors of instructions will often find it helpful to use examples of the sort of case they want to catch and of the sort of case that should fall outside the rule. However, it is seldom sufficient to list the examples that should be caught and those that should not. The instructions should also contain the department's analysis of what distinguishes the two.
- 215 The remedy proposed for the mischief should consist of a series of legal rules or of adaptations of existing legal rules. Most legal rules, in one way or another, set out the circumstances or case in which the rule is to apply and the legal consequences of its application. Instructions must describe both elements of any proposed new rule; and where an existing rule is to be changed, it should be clear from the instructions what both elements of the amended rule will be. In setting out the circumstances or case, it is important to consider all possible permutations and also any new permutations that arise or would be made more likely in the legal situation the Bill will create.
- 216 It should be remembered that every duty imposed by statute requires an enforcement mechanism. Public duties imposed on public authorities can be enforceable in judicial review proceedings. Other duties need a sanction or other mechanism to be set out in the Bill.
- 217 In this connection, it is also important to think about whether anything express needs to be said about procedural and other requirements under the Bill. Left to their own devices, there is at least a risk that the courts may hold that a failure to comply with any

such requirement will vitiate the decision-making process and any decision arrived at as a result. Instructing teams should consider whether (and, if so, how far) they want to pin down how the courts will look at a procedural and similar requirement, and instruct accordingly.

- 218 Another thing that will need to be considered in the case of every discretion or decision-making provision is whether any special appeal or review mechanisms are required.
- 219 Timing is frequently an issue when drafting. Those instructing need to think carefully about the order in which things could happen and also about what happens if two or more things happen at the same time.
- 220 Where a period is specified in a request for a provision, care needs to be taken about what days are included in the period (is the period inclusive or exclusive of the first and last days).
- 221 Sometimes the department will decide that an element of their policy should be provided under a power to be conferred by the Bill, rather than by the Bill itself. It is very unwise to do this unless the scope of how the power will be exercised is sufficiently clear to be able to draft the power accurately.
- 222 In the next part of this note a number of incidental and supplemental matters are mentioned on which provision may be needed to support the provisions to give effect to proposals in instructions. Depending on the circumstances, some of these may best be instructed on as part of the description of a particular element of what is proposed. Others will best be instructed on separately from particular proposals, with the instructions applying to the whole Bill.
- 223 The choice should be made on the basis of whichever is likely to be most helpful to the OPC team. If different things are required in respect of a particular incidental or supplemental matter for different provisions of the Bill, that will strengthen the case for dealing with that matter separately as part of the description of each relevant proposal.

#### *E. Incidental and supplemental matters*

- 224 There are some incidental and supplemental matters that need to be considered in connection with every Bill, although some may not give rise to any instructions. Paragraphs 222 and 223 describe how some of these matters should be dealt with in this separate section of the instructions and how some may be integrated into the remedy section of the instructions.
- 225 If instructions on these matters have been integrated with instructions in the remedy section, it is useful to use this section of the instructions as a checklist to tick off that the matters in question have been considered in relation to everything covered in the instructions.
- 226 Not all of the matters will be relevant in every case but they should each be considered.
- 227 The following are the matters that need to be considered in this way.
  - Service of documents under the Bill, including a consideration of electronic service.

- Any impact of the Electronic Commerce Directive (2000/13/EC) on the proposals for the Bill.
- Any impact of the Services Directive (2006/13/EC) or the Technical Services Directive (1998/34/EC) on the proposals for the Bill.
- Other EU issues.
- ECHR compatibility.
- Territorial extent and application (including the territorial sea etc. and Channel Islands and Isle of Man).
- Devolution issues. (See also paragraphs [247](#) to [251](#)) and any consequential cross border issues.
- Application of the Statutory Instruments Act, Parliamentary etc. control and incidental, supplemental, transitional and consequential powers for SIs under the Bill.
- Financial matters (what are the implications of the proposals for Government finances and how are they going to be met).
- Vicarious liability for criminal offences and also the liability of company directors etc. for offences by companies etc.
- Application of criminal offences etc. to armed services personnel.
- Application to the Crown.
- Any impact of the proposals on matters covered by Parliamentary privilege.
- Disclosure and confidentiality of information obtained under the Bill and information sharing.
- Extent to which powers conferred under the Bill may be delegated.
- Consequential amendments and repeals in other legislation.
- Commencement provisions.
- Transitional and transitory provisions and savings.

228 Most of these speak for themselves, but the last three require some commentary.

*Consequential amendments and repeals*

- 229 It is common for time pressures to make departments consider the taking of a power to implement consequential and transitional etc. provisions for a Bill. There is also a temptation to do this in order to be able to sweep up any consequential or transitional etc. provisions that may have been forgotten.
- 230 For the reasons given in paragraph [221](#), it is better to avoid doing this, and of course it will always delay implementation. It should be possible to include the required provisions in the Bill unless it is a large Bill; and even then, it should usually be possible to do so. There are real risks of postponing consideration of these matters. And departments need to be aware that Law Officers first, and the Delegated Powers and Regulatory Reform Committee in the House of Lords later, are very likely to ask the department to provide a detailed justification for any power of this sort that is included in the Bill (whether on commencement or later).
- 231 It is worth noting too that the consequential amendments and repeals required for a Bill

may give rise to devolution issues even where no such issues arise on the main provisions of the Bill.

*Commencement provisions*

- 232 In instructing on commencement provisions it is very important to consider which provisions may come into force at different times. A provision to bring different provisions into force on different days for different purposes will often prove sufficient. But that may not be enough in a case where there is a change of plan after the Bill has been drafted on the basis that certain things will inevitably be contemporaneous (eg if functions etc. are being transferred from body A to be split between bodies B and C, the Bill may need to ensure that there can be a period during which the functions are split between A and B or between A and C).
- 233 If the plans for the implementation of the Bill involve pilot schemes in specific areas, specific provision may be needed, at the very least to allow for different commencement dates to be appointed for different areas.

*Transitional and transitory provisions and savings*

- 234 The distinction between a transitional provision, a transitory provision and a saving is as follows, although the three are not mutually exclusive.
- A transitional provision is a provision that deals with how a case that began under the old law will be treated when the new law comes into force.
  - A transitory provision is a provision that specifies that a new provision will have effect for a limited period with modifications (perhaps until the coming into force of some other provision). An example would be a provision that says that until the coming into force of a general increase in penalties effected by some other Act, the reference in a provision of the Bill to a maximum of 12 months imprisonment will have effect as a reference to 6 months.
  - A saving is a provision that keeps a repealed provision alive for certain limited purposes.
- 235 Some of these things can often be achieved under the power to bring different provisions into force on different days for different purposes; but that power should not be stretched beyond reasonable limits.
- 236 The reasons given in paragraph 221 for avoiding the taking of powers are particularly relevant to powers to make transitional and transitory provisions and savings. Bills are about changing the law. If the law is being changed from A to B, it is sometimes possible to do that just by stating the destination viz B. And in those cases transitional etc. provisions are about the route from A to B. But the route is often as important as the destination; and if working that out is postponed, sometimes the wrong destination is chosen. Transitionals etc. are usually the most difficult part of the policy; and drafting them is a very specialised business. Wherever possible they should be in the Bill. At the very least their likely content should have been worked out in sufficient detail to be included in the instructions to draft the power.
- 237 Where new law is replacing some law that contained transitional or transitory provisions or savings, it is very important to consider if those are spent or if their effect has to be carried forward into any transitional or transitory provisions or savings in the

new law.

#### *F. Parliamentary and other handling matters*

- 238 In this section of the instructions the department should set out anything that it thinks the OPC team should know about the proposed handing of the Bill and raise any questions that are concerning them, particularly in relation to Parliamentary procedure, on which the OPC team will be able to advise.
- 239 The principal things that should be mentioned here are –
- the timetable and arrangements for pre-legislative scrutiny of a draft Bill;
  - any timetable or other arrangements for PBL Committee and introduction;
  - the proposals for or progress of any consultation on aspects of the Bill;
  - matters on which further provisions may be needed and the plans for instructing on them, including areas where the need for concessions in the House can be predicted;
- 240 This is also the place for the department to raise any questions they may have about –
- the likely scope of the Bill;
  - financial matters – including, for example whether provisions of the Bill will be treated in the Lords as a Bill of aids and supplies or a money Bill for the purposes of the Parliament Acts;
  - other Parliament Acts matters;
  - issues that are giving rise to concern about the potential hybridity<sup>22</sup> either of provisions of the Bill or of affirmative instruments made under a power proposed for the Bill;
  - concerns they may have about proposals affecting the prerogatives or interests of the Crown and the implications for any requirement for Queen’s or Prince’s consent (see paragraphs 324ff).

While OPC can advise on these matters in the first instance (often after informal consultation with the House authorities), the ultimate decision on such matters rests with those authorities. OPC will assist the department in any formal dealings with the House authorities on such matters.

- 241 If further explanations of the matters it is helpful to put in this section are required, an explanation should be sought from the OPC team.
- 242 The drafters of the Bill will provide a short and long title for the Bill that will satisfy the requirements of the House authorities, but if the department have anything to say about them at this stage, then this is where to say it.
- 243 The titles are matters to which it is often necessary to return as drafting progresses; and

22. Hybridity is a complex subject that deals with the case where a public Bill or affirmative instrument strays into the area properly dealt with by private Bill procedure. Very briefly: if a provision is to the detriment of particular persons in a way that does not identify them by reference to a “genuine” class, there are procedural complications. Counsel should be consulted in all cases where there is any question of this point arising.

