

## **A SUMMARY OF WORKING WITH PARLIAMENTARY COUNSEL**

### **INTRODUCTION**

This document provides a high level summary of *Working with Parliamentary Counsel*, which 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; 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.

It is addressed to everyone who is involved directly or indirectly in the work of a departmental team that is instructing OPC, and also to Counsel themselves.

#### ***More detailed guidance***

For more detailed guidance please refer to:

- the full version of *Working with Parliamentary Counsel* (which includes a useful index of technical terms and abbreviations) and
- the Cabinet Office’s *Guide to Making Legislation* which is designed to help departments manage their legislative projects.

#### ***Feedback***

OPC welcomes comments on this document, which should be sent to John Healy.

### **BACKGROUND TO OPC**

#### ***What is OPC?***

OPC is a centrally provided service located in the Cabinet Office. OPC and the Offices of the Parliamentary Business Managers in both Houses constitute the Government in Parliament Group within the Cabinet Office. OPC is headed by the First Parliamentary Counsel and Permanent Secretary (“1<sup>st</sup> PC”). The current 1<sup>st</sup> PC, Sir Stephen Laws KCB, will be succeeded by Richard Heaton on 1 February 2012.

OPC’s full complement is 65 staff, 50 of whom (including 1<sup>st</sup> PC) are legally-qualified “Counsel” of differing seniorities and grades and 15 of whom provide further support to the work of the Office. All Counsel have specialist expertise in legislative drafting and in advising on related matters, such as Parliamentary procedure.

#### ***OPC’s main functions***

OPC provides drafting services, with procedural and other handling advice, to legislating departments in connection with Bills for introduction; draft Bills to be published for pre-legislative scrutiny or other public consultation; and all statutory instruments (“SIs”) that amend primary legislation.

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 draft a Bill;
- to advise on Parliamentary procedure or other handling issues relating to a Bill;
- to draft amendments for a Bill;
- to draft motions for Parliament (e.g. programme motions, allocation of time motions, etc.);
- to advise on the implementation of an Act;
- to vet an SI;
- to draft an SI.

***OPC's aims***

OPC aims to achieve the highest standards, in terms of quality and timeliness, in the drafting and procedural handling of the Government's legislative programme and to provide the best possible service to departments in connection with the other matters on which OPC's advice or other assistance is sought.

***OPC's priorities when providing services***

OPC gives priority to Finance Bills and to Bills that have slots in the Government's legislative programme. The following priorities also apply in practice; Bills already in the House; Bills for presentation and hand-out Bills; draft Bills; and SIs. Further decisions about priorities are made by 1st PC, who is accountable for the decisions to the Government's business managers and PBL Committee.

***Obtaining OPC's services***

Requests for the provision of OPC's services should be made to 1st PC. The request should begin by setting out as accurately as possible —

- the nature of the whole project and its likely scale;
- the timetable and deadlines that are likely to apply to the project as a whole;
- the department's understanding of the current status of the project in the programme and its importance to the Government; and
- the contact details for the officials who are involved in the instructing process and their availability.

The departmental legal adviser will wish to be involved in the request. However, the department should make arrangements with the OPC team allocated to their work, and with their own lawyers, about the most suitable lines of communication between the OPC and departmental teams on different topics.

**WORKING METHODS - GENERAL PRINCIPLES**

***Partnership working***

As part of the Cabinet Office, OPC is signed up to the compact governing cross-departmental working. It is expected that OPC and departments will embed the principles set out in the compact in the way they work together. 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.

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

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.

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.”

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.”

The responsibilities of Counsel may appear at times to create a tension between their 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.
- ❖ The Counsel in charge of a Bill has a responsibility to brief the Law Officers, for meetings of PBL Committee, on matters of legal policy to which a Bill gives rise, including matters involving the rule of law, retrospectively and matters involving fundamental rights and freedoms including those arising under the European Convention on Human Rights (“ECHR”). This responsibility extends to amendments after introduction requiring PBL Committee clearance.
- ❖ The OPC team are advocates for the Government’s policy 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 which meets better-regulation principles and, in particular, does not result in unnecessary litigation.
- ❖ The OPC team’s relationship with the Public Bill Offices (“PBOs”) in the two Houses enables the OPC team to offer advice to the department on any matter that is likely to cause difficulty with the rules and practice of the House.

OPC has the most experience of Bill work anywhere in Whitehall. Departments are able freely to draw on this experience. Some 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.