Ministers may have strong views about the short title, in particular. The drafters of the Bill will do their best to comply with any reasonable requests subject to the need for accuracy and the requirements of the House authorities.

- 244 The same is true of any wishes the department may have about arranging the provisions of the Bill in a particular order for handling purposes. This is where this should be mentioned and explained. Again, the drafters will do their best to accommodate such wishes.

#### *G. Housekeeping matters*

- 245 The main thing that needs to be included in the final section is the contact details and availability of the Bill team members.
- 246 Other things might include for example any arrangements for Bill training events for the team.
- 247 Where a draft of a Bill contains provisions extending or otherwise relating to Scotland or Northern Ireland, the OPC team will assume that it is appropriate to copy that draft and all subsequent relevant drafts (together with the covering correspondence) to, as the case may require, one or both of the following –
- the team of drafters in the Office of the Scottish Parliamentary Counsel (“OSPC”) which is designated to work on UK matters (known as Scottish Parliamentary Counsel (UK) and referred to subsequently as “SPC(UK)”). In general, these drafters take Instructions from the Office of the Solicitor to the Advocate General for Scotland (“OSAG”) and, in this capacity, work to the UK Government rather than to the Scottish Executive;
  - the Office of the Legislative Counsel in Belfast (who work to the Executive).

However the OPC will mention to the departmental team that that is what it is proposing to do before the first occasion on which a draft or correspondence is copied to a particular drafting Office but will then follow that practice for that Office unless asked to stop.

- 248 Currently, there are no arrangements for sending correspondence on a regular basis to the Welsh Legislative Counsel, who work exclusively to the Welsh Assembly Government (“WAG”), or indeed to lawyers in the Wales Office.
- 249 It is helpful for the instructions to make clear in this section whether the departmental team is content for the OPC team to operate from the beginning on the assumption set out in paragraph 247, and (if not) to set out what is wanted. If anything special is wanted for sending copies to those interested in provisions applying to Wales, the instructions should also set that out.
- 250 It is for departmental teams to set up their own communications about the Bill with interested colleagues in the Scotland, Wales and Northern Ireland Offices and, outside the drafting offices, in the devolved administrations.
- 251 Unless told otherwise in this section of the instructions, the OPC team will assume that a response to a set of instructions should be sent to everyone on the copy list for the email covering the instructions.

## **What Counsel will do with instructions**

- 252 When the OPC team have received instructions and had an opportunity to study them, they will inform the instructing team about how they propose to deal with them and the timetable they would hope to meet in sending back draft provisions.
- 253 If other priorities prevent the OPC team from looking at the instructions immediately, they will inform the departmental team, as soon as possible, when they expect to be able to turn to the instructions.
- 254 In each case, the OPC team will provide the instructing team with regular information about how things are progressing. It is sensible for the department and the OPC team to agree how regularly updates should be provided, and the form that they should take.
- 255 As the OPC team study the instructions, they may have comments and questions. Someone should be available to answer these and there are highly likely to be a number in the period immediately after the OPC team turn to the instructions. This has implications for instructing teams who plan a period of leave for immediately after the delivery of instructions.
- 256 The best way of communicating and handling the drafters' comments and questions will depend on the circumstances and the personal preferences of the OPC team and the departmental team, as well as the time constraints under which both are working. Sometimes a phone call or a series of phone calls to the author of the instructions is the best thing, sometimes a meeting, sometimes a letter. If the points Counsel has are intricate or require a lot of thought or research, it is often better for Counsel to put them in writing either with a view to a written reply or so that the letter can form the agenda for a meeting or phone conversation.
- 257 Counsel in OPC are trained to take their instructions literally, as part of their obligation to understand exactly what the department are asking for. So departments should not be surprised or offended if Counsel question propositions that seem obvious to the author. There are obvious risks for the drafter in making undisclosed assumptions which eg fill gaps or extrapolate what the instructions say or which correct what seem to be obvious slips. So drafters tend to err on the side of caution in seeking confirmation of what was intended in cases where it is not exactly what the instructions say.
- 258 In due course, work will proceed and the OPC team will produce a draft of some or all of the provisions the instructions require. It will be sent to the author of the instructions, usually with an accompanying commentary.

## **The revision of drafting instructions**

- 259 Sometimes the department want to revise their instructions after they have delivered them and before they have received a draft. In these circumstances, it is essential to agree the form in which the revisions should be provided with the OPC team. The amount of work done already is likely to determine whether a replacement set of instructions (with or without track changes) would be preferable to a separate document explaining the changes that need to be made to the remedy asked for in the original instructions.

## Commenting on draft provisions

- 260 When an OPC team responds to a set of instructions with a draft and a commentary, the commentary will require an answer. It is often helpful for any reply to indicate the paragraphs on which the department consider no further action is required. The purpose of doing this is to ensure that the OPC team does not think that a point is still outstanding when the department have noted and accepted it. If a point is still under consideration it may be helpful to indicate that as well. A common sense approach to what paragraphs do not need further comment is what is required.
- 261 There are two main purposes for the commentary.
- The first is to explain the drafting where the drafter thinks an explanation will speed the department's understanding of how the provisions have been constructed.
  - The second is to clarify any points in the instructions about which the drafter was unsure when giving effect to the instructions and are therefore likely to be points about which the drafter had to make a judgement or for which there is no provision in the draft.
- 262 In meeting the second of these purposes the drafter may take the opportunity to record his or her understanding of the outcome of a phone call or meeting. This is so that the department can test the drafting against what the drafter thought was required, as well as against their own understanding of the outcome of the phone call or meeting. A subsidiary purpose is to enable the team to turn back later to remind themselves what they were trying to do originally.
- 263 In a Bill project, delivering the desired outcome should always take priority over the creation of “an audit trail”. But it is in everyone’s interest to do their best, in the circumstances, to maintain a record of what is being done, and why, as it happens. When amendments to a provision are suggested during a Bill’s passage through Parliament, it will be several months probably after the provision was drafted. At that stage, it may be difficult to recall the subtleties that influenced the original drafting. The fear that there might be some forgotten subtlety in the draft can unnecessarily inhibit a sensible amendment. On the other hand, there is a risk of destroying something important if you ignore the fear. Things are much easier if the correspondence can be relied on to record what both sides had in mind at the time.
- 264 So this is not about apportioning responsibility. The principal risk when drafting a Bill is that the OPC team and the instructing team will get themselves at cross purposes about what is intended. Where this happens the departmental team will think the draft does what they want it to do, while the OPC team is satisfied that it does something different, while thinking that the different thing is what was intended. For these reasons, and bearing in mind that Counsel in OPC are occupationally disposed to be literal-minded and cautious about unspoken assumptions, the commentary provided by the OPC team may be quite detailed. Often, however, much of it can be ticked off relatively quickly.
- 265 So at this stage, if not earlier when first studying the instructions, Counsel are very likely to raise any inconsistencies they have detected in the instructions. This will be in order to check that there has been no misunderstanding. So, for example, if instructions ask for a power to do A or B, but the power is later referred to elsewhere as a power to

do A, B or C, Counsel is bound to ask whether the proposal to do C has been abandoned or missed out earlier on.

- 266 The draft is always more important than the commentary. The primary obligation of the department when they receive a draft Bill is to read the draft very carefully to check that it really does what they want. They too should be acutely aware of the risks mentioned in paragraph 264, and they should comment in their reply to the OPC team on any doubts they have about whether the Bill does what they want.
- 267 It should be borne in mind that those in the outside world who need to understand the Bill will have to do so without the benefit of the drafter's commentary. The commentary, so far as it explains how the Bill works, is to speed understanding not to supplement the Bill's provisions. If the departmental team think that the draft cannot be understood without the commentary, or would not be understood easily enough by the eventual audience for the Act or Bill, they should say so.
- 268 Counsel have to make complex judgements when drafting in which they balance eg effectiveness and accuracy against readability and clarity - see paragraph 164. They are interested in receiving comments on the readability and clarity of drafts, as well as on their effectiveness and accuracy, and indeed welcome them. It is helpful for a drafter to know how a provision reads to someone who comes to it from with a different perspective, even if it is not always going to be possible to find a way to make the provision clearer, or at least to give priority to a revision for essentially presentational reasons. The drafter also needs, eventually to make a judgement about how best to balance the different needs and preferences of different potential audiences.
- 269 Also, if at any stage the department take the view that a provision needs to cover or exclude a case that was not covered in the instructions, they should tell the OPC team about the new case unless they think the matter is so obvious that it is unnecessary.
- 270 It is wise to be cautious about concluding that a draft has inadvertently covered or excluded something which had not been thought about originally but which there is now a desire to cover or exclude. A consultee may put forward a case that has not been considered before and it may be possible to see how one reading of the draft that had not occurred to the departmental team before would catch that case. It is important to consult the drafter about this. The drafter will wish to consider whether that reading would have wider implications that need to be addressed or carries a risk of being rejected, perhaps because it requires too benevolent a construction or suggests an attempt to manipulate the text to avoid the purpose of the provisions. Sometimes the drafter will wish to say, "Now I know that is a case you want to cover/exclude, the provision would be much better and more effective if it were drafted differently."
- 271 Similarly, it is not helpful to frame comments in the form just of questions to the OPC team about whether the draft covers a particular case. It also needs to be made clear whether the case is one the department want to cover or one they wish to exclude. There may be doubt both ways and the drafter needs to know what is wanted. If the department want confirmation that the provision covers or excludes a case that is important to them, they need to explain why they think the matter may be doubtful.
- 272 Comments on drafts should follow the same structure as any other instructions to draft, particularly if they are asking for entirely new provisions. Comments on provisions that are asking for clarification or other changes to a provision will probably consist in no

more than—

- a statement of the mischief (why the draft fails to give effect to the policy or appears to be insufficiently clear); and
- a proposal for a remedy (a statement of the different substantive effect that is intended, together with a request for any incidental etc. provision that will be needed to support the remedy).

- 273 The process of preparing comments on a draft is as skilled as the process of preparing instructions in the first place. The department will probably find that they have various different, and sometimes inconsistent, comments and questions about a draft. The instructing departmental lawyers will work through these with the other officials so that they can be presented to the drafter as a coherent set of instructions for the next round.
- 274 There is one technical matter of form that assists the OPC team when the departmental team comment on a draft. Every clause or Schedule of a Bill is given a “j” number that is printed after its title. These numbers do not change from draft to draft; so it is helpful if they are used (preferably in addition to the clause or Schedule number in the latest draft) to refer to provisions in the Bill. These numbers are the file names the drafter will use to summon up the electronic version of the clause or Schedule in order to amend it. And using them also makes it easier when it is necessary to look back at how a provision came to take the form it does to track through the correspondence to trace all the comments relating to the same clause.

### **Procedural handling of a Bill**

#### **Parliamentary Business and Legislation Committee**

- 275 Parliamentary Business and Legislation Committee (known as “PBL Committee”) is the Ministerial Committee of the Cabinet with oversight of the Government’s legislative programme<sup>23</sup>. The Committee—
- considers bids for the inclusion of Bills in the legislative programme, and makes recommendations on the contents of the programme and draft programme to Cabinet;
  - grants authority to departments to make use of OPC’s resources for Bill work (“drafting authority”);
  - authorises the publication of Bills or draft clauses for pre-legislative scrutiny or other public consultation;
  - considers the readiness for introduction of all Government Bills (except Finance Bills) and authorises their introduction;
  - considers and authorises the tabling of Government amendments to Bills which are already in the House (usually by correspondence);
  - considers other handling issues relating to the legislative programme.

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23. The members and remit of PBL Committee can be found at: <http://www.cabinetoffice.gov.uk/sites/default/files/resources/cabinet-committees-system.pdf>

276 PBL Committee is serviced by the Cabinet Office Legislation team, which is part of the Economic and Domestic Secretariat in the Cabinet Office. The Cabinet Office Legislation team works with departments to assist them with the project management of their Bill projects. They will also act on behalf of PBL Committee and the business managers in progress-chasing projects and in co-ordinating the management of the programme generally.

277 The Cabinet Office Legislation team holds regular meetings with each departmental Bill team to keep track of the progress of work on the Bill. The OPC team are invited to these meetings and are asked –

- to comment on how things are going from the drafting perspective; and
- to advise the department and the Cabinet Office Legislation team on what, from Counsel's point of view, is needed to deliver the project in accordance with requirements of PBL Committee and the business managers.

It is helpful if the final version of any project plan prepared by the department for the Cabinet Office Legislation team in advance of one these meetings is copied to the OPC team leader also in advance of the meeting.

278 1st PC attends PBL Committee and has a seat at the table. Where a meeting of PBL Committee considers a particular Bill, 1st PC's seat at the table will usually be occupied, during discussion of that Bill, by the Counsel who leads the OPC team on that Bill.

279 Shortly before the introduction of a Bill into Parliament, there will be a meeting of PBL Committee to discuss whether it is ready for introduction. The standards referred to at paragraphs 52 to 54 provide a framework within which Counsel can answer questions by the Committee about a Bill's readiness. More guidance about the arrangements for this meeting and the documents required for it can be found in the *Guide to Making Legislation* (see above paragraph 7).

280 PBL Committee's authorisation for the making of amendments, and sometimes for the publication of draft Bills, may be arranged through correspondence without a meeting of the Committee. Similarly, the presentation of a Bill that is not part of the main legislative programme (eg a consolidation Bill<sup>24</sup>) may be authorised through correspondence.

281 Counsel's PBL Committee role is –

- in advance of the meeting on a Bill, to brief the Cabinet Office Legislation team and, through them, the Chair of the Committee on any difficulties relating to the Bill that will need to be discussed at the meeting;
- in advance of the meeting on a Bill, to brief the Law Officers on any points of legal policy or the rule of law etc. which arise on the Bill;
- to send the Cabinet Office Legislation team the print of the Bill that is circulated for an PBL Committee meeting with the other papers (which will have been supplied to the Cabinet Office Legislation team by the department);
- to advise the Committee, from a technical point of view, on the readiness of a Bill and the likely extent of Government amendments when the Bill is in Parliament;

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24. Defined in the [Annex](#).

- to advise the Committee about any points of Parliamentary procedure or other handling matters within Counsel's special area of expertise;
- to advise the Committee on any drafting issues that arise in the discussion at the meeting.

- 282 This role means that it is wise for the departmental team to share with Counsel the drafts of whatever they are proposing to say in their PBL Committee memorandum etc., or in their briefing to their Minister for the meeting. A Bill can find itself in considerable difficulty if a difference of view between the department or their Minister and Counsel first emerges at the meeting. The drafter is unlikely to sign up to over-optimistic assessments of the Bill's readiness or of the likely need for amendments in Parliament.
- 283 The responsibility of Counsel to brief the Law Officers for the PBL Committee meeting also means that Counsel should be sent a copy of the draft ECHR memorandum when it is sent to the Law Officers two weeks before the meeting. It is for this reason too that Counsel needs to know about all correspondence between the Law Officers and the department that relates to the Bill or connected matters.
- 284 Counsel's briefing for the Law Officers is copied to the Ministry of Justice and to the Secretary to the Advocate General for Scotland. Both the Lord Chancellor and the Advocate General are members of PBL Committee.

### **Explanatory Notes**

- 285 Extensive guidance about Explanatory Notes is contained in Chapter 11 of the Cabinet Office's *Guide to Making Legislation*.
- 286 Explanatory Notes are required for every Bill introduced into Parliament, for every Bill sent to the second House and for the first list of amendments sent back from the second House to the first House. A set of Notes for the Act is also required as soon as possible after Royal Assent.
- 287 An up to date set of Explanatory Notes approved by the OPC team is required to be circulated with the papers for the PBL Committee meeting that will consider the Bill's readiness for introduction.
- 288 Explanatory Notes on a Bill or on second House amendments are prepared by the departmental team but they are printed and published by Parliament, not the Government. So the House authorities have ultimate control over their content and form.
- 289 The role of the OPC team in relation to Explanatory Notes is as follows –
- to clear in advance with the department the set of Explanatory Notes that is sent to the Cabinet Office Legislation team for circulation in advance of the PBL Committee meeting about the Bill;
  - to remind the department in advance of introduction, transfer to the second House or third reading in the second House that a set of Notes will be needed, or have to be revised for the next stage;
  - to clear in advance the set that is sent to the House on each occasion;

- to send an electronic and hard copy of the Notes on a Bill or on second House Amendments to the PBO in time for each stage at which they are needed and to communicate with the PBOs about them;
- to liaise with the department about the PBO's comments on the Notes;
- to clear the Explanatory Notes on the Act before they are sent to the Office of Public Sector Information ("OPSI") by the department.

- 290 When clearing Notes for PBL Committee, for publication by the House or after Royal Assent, Counsel will concentrate on securing –
- the technical accuracy of the notes; and
  - that the Notes to be printed by Parliament conform to the requirements of the House authorities.

Counsel may also be able to advise the departmental team about the application of the guidance in the *Guide to Making Legislation*.

- 291 The principal requirement of the House authorities is that the notes, when they describe a clause, should be explanatory and factual, rather than seek to argue the case for the policy.
- 292 The House authorities do not find it helpful to be asked to read Explanatory Notes at the last minute. It assists if work can be done on the Notes as far as possible in advance, so that Counsel can show a relatively final version of the Notes to the House authorities a week or so in advance of their likely publication date. This is more difficult between Houses than it is, or at least should be, before initial introduction.
- 293 Counsel reading Explanatory Notes will also be checking for whether they reveal a possible misunderstanding between the drafter and the department about what a particular provision of a Bill, or an amendment, was intended to do.
- 294 Counsel commenting on Explanatory Notes may also, if there is time, draw attention to respects in which they can be made more helpful or more compatible with the guidance.
- 295 OPC's functions in relation to the Explanatory Notes can be time-consuming and often needs to be undertaken at a time when the Bill itself is making heavy demands on Counsel's time. The same is true for the departmental team. At the beginning of a Session, the House authorities are also likely to be very busy. For this reason it is wise not to postpone the work until the last minute and to plan as much of the work as possible for a less busy time.
- 296 The following are tips to consider when preparing Explanatory Notes –
- Think about them early and start work on them as provisions begin to settle down.
  - Think about the Notes that will be needed on second House amendments as they are made.
  - Ensure the Notes are drafted by a member of the Bill team who is familiar with the work on the Bill and with what it is trying to do.
  - A paraphrase of the Bill will not be helpful to the reader and is actually more likely to be inaccurate than a more discursive explanation.

- Try to use the instructions, rather than Counsel's drafting, as the basis for explaining what the provisions do - but remember that the policy may have moved on.
- Remember that the real value of the Notes is that they can include things that should not be in the text of the Bill (eg background and context, examples and full explanations of the effect of a cross reference or of the existing law).
- Make sure that everyone who is given permission to amend the Notes is familiar with how to use the Word template in which they must be prepared and has it properly installed.
- Appoint one person to be the principal editor of the Notes.