The OPC team are able to bring to a legislative project:

- experience of how legislative projects are planned and managed;
- special expertise in the analysis of the structure and content of legislative proposals;
- assistance in understanding how best to manage the freedom which the doctrine of Parliamentary sovereignty provides to the legislator and to appreciate the parameters within which it can be exercised;
- an outside, critical perspective (they have a challenge function which can help departments test their proposals);
- considerable experience and technical expertise in crafting the wording to produce clear, simple and unambiguous propositions that fit into the structure of the existing law;
- shared common drafting standards and practices which have been developed and tested within the community of drafting experts that constitutes OPC;
- familiarity with Parliamentary procedure that enables them to structure legislation to fit the requirements of Parliamentary debate and to comply with the rules of procedure;

- ongoing business relationships with the officials in both Houses, with the officials in the Legislation Team and with the officials who work to the Government's business managers; and
- working relationships with the drafters in the devolved administrations.

### ***Departmental responsibilities and strengths***

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 accordance with the timetable established by the plan for the Bill. OPC recognises that the department contribute particular strengths to a legislative project. They include the following:

- departmental lawyers will have specialist knowledge of the existing law and of the difficulties of applying it in practice;
- departmental officials can contribute 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;
- the department are likely to be more familiar than members of the OPC team with the political context of a legislative proposal;
- 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: so they can bring a 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 provide the specialist skills and resources needed for the management of the Bill project; and
- the department will have the benefit of input from members of the departmental team who are not focusing on the Bill (e.g. those who will be implementing it when it becomes an Act).

### ***Role of the OPC team in relation to policy-making***

Departments need to establish an understanding with the OPC team about the contribution to policy-making expected. They will usually assume that a cautious detachment will be expected of them in relation to policy-making. However, in the case of a particular project, or a particular policy area within it, something different may be worked out between the OPC team and the department.

### ***Importance of good communications***

The principal and essential requirement for an efficient partnership between the OPC team and a departmental team is good communications between all elements of the team involved in the legislative project.

The department need to—

- make clear what service they want from OPC;
- ensure that the OPC team 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;
- ensure that their legislative intentions are clearly explained to the OPC team in sufficient detail to enable the OPC team to give effect to them without having to improvise on policy matters;
- be frank about what compromises have been made in the process of preparing instructions and about how conflicting objectives have been reconciled;
- explain why policy options that the OPC team 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;
- read the drafts provided by members of the OPC team critically and very carefully to check that the OPC team has properly understood their intentions;

- supplement the results of that exercise with a response to any commentary provided by the OPC team with the draft;
- remember, when commenting on a draft, that it will have to be understood without the OPC team's commentary when it has been enacted;
- not take for granted that the OPC team has understood their wishes or the political context in which a provision is required; and
- 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.

The OPC team need to —

- let the department know promptly which Counsel are allocated to a project;
- keep the department regularly informed about the progress of the work in OPC and predict when drafts should be expected;
- 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;
- communicate the department's policy, as understood, in an unambiguous legislative form;
- explain in a commentary where decisions have been made about what was meant by the department;
- explain how the draft works and why a particular drafting approach has been adopted whenever the department ask;
- avoid volunteering explanations or requiring the department's endorsement of drafting decisions for which the drafter needs to take responsibility; and
- 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.

Both the department and the OPC team need to 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; and
- all serious proposals for additions to the contents of the Bill or for omissions and subsequently for Government amendments.

Both the department and the OPC team also need to recognise 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,
- 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.

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

### ***The Departmental Team***

When working with an OPC team on a Bill project the department will have established a “departmental team” with different officials carrying out the roles of—

- policy officials who are 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 who are usually led by the “Bill team manager” who are responsible for the planning, administration and implementation of the legislative project; and
- departmental lawyers who give legal advice to both policy officials and Bill team officials and who are responsible for producing the drafting instructions for the OPC team.

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.

The subject-matter of a Bill will occasionally require more than one department to provide the policy officials and departmental lawyers.

### ***Initial contact***

On the first occasion that a service is required of OPC in connection with a Bill the instructions should be sent to 1st PC who will identify a Counsel to lead the OPC team on the project.

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. 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.

When the leader of the OPC team has been identified at least one other Counsel will be added to the team.

### ***An initial meeting***

When a team in OPC has been allocated to a Bill, it is useful for that team to have an initial meeting with the departmental team. 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;
- clarifying how relations with the devolved administrations are going to be handled;
- 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;
- enabling the OPC team to advise on what would be most helpful so far as the structure, form and contents of the instructions are concerned;
- enabling the OPC team to explain how the work will be organised and timetabled in OPC; and
- enabling the departmental team and the OPC team to discuss the risks that are likely to affect the delivery of the Bill and how those risks can best be managed.