- 297 Where Explanatory Notes need to be amended to take account of points made by Counsel or the House authorities, Counsel will normally return the electronic version for amendment by the department. This is the safest way to avoid template problems and problems arising from the use of different versions of Word.
- 298 Please consult the OPC team if there is a suggestion that the Explanatory Notes should be published on interleaved pages facing the Bill text. Arrangements can be made for this in the case of draft Bills; but various things need to be prepared for and considered first.

#### **Advice and assistance on Parliamentary procedure, practice etc.**

- 299 The OPC team provide advice and assistance about various matters of Parliamentary procedure and practice and handling and, in this connection, perform certain tasks for the departmental Bill team.
- 300 The OPC team will have an established working relationship with the officials in the PBO of each House. For this reason it is sensible to use Counsel as the principal, and for many purposes only, channel of communication with the House authorities. This is particularly important wherever there is room for different views to be taken of how the rules should be applied. If the department deal directly with officials in the PBO (as sometimes happens when the Bill team and the clerk meet during the Parliamentary stages), the departmental team should keep the OPC team informed about that.
- 301 The rules of Parliamentary procedure and practice are complex but also contain a substantial element of flexibility and discretion that is designed to enable the House authorities to advise the Speaker to apply them in a way that will satisfy the House. Many of the rules have the characteristics of constitutional conventions. Counsel will often have to consult the House authorities about how a rule will apply in a particular case; departments benefit from Counsel's ability (as a result of experience) to formulate the question for the House authorities in the manner most appropriate to the context.
- 302 It is also important to emphasise that the rules and the way they are applied, differ between the two Houses. One of the most significant differences between the Houses is that in the Commons, there is a Speaker with the authority to decide on and to apply the rules. In the House of Lords, the House itself is the ultimate arbiter of how the rules are applied. The Houses try to be consistent in the same case, but different answers may apply in different Houses and according to which House has to decide the matter first.

- 303 Counsel can advise the departmental team about the implications of this in a particular case. In theory it is possible, at least in the Commons (where the Government will have a majority), to set aside most rules of Parliamentary procedure by a vote of the House. However there is usually a relatively high political price to be paid for this.
- 304 Counsel are the only officials with the authority to put down amendments of a Bill in a Minister's name. Counsel also have authority to put down other motions relating to a Bill but so in practice does the Government Whips Office ("GWO"). Some motions are always put down by the GWO. Others are put down by Counsel or, if necessary by the GWO. The OPC team can advise on tabling motions.
- 305 The OPC team also has an established relationship, and an organisational link, with the officials in the two GWOs and will work closely with them on certain procedural matters, while keeping the departmental team informed. It is recognised that the departmental team will have their own separate dealings with the GWO, but it is helpful for the departmental team to make sure the OPC team know about any of their dealings with the Whips that may affect Bill handling or the timetable for the Bill.

*Attendance of Counsel at Parliamentary proceedings*

- 306 Counsel will not usually attend the Parliamentary stages of a Bill, but they will make themselves available to do so if needed by the departmental team or, of course, by the Minister.
- 307 Counsel do, at least sometimes, attend the meetings of a programming sub-committee in the Commons. They are the only Government officials who are entitled to do so and if there is any chance the motion may need to be redrafted during the sub-committee's proceedings, it is wise for Counsel to be there. Counsel will consult the department about whether his or her attendance is required.
- 308 Counsel will often need to be present during a "to-ing and fro-ing" stage (viz when a Bill is passing between the Houses). This is especially the case if there are going to be several exchanges on a single day, or if there is likely to be any disagreement in the Commons reasons committee.
- 309 Generally, it will be useful to have Counsel present whenever some drafting or advice may be needed very urgently while things are moving quickly. At other times it may be sufficient for Counsel to keep an eye on proceedings from a distance and be available to be summoned if required.
- 310 The departmental team should discuss with Counsel what are the most sensible arrangements for the case in question.

*List of things with which Counsel will deal*

- 311 Counsel is responsible for considering and dealing with a whole range of procedural and handling matters in preparation for a Bill's passage through Parliament and in the course of its passage. Here is a list—
- advising on and making arrangements for the Bill's presentation and publication;
  - confirming to the House on introduction, and on transfer to the second House, that the ECHR statement for the Bill has been made;

- advising whether Queen's and Prince's consent are required and advising on related procedure;
- advising on the scope of the Bill;
- advising on whether any question of hybridity arises and of the consequences of hybridity;
- matters relating to Commons financial procedures and privileges –
  - advising on whether these procedures and privileges affect the choice of the House of introduction or facilitate handling when the Bill reaches the Lords;
  - advising on whether a money resolution is required for the Bill as introduced, or for any amendment;
  - advising on whether a ways and means resolution is required for the Bill, or any amendment;
  - drafting the motions for money resolutions and ways and means resolutions;
  - securing Treasury approval for the tabling of the motions and tabling them;
  - notifying the Lords PBO whether a privilege amendment is required for a Bill that is introduced in the Lords;
  - drafting and tabling an amendment to remove the privilege amendment in the Commons;
- matters relating to programming etc. in the House of Commons<sup>25</sup> –
  - advising on matters relating to programming;
  - drafting and tabling an anticipatory order of consideration motion;
  - drafting programme motions and programming sub-committee motions and supplementary and amending motions;
- drafting orders of consideration motions for the House of Lords and making arrangements for them to be tabled by the Lords Whips;
- advising on special procedural arrangements that need to be made for an emergency Bill or other Bill that needs to be passed with unusual speed (eg in the “wash up” to a general election), including –
  - liaising with the Whips Offices; and
  - drafting and tabling motions needed in connection with an accelerated passage;
- matters relating to amendments –
  - advising on proposals for Government amendments and on the clearance required;
  - drafting all Government amendments;
  - tabling amendments on behalf of departmental Ministers;

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25. The government has indicated its intention approach the question of programming in a different way from its predecessor. The features of this will emerge in practice but are expected to include consideration of allowing more time for Bills at Commons report stage. Some Bills may proceed without programme motions and, if this happens, it could result in the need to resort to a traditional Allocation of Time motion, in relation to which Parliamentary Counsel have similar functions as they do in relation to programming.

- advising on and approving the acceptance of non-Government amendments;
- consulting with the departmental team and the PBO in the Commons about the grouping and selection of Commons amendments;
- matters relating to to-ing and fro-ing (“ping pong”) –
  - advising on procedure;
  - drafting all Government motions in the Commons;
  - drafting all Government reasons for disagreement for the Commons reasons committee;
  - settling all Government motions in the Lords with the Lords PBO;
  - confirming the effect of motions with each PBO between each stage;
  - dealing with any related programming matters or matters relating to grouping and selection or order of consideration;
- working with the PBO to secure the accuracy and integrity of the legislative text and dealing with printing mistakes;
- advising on the application of the Parliament Acts;
- advising on the “carry-over” of a Bill from one Session to another and drafting and tabling any necessary motions;
- advising on relevant Parliamentary procedure generally (eg on the timetable for tabling and on what can be tabled on non-sitting days during the Parliamentary recess);
- arranging for early publication of the Act where necessary.

312 Most of the matters (eg scope) on which Counsel can provide advice are ultimately matter for the decision of the Speaker or relevant chairman in the Commons or the House itself in the Lords. On such matters, if the answer is not readily apparent, Counsel will informally consult the House authorities, who are solely responsible for advising the Speaker or chairman or the House.

*Arrangements for the Bill’s presentation and publication*

- 313 The arrangements for the Bill’s presentation and for its publication are made by Counsel with the PBO. Counsel will do this on the instructions of the departmental team. The departmental team will need to check what is wanted with number 10 and to confirm that the Cabinet Office Legislation team are satisfied that all the conditions for presentation of the Bill in accordance with those arrangements have been satisfied.
- 314 The normal arrangements in the House of Commons are for a notice of presentation to be sent to the House on one sitting day, with the Bill being presented on the following sitting day immediately after “the commencement of public business”. The precise time of the commencement of public business will vary from day to day. Arrangements can be made for the Bill to be published on the same day as presentation. But it must be embargoed until the time of presentation. A Bill that is not published immediately after presentation will be published first thing on the following day (whether or not that is a sitting day).
- 315 In the House of Lords a Bill is presented at a sitting of the House on one day and is published first thing the following morning (whether or not the following day is a

sitting day).

- 316 Arrangements can be made, in the case of a Bill introduced in the Commons, for a number of copies of the Bill to be reserved for collection by the department, so that a press conference can be held immediately after presentation. Counsel should be consulted about what is possible and will make the necessary arrangements with the PBO.
- 317 Some Bills are presented in the Commons under special arrangements with special procedures – principally if they are Bills primarily about financial matters. Counsel will be able to advise where these special arrangements are needed and about the implications.
- 318 Also sometimes special arrangements would have to be made in the case of an emergency Bill. Again Counsel will advise.
- 319 The text of any Bill needs to be handed in at the latest in the afternoon before the day of its publication. There are deadlines for handing in the text, and Counsel will advise the departmental team what they are.
- 320 In the case of a draft Bill., the draft will be printed as part of a command paper by the department under arrangements they themselves make with the printer. They will need to get the text from Counsel. It will come in “pdf” format. The department will need to have informed Counsel when they need to receive the text in order to meet their publication timetable.

*ECHR statement*

- 321 When the Bill is presented, it is usual to print the section 19 statement on the cover sheet of the Bill. This is only possible, however, if Counsel can assure the PBO that the statement has been made by the appropriate Minister. Counsel will be able to advise the department what is required for this purpose. and which Minister must be available at what time to sign the statement.
- 322 A further ECHR statement is needed when the Bill transfers to the second House. Again Counsel will be able to advise the departmental team on what is required in practical terms for the statement to be printed on the Bill when it is reprinted for the second House.
- 323 The department is responsible for retaining the original section 19 statement, signed by the Minister.

*Queen's and Prince's consent*

- 324 A Bill that affects the private interests or prerogatives of the Crown, the Duchy of Lancaster or of the Duchy of Cornwall is required by Parliamentary rules to be given Queen's or Prince's consent. This is something quite different from the Royal Assent that turns the Bill into an Act.
- 325 Usually, if this is needed, it will be needed for third reading of the Bill in each House. In some cases it may be needed on second reading instead. Counsel will be able to advise on whether consent is required – usually after discussing the matter with the House

authorities — and on what is required in practical terms to have it signified.

- 326 This is usually a matter that needs to be thought about early on because it can take time to receive Queen's and Prince's consent. It is for the departmental team to obtain the consent from the Palace and the Duchy.

*Scope of the Bill*

- 327 The rules of Parliamentary procedure contain rules to ensure that debate on a Bill is confined to its subject matter. These are often referred to as the rules about scope, although that is actually the correct term only in the Commons.
- 328 The rules of scope will prevent Opposition and backbench members from moving amendments that are outside the scope of the Bill. The same rules will prevent the Government from adding provisions to a Bill on subjects outside its scope.
- 329 The rules of scope are complex in practice. They differ between the Houses and in their application in different cases; and they are also capable of avoidance, at least for the purposes of debate. There is a widespread misconception that the rules depend on the long title of the Bill. The relevance of the long title of the Bill is, at most, peripheral.
- 330 Counsel will be able to advise on scope questions.
- 331 However, it is seldom practicable to get definitive rulings on scope until there is a relatively settled and complete draft of the Bill, and for the reasons given above it is usually necessary for Counsel to consult the House authorities before giving a view that is capable of being relied on.
- 332 Departments need to instruct Counsel if they have specific wishes so far as the scope of the Bill is concerned, but it is not always possible to satisfy them. Departments need to keep in mind the potentially two-edged nature of a ruling on scope. It will inhibit both those outside the Government who want to amend the Bill and the Government itself.

*Commons financial privilege*

- 333 The House of Commons claims exclusive rights and privileges over the House of Lords in financial matters. There are also some special procedures affecting Bills that have to be followed in relation to financial matters.
- 334 These things may have implications for the House of introduction of a Bill. Counsel will be able to advise on this. However, the rules are not as strict as they once were and so there is often also a political judgement that has to be made about whether a Bill with substantial financial content that could technically start in the House of Lords should do so.

*Money and ways and means resolutions etc.*

- 335 In the House of Commons, any provision of a Bill that gives rise to new or increased public expenditure or which imposes a charge on the public (eg a tax) cannot be included in the Bill unless the House has agreed a money resolution (for expenditure) or a ways and means resolution (for a charge).

- 336 For this reason the provisions of a Bill that give rise to expenditure, or to a charge, are printed in italics in a Bill introduced in the Commons and they are notionally treated as not in the Bill until added to the Bill in committee by the motion for the clause or Schedule in which they are contained to stand part of or be added to the Bill. The provisions can only become part of the Bill if they have been “franked” by the required resolution.
- 337 Where expenditure or charges can be found in a number of provisions it is common to insert a clause to “drain” the italics. This can enable a single clause to be italicised, where without that clause there would be a whole series of italicised provisions. However, the rules about the extent to which italics can be drained from a provision are far from straightforward.
- 338 Amendments proposed to Bills that give rise to expenditure or charges are out of order unless franked either by an existing money or ways and means resolution or by a further resolution.
- 339 Where a Bill that has been introduced in the Lords contains provisions by the time it is ready to go to the Commons that would have been italicised had the Bill been introduced in the Commons, those provisions are not italicised. Instead, before the Bill is sent to the Commons, an amendment (known as a “privilege amendment”) is automatically made (viz without being put down) that negatives the financial effects of those provisions. This is printed in bold when the Bill is first printed for the House of Commons. The Government then has to frank the provisions in question with a money resolution in the Commons. That resolution then enables the Government to put down an amendment in committee to leave out the words inserted by the privilege amendment. The amendment to remove the privilege amendment is an ordinary amendment and has to be drafted and put down, with the authority of departmental Ministers, by Counsel.
- 340 These rules mean that the departmental team should make the OPC team fully aware of the financial implications of a Bill. The following points should be noted.
- What is important is increased expenditure or charges that are directly attributable to the provisions of the Bill. Increases that are attributable to changes of current practice that are associated with but not dependent on the provisions of the Bill are irrelevant.
  - There is a “de minimis” rule which disregards small increases of expenditure, but Counsel has to be able to demonstrate that even very small increases fall within that rule – so their maximum cost should be calculated and disclosed to Counsel.
  - It is irrelevant that the Bill or other factors are intended to produce balancing savings. It is the gross amount of new or increased expenditure, not the net amount, that triggers the need for a money resolution.
  - New or increased local authority expenditure needs cover because of its potential effect on central government grants.
  - The rules about what does and does not require resolution cover can be complicated and the departmental team should consult Counsel about the detail the OPC team should be provided with in order to take advice from the Commons PBO.

- A motion for a money resolution or ways and means resolution can only be put down if it has the approval of a Treasury Minister (usually the Financial Secretary). This is a rule of the House not only of Government.
- Authority from the instructing department and their Ministers is not needed to table the motion for a financial resolution. The departmental team will have had an opportunity to see the terms of the proposed motion and may wish to brief their Ministers on the need for a resolution.
- Motions for financial resolutions that are taken immediately after second reading are not subject to debate. A short debate occurs if they are taken at any other time (eg to frank an amendment not covered by the resolutions already taken).

341 Counsel's role in relation to financial resolutions is as follows –

- Counsel will consult with the Commons PBO as to which provisions of a Bill need to be italicised or, as the case may be, will consult with the Lords PBO (after having consulted the Commons PBO) as to whether a privilege amendment will be required;
- In the case of a Lords starter, Counsel will review the need for a privilege amendment at the time of Third reading and will confirm the position to the Lords PBO;
- When a Bill returns from the Lords to the Commons with amendments, Counsel will review whether, in their view, any of the amendments require a further money or ways and means resolution and will inform the PBO accordingly and discuss options with the departmental Bill team and (if necessary) the Treasury.
- In each of the three cases set out above, Counsel will draft any money or ways and means resolution that is considered necessary in the light of discussions with the departmental team and the views of the House authorities.
- Counsel will send the draft motion for any resolution that is needed to the PBO for confirmation that the PBO are satisfied that it covers the provisions in the Bill that will have to be franked. The PBO can be expected to draw attention to any discrepancy between what is said by Counsel in seeking this confirmation and the financial effects parts of the Explanatory Notes.
- When confirmation is received or, if time is short, while it is being sought, Counsel will write to the Treasury asking for their agreement to the draft motion. The letter will be copied to the department and officials in the Treasury may contact the departmental team to discuss the practical financial implications of the Bill.
- When the Treasury have agreed the form of the motion Counsel will ask for it to be approved by the Minister and, assuming the Bill has been introduced, will put the motion down as soon as they are informed that the motion has been approved.
- Counsel will advise the department and the Treasury about timing. Different rules apply to the tabling of motions for financial resolutions from those that apply for amendments of Bills.
- Where a privilege amendment has been inserted in a Bill that started in the Lords, Counsel will remind the department of the need to put down an amendment for Commons committee stage to remove the privilege amendment.
- Counsel will put down the amendment to remove the privilege amendment only when instructed to do so, with Ministerial authority, by the department. NB: No PBL Committee clearance is needed for the tabling of this amendment.

*Programming in the Commons*

- 342 Government Bills in the Commons are often subject to programming. Programming is the process by which proceedings after the Bill's Second Reading are timetabled and the proceedings are brought to a conclusion in accordance with the timetable.
- 343 The process of programming is governed by Standing Orders of the House. The Standing Orders set out how programming works, specifying how much, if any debate, is required on each programming motion or supplementary motion and setting the rules for bringing proceedings to an end when "a knife falls", that is to say, when a time is reached at which proceedings must be brought to a conclusion.
- 344 The OPC team will be able to advise on the effect of the Standing Orders and will be able to explain what happens when the knives fall (eg what will happen to unreached Government amendments and to Opposition amendments that the Government wants to accept).
- 345 The Standing Orders draw on, and largely replace, the procedural provisions that used to be made by allocation of time orders (which were known as "guillotines"). A guillotine may still be needed in the case of a Bill that needs to be timetabled at Second Reading, as well as at subsequent stages (eg an emergency Bill) or if the Government has decided not to programme a Bill and it is subsequently subjected to time-wasting or delaying tactics by the Opposition.
- 346 In practice what is required for programming in most cases is –
- a programming motion to be put down in time to be taken immediately after the end of the Second Reading debate, to bring the Bill within the programming system and to outline the timetable for the Bill;
  - a programming sub-committee motion to timetable proceedings (and possibly to provide for the order of consideration) in public Bill Committee;
  - a supplementary programming motion to timetable proceedings (and possibly to provide for the order of consideration) on Consideration (sometimes called the Report stage of the Bill);
  - a supplementary programming motion to timetable proceedings (and possibly to provide for the order of consideration) on consideration of Lords amendments.
- 347 The third and fourth motions mentioned above will not be needed in every case. If the Bill, or part of it, is committed to a Committee of the Whole House, it is likely that provision will be made for this in the initial motion.
- 348 Further motions will be needed if changes are wanted to any of the provisions made by the resolutions resulting from the motions mentioned above.
- 349 A programming motion covering a particular stage of the Bill can spell out the order in which the clauses and Schedules and any amendments on them are considered at that stage. This is only needed if the normal order is to be departed from. If the programming sub-committee motion is to contain an order of consideration but will not be agreed in time to allow the amendments for public Bill Committee to be arranged in that order on the notice paper for the first meeting, it may be necessary to put down a dummy "order of consideration motion" in advance of the first meeting in the Ministers name. The motion is never put because it is usually superseded by the programming

sub-committee resolution.