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.

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

Drafting a Bill is an intellectual and creative process, not a mere translation into formal wording. It is important that Ministers are briefed on how time consuming the drafting process will be.

Drafting almost any Bill takes time and nearly always at least 3 rounds of drafting. 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. 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.

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 the OPC team have to identify drafting issues or constraints that emerge later in the process.

#### ***Involving the OPC team in Bill team training***

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 if everyone working on the departmental team knows and understands what Counsel's role is, and has an opportunity to learn from them about Bill work.

The National School of Government 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. The OPC team can also contribute to specific training events for the Bill team including refreshers on different aspects of the process as the time for them draws near.

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

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. 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 and advising on the taking of steps to avoid or mitigate those risks.

At both stages the essential thing to remember is that Bills for the legislative programme, or rather the Acts they become, will be able to 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; and

- it can regulate and set conditions for each of the above.

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 Ministers.

Risks to the Bill project 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;
- attempts to add new topics to the Bill will be made at a late stage;
- the process of securing collective Ministerial agreement or a consultation with outside stakeholders will result in major changes of policy;
- the detail of the policy will require longer to work out than expected;
- the introduction of the Bill before it is ready will be a source of embarrassment both to the departmental Ministers and to the business managers; and
- the need for a substantial number of amendments would have a detrimental effect on the progress of other Bills in the programme.

These risks are greater if they materialise at a late stage.

## **INSTRUCTING OPC**

### ***Advice on instructing OPC***

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. The OPC team can advise the department about the best way to instruct them.

The purpose of instructions to draft a Bill, or provisions to be contained in a Bill, is to give the OPC team everything they need to produce a draft. The better the instructions the better the Bill will be, the more value the OPC team will be able to add and the less time will be needed for the drafting stage. Instructions should be structured and their contents decided upon on the basis of what is likely to be most useful to the OPC team.

### ***A single document***

Instructions to draft a Bill, or provisions for a Bill, should consist of a 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. The authors of instructions often annex a number of documents to their instructions eg the White Paper and other consultation documents, and that can be useful. However, instructing teams should –

- assume that the OPC team 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 the OPC team has been sent; and
- explain the relevance of any documents which accompany the instructions; and, in case of White Papers etc, acknowledge any departure in the instructions from the published proposals that might otherwise confuse the OPC team.

### ***The form of the document***

OPC is sometimes asked how to format instructions. The OPC team find it helpful if the pages and paragraphs are numbered and lettered, there are headings and a table of contents, 1.5 or double spacing, in a legible 12 point font is used, and the margins are wide enough to facilitate the noting of comments and questions.

Ideally Instructions should be sent by email with electronic copies of (or web links to) any accompanying documents. 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 sent to 1st PC.

### ***Instructions in instalments***



Ideally, all the instructions for a Bill should be delivered at the same time because it is easier for a drafter to begin to develop the structure for a Bill after having read through all the instructions. However, 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.
- ❖ Ultimately the test of what is sensible is whether the risks from instructing in instalments outweigh the advantages of making some early progress on at least part of the Bill. This can be discussed with the OPC team.
- ❖ Where instructions are delivered in advance of other instructions, it is important always to include information about how future decisions may affect the drafting.
- ❖ In the case of instructions that are contingent on future policy decisions, etc, the position is the same. 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?

### ***Instructions in narrative form***

Instructions need to be in narrative form, i.e. they should explain what is wanted, not try to set it out in the form of a draft. The starting place for all instructions is that a Bill can do only one thing. It can change the law.

### ***Instructions on different topics may require different approaches***

Different topics may require instructions that put different emphases on different matters. 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 —

- the necessity to produce a provision that is effective in order 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; and
- the tendency to turn septic of provisions in a Bill that are not legally necessary.

### ***The structure of drafting Instructions***

Please refer to the **checklist** which contains a brief overview of the recommended structure for a set of Instructions. The proposed structure works for a single set of instructions on only one topic or for instructions for the whole Bill or for instructions for different parts of a Bill dealing with related topics.

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 topics or for different parts of a topic. This is something that it will often be useful to discuss with the OPC team. The test is whatever is most helpful to that team in the circumstances. 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 particular topic.

***What the OPC team will do with instructions***

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
- confirm the timetable they would hope to meet in sending back draft provisions
- provide the instructing team with regular information about how things are progressing.

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.

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 project's time constraints. 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.

Counsel 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 the OPC team question propositions that seem obvious to the author.

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.

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.

***Commenting on draft provisions***

When an OPC team responds to a set of instructions with a draft and a commentary, the commentary will require an answer. There are two main purposes for the commentary -

- first, to explain the drafting where the drafter thinks an explanation will speed the department's understanding of how the provisions have been constructed.
- Secondly, 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.

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 at a later stage to remind themselves what they were trying to do originally.

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. This is helpful, not least, when changes are asked for after recollections of the original thinking have dimmed.

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. In order to

minimise the risk of this happening, the commentary provided by the OPC team may be quite detailed. Often, however, much of it can be ticked off relatively quickly.

So the OPC team are very likely at different stages to raise any inconsistencies they have detected in the instructions. This will be in order to check that there has been no misunderstanding.

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.

The OPC team have to make complex judgements when drafting. 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 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 to make a judgement about how best to balance the different needs and preferences of different potential audiences.

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.

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. It may be possible for a departmental team to see how one reading of the draft that had not occurred to them before would catch a new 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 if it 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."

Similarly, it is not helpful to frame comments only in the form 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.

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 and a proposal for a remedy.

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.

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.

## PROCEDURAL HANDLING OF A BILL

### ***Parliamentary Business and Legislation Committee and Parliamentary Business and Legislation (Officials) Committee***

Parliamentary Business and Legislation Committee (known as “PBL Committee”) is the Ministerial Committee of the Cabinet with oversight of the Government’s legislative programme. The Committee—

- considers bids for the inclusion of Bills in the legislative programme, and the draft legislative programme, and makes recommendations on the contents of the programme and draft programme to Cabinet;
- grants “drafting authority” to departments to make use of OPC’s resources for Bill work;
- authorises the publication of draft 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.

Parliamentary Business Committee is serviced by the Legislation Team in the Economic and Domestic Affairs Secretariat (“the Legislation Team”), which is part of the Cabinet Office and works with departments to assist them with the project management of their Bill projects. The Legislation Team will also act on behalf of PBL Committee and the business managers in co-ordinating the management of the programme generally.

The 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 Legislation Team on what, from the OPC team’s point of view, is needed to deliver the project in accordance with requirements of PBL Committee and the business managers.

The Government publishes a draft of the legislative programme in the Spring, before the disclosure of the final and full legislative programme in the Queen’s Speech, usually in November. The preparation of the draft legislative programme is co-ordinated and managed by the Legislation Team.

Legislation (Officials) Committee consists of a representative from each of the departments with an interest in the legislative programme (its membership, accordingly, includes officials of Ministers who are not themselves members of PBL Committee). It is a forum for the exchange of information about the legislative programme and the preparation of legislation. The Legislation Team will also use it to keep departments informed about how the other aspects of the legislative programme impinge on their own projects.

1st PC attends PBL Committee and is also a member of Legislation (Officials) Committee. 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.

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. More guidance about the arrangements for this meeting and the documents required for it can be found in the Guide to Making Legislation

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 (e.g. a consolidation Bill) may be authorised through correspondence.

Counsel's PBL Committee role is—

- in advance of the meeting on a Bill, to brief the 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 Legislation Team the print of the Bill that is circulated for a PBL Committee meeting with the other papers (which will have been supplied to the 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;
- 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.

This role means that it is wise for the departmental team to share with the OPC team 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.

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.

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***

Extensive guidance about Explanatory Notes is contained in the Cabinet Office's Guide to Making Legislation. 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.

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.

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.

The role of the OPC team in relation to Explanatory Notes is as follows—

- so far as is possible, to clear in advance with the department the set of Explanatory Notes that is sent to the Legislation Team for circulation before 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 Notes on the resulting Act before they are sent to the Office of Public Sector Information (“OPSI”) by the department.

When clearing Notes for PBL Committee, for publication by the House or after Royal Assent, the OPC team will concentrate on securing the technical accuracy of the Notes and that they conform to the requirements of the House authorities in order for them to be published by Parliament.

The principal requirement of the House authorities is that the notes, when they describe a provision, should be explanatory and factual, rather than seek to argue the case for the policy.

It assists if work can be done on the Notes as far as possible in advance, so that the OPC team 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.

The OPC team 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. If there is time, they may also draw attention to respects in which the Notes can be made more helpful or more compatible with the guidance.

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 the OPC team’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 (e.g. 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 that it has been properly installed.
- Appoint one person to be the principal editor of the Notes.

Where Explanatory Notes need to be amended to take account of points made by the OPC team or the House authorities, the OPC team will normally return the electronic version for amendment by the department.

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

The OPC team provide advice and assistance about various matters of Parliamentary procedure and practice and handling. In this connection, they also perform certain tasks for the departmental Bill team.