- 350 The OPC team will warn the department about the need for a dummy order of consideration if they know about the proposal to change the order of consideration. However if the departmental team get to know about a proposed change of order, they should alert the OPC team immediately, in case they have not been told.
- 351 The OPC draft the programming motions and programming sub-committee motions that are required. The contents are normally agreed by the GWO, who give Counsel their instructions on these matters. The Whips will liaise with the department but the OPC will also send copies of drafts to the departmental Bill team. The tabling is arranged between GWO and OPC and the OPC team will keep the department informed about what is happening.
- 352 Programming sub-committee resolutions are agreed at a meeting of that committee which is a select committee and meets in private. Parliamentary Counsel are the only Government officials authorised to attend this meeting. If it is likely that any significant redrafting of the motion is going to be required after discussion in the sub-committee, one of the OPC team will attend the meeting.

*Order of consideration motions in the Lords*

- 353 In the Lords there is no programming and the Government has no control over the timetable. The only procedural motions the OPC team is likely to have to prepare are those relating to the order in which amendments are taken at a particular stage in the Lords. If the Government wish the Bill to be considered out of the normal order, the drafter will be asked to draft a motion to change the order of consideration and to arrange with the Lords Whips Office for the motion to be tabled.
- 354 It is worth noting that the default position in the Lords is for a new clause or new Schedule to be taken at the place where it would be inserted. In the Commons the default position is to take new clauses after amendments to all the other clauses at committee stage but before those amendments at Consideration/Report stage. The same is true in relation to new Schedules and amendments to the existing Schedules.

*Emergency legislation and other fast track legislation*

- 355 Sometimes legislation is needed in a hurry and has to be rushed through both Houses. This can happen because of a situation that needs urgent legislative attention or perhaps in the run up to a general election.
- 356 In those circumstances, programming in the Commons is seldom enough to guarantee speedy passage. Other motions and procedural steps will be need to be taken.
- 357 For instance, an allocation of time motion (“a guillotine”) may be needed. Unlike a programme order, a guillotine can timetable the Second Reading of the Bill. The guillotine, or separate procedure motions, may make provision for other matters (such as enabling more than one stage is to be taken on the same day, enabling financial motions to be moved between stages or allowing amendments to be tabled before second reading). Sometimes everything will be dealt with in a composite “business of the House motion”.

- 358 The procedural aspects of passing legislation at speed have to be agreed between the OPC team and the PBOs in both Houses. It is essential for all involved to know what is to happen when. For that reason, it is necessary to give the OPC team at least some time to talk to the PBOs about what is needed. The GWOs in both Houses will also need to be involved.
- 359 The OPC team will be able to advise on what is necessary, will liaise with the PBOs and the Whips and will draft and put down any necessary procedure motions.
- 360 When things are moving fast, there are obvious advantages in ensuring that drafters are on hand whenever they may be needed. The departmental team and OPC team should talk to each other about what arrangements should be made for this.
- 361 The Lords constitution Committee has published a report on fast track legislation and the Government has accepted some of its recommendations. These have to be taken into account in cases where legislation is proceeding down a fast track.
- 362 Experience has shown that where fast track legislation is being prepared on a contingent basis in anticipation of events outside Parliament (eg an expected court judgment), it is important to prepare for as many possible contingencies as possible and not to become wedded to a particular outcome.
- 363 In the run up to an election all the different OPC teams involved will liaise with each other.

*Amendments*

- A *Government amendments*
- 364 The process of producing Government amendments is very similar to the process of producing a Bill. But the time scales are even more compressed, and the opportunities for correction at a later stage more limited.
- 365 For this reason it is important for the departmental team and the OPC to develop a clear plan for the preparation of amendments and to ensure that they are each keeping the other informed about progress. The plan needs to recognise that tasks that would take a long time in the period before a Bill is presented cannot be performed significantly faster when it is in the House.
- 366 The OPC team will be available, just as they are in early stages of Bill preparation to give advice in advance of instructions about proposed amendments, wherever the departmental team think that would be helpful.
- 367 Government amendments can only be put down with PBL Committee authority and in theory the Committee's authority is required for them to be prepared. In practice there may not be time to get authority to draft an amendment in time and drafters often draft on a contingent basis. However where there is a lot to do and priorities need to be organised, it is useful to get some indication from the Cabinet Office Legislation team about what should be treated as the highest priority. There is a general authority for some technical amendments.
- 368 It is important not to underestimate the time that will be needed to secure policy and

PBL clearance for amendments. The processes for securing collective agreement may be time consuming and are particularly important in the context of a coalition government.

- 369 The OPC team will be able to give advice on what authority is needed for amendments and generally on clearance. However they will rely on the departmental team to have the necessary authority before they ask for amendments to be tabled.
- 370 Depending on whether a Government amendment is wanted to add something new to the Bill or to change something for which it already provides, instructions to prepare Government amendments should take a similar form to instructions to draft a Bill or instructions to modify a draft. It should of course be unnecessary to describe in detail the effect of the existing provisions of the Bill but it may be necessary to explain the mischief with them. Concessions to points made by the Bill's critics can often give rise to the sort of problems discussed in paragraphs [209](#) to [210](#).
- 371 Just as a draft Bill may need a number of rounds of drafting so may a set of amendments. It is also important to keep clear records of which version of amendments is the latest. If this is not done, it can cause confusion when it comes to instructions to table. The departmental team and the OPC should have a clear mutual understanding about how they will refer to amendments when speaking on the phone.
- 372 Parliamentary Counsel have authority to table amendments in either House on behalf of a Minister of the Crown. The OPC team will table amendments on the basis of oral instructions from the department, whose responsibility it is to ensure that a departmental Minister has personally authorised the tabling and that all necessary collective agreement has been obtained. As mentioned above it is important to have a clear basis for identifying the amendments that are to be tabled.
- 373 There are rules that limit the times when amendments can be tabled, and the OPC team will be able to advise about this. In addition the GWO will be able to advise on any current understanding or situation that requires longer than the minimum amount of notice to be given of amendments, in order to avoid complaints in the House.
- 374 The OPC team can also advise if it becomes important that a particular Government amendment is debated or voted on before other amendments.

#### *B Accepting non-Government amendments*

- 375 Sometimes the Minister in charge of a Bill will wish to accept an amendment put down by a Member other than a Minister (references in this and the following paragraphs to Member include a peer where the Bill is in the House of Lords). Sometimes a Minister will want an amendment to be drafted for another Member so that it can be accepted by the Government.
- 376 It is comparatively rare for a non-Government amendment to be drafted in a form in which it can be accepted unchanged or without the addition of further consequential amendments. In principle no amendment should be accepted without the OPC team having been consulted. Usually it will be better to undertake to accept it in principle and to come back with Government amendments at a later stage. The OPC team will be able to advise on the most appropriate course of action.
- 377 The OPC team is available to draft amendments to be handed to Members. However the

procedure for getting authority for Parliamentary Counsel to table amendments in the name of a Member who is not a Minister is complex and bureaucratic. In addition there can be procedural disadvantages where an amendment is tabled in the name of a Member who is not a Minister.

### C *Grouping and selection of amendments*

- 378 At committee stage and report stage in the House of Commons the chairman or Speaker will select and group the amendments that have been put down.
- 379 What this means is that he or she will decide which amendments should not be selected for debate by either ruling them out of order or just exercising a residual discretion not to select them; then the amendments will be grouped so that several can debated together when the first is moved. Where amendments are grouped there is no separate debate on amendments later in the group but they can be separately voted on unless they fall as a result of an earlier vote.
- 380 The chairman or Speaker are advised about these decisions by the House's officials. In the case of a Bill in public Bill Committee, the advice will be given by the clerk in the Public Bill Office who is in charge of the Bill. However, in the case of decisions affecting business on the floor of the House (whether in committee or on report) advice from that clerk is passed up through and agreed with more senior clerks including the Clerk of Legislation and often the Clerk of the House.
- 381 It is common for the clerk in the PBO to discuss the advice he will be giving on these matters with the OPC team. Occasionally where there is a conference with the Chairman or Ways and Means or the Speaker about the advice he or she is being given on grouping and selection, the Counsel in charge of the Bill will be invited along.
- 382 Different clerks deal with these matters differently. Some like to come up with a provisional grouping and selection and then discuss it with a member of the OPC team. Some prefer to consider the views of the OPC team first. The views of the departmental team, who often want an early indication of grouping in order to write notes on amendments, need to be fed in through the OPC team. The departmental team and the OPC need to agree how this is best done, as well as agreeing a sensible way to pass back to the department any indications from the clerk of the likely grouping and selection. It is common these days for someone in OPC to talk directly to the Bill team manager or someone who is working in that team, rather than to use the departmental lawyer as a conduit.
- 383 In the House of Lords there is no grouping and selection but peers moving amendments can suggest a grouping. Departmental suggestions are made through the Lords Whips Office, and the OPC team is usually not involved. It can however give advice if required. It can also approach the PBO if there is a suggestion that an amendment that has been put down is out of order.

### *Exchanges between the Houses*

- 384 When a Bill has completed its passage through the second House, it is returned to the first House with a list of amendments made in the first. This initiates a process popularly known as "ping pong" or "to-ing and fro-ing".

- 385 The procedural aspects of this can be complex and it is important for the OPC team and the departmental team to work closely together. Things can get particularly difficult if, as sometimes happens, a Bill is going through two or more different stages of ping pong on the same sitting day.
- 386 It can often be helpful to have a meeting with the OPC team in advance of the exchanges between the Houses so that the OPC team can explain the procedural complications to the whole team and so the departmental team and the OPC team can agree how they will handle the process.
- 387 The process operates from the Bill that was sent to the second House and a consolidated list of all the amendments made in the second House. The process then proceeds by a series of messages between the Houses which together constitute an agreement of the final text of the Bill. When there are no further disagreements between the Houses the Bill can proceed to Royal Assent. If deadlock is reached, the Bill falls.
- 388 This document does not try to set out the detail of the procedural complexities, it only explains how the OPC team and the departmental team should work together. However, three features of the process need to be mentioned to enable that to be done –
- There is a “double insistence”<sup>26</sup> rule for determining if deadlock has been reached. The rules for determining when this has occurred are complex, as are the rules about how the situation can be avoided.
  - For the purposes of this rule amendments or other messages may be collected together into a single “package” to constitute a single proposal, but the rules about when this can be done are also complex.
  - Whenever a House disagrees with a proposal from the other House and does not propose an alternative it has to agree a reason for the disagreement.
- 389 There has to be a set of explanatory notes on the consolidated list of amendments sent back from the second House. The department needs to prepare the Notes in consultation with the OPC team, who in turn will clear the notes with the PBO. It is wise to begin preparation of this in advance of seeing the list, because things can move very quickly.
- 390 In addition the Commons stages of the exchanges usually have to be covered by a supplementary programme motion. This is dealt with in the same way as other programme motions and the OPC team will be able to advise on its effect.
- 391 Because the Government has a majority in the House of Commons it is more usual for the Government’s proposals during exchanges between the Houses to be put forward in that House. However, if a compromise is reached outside the House or the Government wants to test a proposed compromise in the House of Lords it may want to put its proposals forward in that House.
- 392 In the Commons grouping operates at two levels. Amendments from the Lords may be grouped together for the purposes of the motion to agree them. Separately if there is

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26. This situation can arise in a number of ways. An example is where the Lords send back an amendment, the Commons disagree with it, the Lords insist on their amendment [insistence no. 1] and then the Commons insist on their disagreement [insistence no. 2]. There have been two insistences. That is treated as deadlock and the Bill is lost. The process is restarted if at any stage either House makes a new proposal (eg by proposing a different amendment instead of the one originally sent back).

more than one motion relating to the same amendment or group of amendments the rules of selection and grouping apply to the motions. Decisions on this can be affected by the rules about “packaging”. The departmental team and the OPC team should discuss this and then the OPC team will speak to the PBO. The OPC team needs to discuss questions about packages in one House with both PBOs, to ensure that there will be no difficulty with the package being treated as such when it reaches the other House.

- 393 In the Commons the default motion is that the House will agree with each Lords amendment.
- 394 If the Government wants to disagree with an amendment or to make some other proposal in respect of an amendment, the OPC team should be instructed to draft the appropriate motion in the same way as an amendment to the Bill. The arrangements for tabling etc. are also the same, although some of the formalities may, by agreement, be relaxed when things are moving fast.
- 395 If the OPC team is asked to draft a motion that amounts to a simple disagreement so that a reason will be required, the department should indicate the sort of reason that they think should be appropriate. There is a common form reason that is given if a Lords amendment interferes with Commons financial privilege, and it is the practice for other reasons to be brief and relatively uninformative. The OPC team will draft the motion and the reason and, if necessary will attend the Commons reasons committee at which it is settled.
- 396 In the Lords a motion in the name of the Minister to accept each of the proposals made by the Commons is put in the Minister’s brief by the Lords PBO and does not need to be tabled. But if other peers want to do something different they need to table their motions as amendments to the Government motion. In those circumstances the PBO will wish to discuss the motion with the OPC team, who will ensure that it meets the demands of the agreed position on packaging.
- 397 The OPC team also need to confirm with the department that they are happy for any motion to be tabled in the Minister’s name in the terms agreed with the PBO
- 398 If, after a Commons stage, the Government decides it does not after all want to accept all the Commons proposals, for example because it wants to put forward a subsequently agreed compromise in the Lords, the OPC team must be instructed as soon as possible after the end of the Commons stage and, they will then settle a motion with the PBO to meet the Government proposals. Sometimes other motions may be put down on which the Government will wish to table amendments. The OPC team and the departmental team should keep in close touch about how to respond to what is happening and when to authorise the tabling of any proposals.

*Printing corrections etc.*

- 399 As a Bill passes through Parliament it will be reprinted on a number of occasions to incorporate any amendments made. So a Bill, if it has been amended, will be reprinted after committee stage in the Commons and after consideration stage if third reading is not to follow immediately. The Bill is always reprinted when it moves to the second House. In the Lords the Bill, if it has been amended, will be reprinted after committee stage and after Report stage (Third Reading is nearly always on a later day). Before

Royal Assent the Lords PBO will produce a Royal Assent proof.

- 400 At each reprint the PBO is likely to produce a proof copy to the OPC team who may ask the departmental team's assistance with checking it. It is obviously in everyone's interest that the print of the Bill accurately reproduces what has been agreed.
- 401 As well as ensuring that the Bill accurately represents the proceedings in Parliament, it is also possible to ask the PBOs to correct obvious printing mistakes without the need for an amendment. In addition some parts of the Bill (eg clause and heading titles and the maintenance of cross references) are treated as matters of printing and cannot be changed by amendments. It is important to have as many eyes as possible checking these matters.

*Parliament Acts*

- 402 The Parliament Acts 1911 and 1949 deal with two matters. The first is the passage of Bills that are certified by the Speaker as money Bills. The other is the passage of a Bill which has been rejected by the House of Lords in the two successive Sessions.
- 403 A Bill that is certified as a money Bill for the purposes of the Parliament Acts is likely to receive an expedited passage through the House of Lords. The OPC team will be able to advise on the likelihood of certification.
- 404 The OPC team will also be able to advise on the application of the Parliament Acts generally to a particular Bill and on the procedure to be followed in the first and second Session when it is expected that a Bill will eventually need, in the second, to pass under the Acts without the agreement of the House of Lords.

*Carry over*

- 405 There are now accepted procedures for Bills to be carried over from one Session to another. The description is inaccurate. What actually happens is that Bill that has begun its passage in one House but has fallen at the end of a Session can be reintroduced in the following Session under arrangements that enable it to continue its passage from the point it reached in the previous Session.
- 406 The procedure has always been used for Bills that have not reached their second House in the first Session and is more usually used for Bills that begin in the Commons.
- 407 If carry over is contemplated for a Bill, the OPC team need to be informed and will be able to advise on the application of the procedures to the Bill, which in the Commons is governed by Standing Orders, although that procedure can of course be modified by *ad hoc* resolution.
- 408 In addition the OPC team will draft and put down any motions that are needed, in the first or second Session, for the procedure to work.

*Other questions on Parliamentary procedure*

- 409 Other questions relating to Parliamentary procedure may arise in connection with a Bill and the OPC team will be available to advise on them.

- 410 Generally for example there are limits on and deadlines for the tabling of motions and amendments etc when the House is not sitting. The OPC team can advise on these.

*Publication of the Act*

- 411 It can take ten days or more after a Bill receives Royal Assent for the Act to be published.
- 412 Sometimes it is important for an Act to be published as soon as possible after Royal Assent. This may be the case for example, if the Act comes into force on Royal Assent and someone's freedom or other rights are going to be interfered with under the new Act immediately after it comes into force. In those circumstances there should be a print of the Act for that person to refer to.
- 413 In those circumstances, the OPC team should be approached as soon as possible once the Bill has reached its second House and at least a couple of weeks before it reaches its final stage in that House. The OPC team can then make arrangements with the Lords PBO for the Act to be given a priority in the printing queue and, if necessary, for the internet publication to take place before the paper publication is possible.

**A lessons-learned exercise**

- 414 Following an initiative in 2008, it was agreed that departments would hold lessons learned exercises on each of their Bill projects. The exercises would not be confined to working with OPC but would extend to the whole project and be designed to produce lessons that would help future Bill teams.
- 415 An official was nominated in each department to take responsibility for ensuring the exercises were held and for feeding back the output to the Cabinet Office Legislation team and 1st PC.
- 416 The outputs are useful both within the departments preparing them to inform future departmental Bill team and more generally. The intention was that they should be collated into a document that would set out the lessons for all legislating departments and those at the centre involved in legislation. They could also be used, for example, for revising further editions of this document and of the Cabinet Office's *Guide to Making Legislation*.
- 417 A document setting out the lessons from the 2007-08 Session was prepared and distributed in 2009 and a second document prepared and circulated covering the lessons learned from the 2008-09 and 2009-10 Sessions. Those documents have been used for the latest revision of this document. The intention is that the process should be repeated each year so that the lessons learned each year within a department can be passed on to future Bill teams in that department and general lessons captured in more general guidance. Those general lessons seem to concentrate on aspects of project planning, management of Bill projects and effective communications.
- 418 Departmental teams should be prepared to participate in these exercises as soon as a Bill is finished and before the team disperses. They should help the nominated official to decide the best form for the exercise. They may wish to involve members of the OPC team, either as full participants with the members of the departmental Bill team, or as

individuals it would be appropriate to consult in the process.

#### **Post-legislative scrutiny**

- 419 Arrangements are now in place for Bills to undergo a process of post-legislative scrutiny three to five years after they receive Royal Assent. This involves initially the submission of a memorandum to the relevant departmental select committee. Further details of the process and guidance about it can be obtained from the Cabinet Office Legislation team.
- 420 Before a Bill team disperses it should consider what it needs to do, in terms of recording its intentions and objectives, to prepare its successors for this process. The OPC team and Cabinet Office Legislation team are available to be consulted about this.

## **PRIVATE MEMBERS BILLS**

**This section is still to be completed**

## **STATUTORY INSTRUMENTS**

**This section is still to be completed**

# ANNEX

## INDEX OF TECHNICAL TERMS AND ABBREVIATIONS

Term	Meaning
1st PC	First Parliamentary Counsel and Permanent Secretary
2nd PC	Second Parliamentary Counsel
Baldwin agreement	Also known as the 1932 Public Accounts Committee Concordat. As a matter of constitutional propriety, convention requires legislation for any significant and continuous commitment to expenditure of public funds: see Annex 2.1 of <i>Managing Public Money</i> ( <a href="http://hm-treasury.gov.uk/d/mpm_annex2.1.pdf">http://hm-treasury.gov.uk/d/mpm_annex2.1.pdf</a> ).
Bills of aids and supplies	For example, Consolidated Fund Bills and Finance Bills. (See Erskine May, 23rd edn, p567-8).
carry-over	Where a Bill is carried over from one Session to another. In practice what happens is that the Bill is reintroduced in the next Session but standing orders, or a special resolution, provide for it to be proceeded with in the first House in the second Session from the point it reached in the first Session.
Commons reasons committee	If the Commons disagree with a Lords amendment, and do not offer an alternative, a Committee (with a Government majority including the Minister) is appointed to draw up “reasons for the disagreement”. This is the “Commons reasons committee”. It meets in a room behind the Speaker’s Chair immediately after the end of the consideration stage that has resulted in the disagreement. There are Lords reasons committees in similar circumstances; but because they are usually giving reasons for disagreeing with Government proposals, the drafter is not involved.
Consolidation Bill	A consolidation Bill is a Bill that re-enacts different statutory provisions without changing the law or with only the changes that will facilitate the re-enactment or which are recommended by the Law Commission. Such Bills are usually drafted by Parliamentary Counsel at the Law Commission and go through a special expedited procedure. For that reason they do not need to be treated in the same way as Bills which are part of the political programme of the Government and so are included in the legislative programme.
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

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Term	Meaning
ECHR statement	Also known as a section 19 statement. This is the Ministerial statement made under section 19(1) of the Human Rights Act 1998, and usually printed on the cover sheet of the Bill. It says either that in the Minister's opinion the provisions of the Bill are compatible with the Convention rights or that he or she is unable to state that.
Finance Bill	The Bill that gives effect to proposals in a Budget. It is a Bill that deals with raising money for central funds, not with spending. It has a scope that is determined by procedural rules not by its contents on introduction.
financial resolutions	See "money" "and" "ways and means" "motions"/"resolutions".
GLS	Government Legal Service
Government business managers	The Leaders of the House of Commons and the House of Lords and the Chief Whips in the two Houses.
GWO	Government Whips Office
handout Bills	Bills which are prepared for the Government to be offered to private members for introduction as private members Bills.
House authorities	Principally the officials of the Public Bill Office in the House of Commons or of the Public Bill Office in the House of Lords, but for some purposes also more senior Clerks within the hierarchy.
hybridity	This is a complex subject that deals with the case where a public Bill or affirmative instrument strays into the area properly dealt with by private Bill procedure. Very briefly: if a provision is to the detriment of particular persons in a way that does not identify them by reference to a "genuine" class, there are procedural complications.
Law Officers	The Law Officers of the Crown are the Attorney General and the Solicitor General and the Advocate General for Scotland (who is a member of the UK Government). Counsel will normally correspond with the English Law Officers, copying correspondence to the Advocate General wherever appropriate.
Legislation team	The part of the Economic and Domestic Secretariat in Cabinet Office that services PBL Committee.
LION	Legal Information On-line Network <a href="http://www.knowledgenetwork.gsi.gov.uk/lion2/areapres.nsf/luWebStaticPages/editorial?opendocument">http://www.knowledgenetwork.gsi.gov.uk/lion2/areapres.nsf/luWebStaticPages/editorial?opendocument</a>

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Term	Meaning
Money Bill	This is a Bill that deals with national taxation, public money or loans and their management. It is only considered to be a Money Bill if the Speaker of the House of Commons agrees that it is. As the House of Lords has no power over Money Bills they can gain Royal Assent without the Lords' approval.
money and ways and means resolutions	Any provisions of a Bill that give rise to a new or increased public expenditure or which impose a charge on the public (eg a tax) cannot be included in a Bill unless the House has agreed a money resolution (for expenditure) or a ways and means resolution (for a charge).
motion	A proposal to a House of Parliament, which (when agreed) becomes a resolution.
NIO	Northern Ireland Office
notice of presentation	In the House of Commons, the notice of presentation gives the short and long titles of the Bill and is sent to the House the sitting day before First Reading.
OPC	Office of the Parliamentary Counsel
OPSI	Office of Public Sector Information
OSAG	Office of the Solicitor to the Advocate General for Scotland
OSPC	Office of the Scottish Parliamentary Counsel
PAC	Public Accounts Committee
PBO	Public Bill Office
PBL Committee	The Cabinet Committee whose full title is the Parliamentary Business and Legislation Committee. Its terms of reference are “to consider the Government’s Parliamentary Business and the implementation of its legislative programme” (see See <a href="http://www.cabinet-office.gov.uk/media/425203/cabinet-committees-system.pdf">http://www.cabinet-office.gov.uk/media/425203/cabinet-committees-system.pdf</a> )
PBR	Pre Budget Report
ping-pong	This refers to the exchange of amendments and resolutions to Bills between the House of Commons and the House of Lords in order to arrive at an agreed text. (See also to-ing and fro-ing). The stages are known as “consideration of Lords amendments” and “consideration of Commons amendments”.

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Term	Meaning
post-legislative scrutiny	This is a procedure introduced in 2008. Under the system, the question whether the effectiveness of an Act should be reviewed by the relevant departmental select committee is considered by that committee on a memorandum submitted by the department 3 to 5 years after the passing of the Act, and (if appropriate) a review is carried out.
pre-legislative scrutiny	This is the process by which a draft Bill published by the Government for public consultation is considered by a departmental select committee, or by a specially constituted joint committee, as part of the consultation process.
privilege amendment	An amendment made automatically on Third Reading in the Lords to negative any taxing or spending provisions of a Bill, or provisions dealing with rates or council tax, which would otherwise infringe the privileges of the House of Commons.
programming	Programming is the process by which proceedings at all stages of a Bill's passage after Second Reading through the House of Commons are timetabled and the proceedings are brought to a conclusion in accordance with the timetable.
programme motion	A motion, usually put down in time to be taken immediately after the end of the second reading debate, to bring the Bill within the programming system and to outline the timetable for the Bill.
programming sub-committee motion	A motion to timetable proceedings (and possibly to provide for the order of consideration) in public Bill Committee.
Public Bill Offices	The main functions of the Public Bill Offices in the House of Commons and the House of Lords are to advise the Speaker or chairman in the Commons or the House in the Lords about the application of the rules of procedure to Bills. Both Offices provide assistance to members in preparing amendments or Private Members Bills and advise them on procedure.
Queen's and Prince's consent	A Bill that affects the private interests or prerogatives of the Crown, the Duchy of Lancaster or of the Duchy of Cornwall is required by Parliamentary rules to be given Queen's or Prince's consent. This is something quite different from the Royal Assent that turns the Bill into an Act.
resolution	A motion that has been agreed.
saving	This is a provision that keeps a repealed provision alive for certain limited purposes.

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Term	Meaning
Session	A Session of Parliament beginning with a State Opening and Queen's Speech and ending with a prorogation. Sessions normally begin in November and last for about a year. General elections can result in longer or shorter Sessions. Unless affected by "carry over", Bills fall if not passed in a Session.
SI	Statutory Instrument
SPC(UK)	Counsel in the Office of the Scottish Parliamentary Counsel who work on UK Bills to OSAG and therefore to the UK Government.
spill-over	The part of the Session that falls after the summer recess.
TFOs	Transfer of Functions Orders under the Ministers of the Crown Act 1975
to-ing and fro-ing	See "ping pong".
transitional provision	This is a provision that deals with how a case that began under the old law will be treated when the new law comes into force.
transitory provision	This is a provision that specifies that a new provision will have effect for a limited period with modifications (perhaps until the coming into force of some other provision). An example would be a provision that says that until the coming into force of a general increase in penalties effected by some other Act, the reference in a provision of the Bill to a maximum of 12 months imprisonment will have effect as a reference to 6 months.
wash up	The period when Parliamentary business is being finished off between the announcement of a general election and the dissolution of Parliament. Sometimes Bills are rushed through in this period with the agreement of Opposition parties and sometimes with changes to give effect to the terms of that agreement.
WAG	Welsh Assembly Government