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 the OPC team as the principal, and for many purposes only, channel of communication with the House authorities.

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. The OPC team will often have to consult the House authorities about how a rule will apply in a particular case; departments benefit from Counsel’s experience of formulating questions for the House authorities in the manner most appropriate to the context.

The rules and the way they are applied, differ between the two Houses. Counsel can advise the departmental team about the implications of this in a particular case.

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 the tabling of motions.

The OPC team also has an established relationship with the officials in the two GWOs and will work closely with them on certain procedural matters, while keeping the departmental team informed. The departmental team will have their own separate dealings with the GWO, but it is helpful for the Department keep the OPC team informed about anything the Whips tell them that may affect Bill handling or the timetable for the Bill.

#### ***Attendance of Counsel at Parliamentary proceedings***

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.

Counsel 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. The OPC team will consult the department about whether the Minister requires his or her attendance.

Members of the OPC team 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.

Generally, it will be useful to have members of the OPC team present whenever some drafting or advice may be needed very urgently while things are moving quickly. The departmental team should discuss with the OPC team what are the most sensible arrangements for the case in question.

#### ***List of things with which the OPC team will deal***

The OPC team 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—
  - advising on matters relating to programming;
  - drafting and tabling a dummy order of consideration motion (see p.21);
  - 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” before a general election), including—
  - liaising with the GWO; 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;
  - 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;
- arranging for early publication of the Act where necessary.

Most of the matters (e.g. scope) on which Counsel can provide advice are ultimately matters for the decision of the Speaker or relevant chairman in the Commons or, in the Lords, of the House itself. On such matters, if the answer is not readily apparent, the OPC team 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***

The arrangements for the Bill's presentation and for its publication are made by the OPC team with the PBO. The OPC team will do this on the instructions of the departmental team who will need to



check what is wanted with Number 10 and to confirm that the Legislation Team are satisfied that all the conditions for presentation of the Bill in accordance with those arrangements have been satisfied.

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). 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).

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. The OPC team should be consulted about what is possible and will make the necessary arrangements with the PBO.

Some Bills are presented in the Commons under special arrangements with special procedures — principally if they are Bills primarily about financial matters. The OPC team will be able to advise where these special arrangements are needed and about the implications. Also sometimes special arrangements would have to be made in the case of an emergency Bill. Again the OPC team will advise.

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 the OPC team will advise the departmental team what they are. 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 the OPC team. The department will need to have informed the OPC team when they need to receive the text in order to meet their publication timetable.

#### ***ECHR statement***

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 the OPC team can assure the PBO that the statement has been made by the appropriate Minister. A further ECHR statement is needed when the Bill transfers to the second House.

The OPC team will be able to advise the department what is required and which Ministers must be available at which times to sign the statements.

The department is responsible for retaining the original signed statement.

#### ***Queen’s and Prince’s consent***

A Bill that affects the private interests or prerogatives of the Crown, the Duchy of Lancaster or 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.

This needs to be thought about early on as it can take time to receive any required consent. The OPC team will be able to advise on whether consent is required and on what is required in practical terms to have it signified.

#### ***Scope of the Bill***

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.

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.

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. The OPC team will be able to advise on scope questions. 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 the OPC team to consult the House authorities before giving a view that is capable of being relied on.

Departments need to instruct the OPC team 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***

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. These things may have implications for the House of introduction of a Bill. The OPC team will be able to advise on this.

***Money and ways and means resolutions etc.***

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). 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 by then been “franked” by the required resolution.

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.

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.

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 endorse the provisions in question by tabling an appropriate 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 the OPC team.

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.
- ❖ Small increases of expenditure are disregarded, but even very small increases have to be shown to fall within the disregard so that their maximum cost should be calculated and disclosed to the OPC team.
- ❖ 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 the OPC team about the detail they 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. 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.

The OPC team's role in relation to financial resolutions is as follows—

- ❖ The OPC team 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, the OPC team 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, the OPC team 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 team and (if necessary) the Treasury.
- ❖ In each of the three cases set out above, the OPC team, 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.
- ❖ The OPC team 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 the OPC team 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, the OPC team 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 the OPC team will ensure that the motion is initialled by a Treasury Minister and, assuming the Bill has been introduced, will put the motion down as soon as they receive confirmation that the motion has been initialled.
- ❖ The OPC team 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, the OPC team will remind the department of the need to put down an amendment for Commons committee stage to remove the privilege amendment.
- ❖ The OPC team 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***

Government Bills in the Commons are usually subject to programming which 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.

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 out the rules for bringing proceedings to an end, i.e. when a time is reached at which proceedings must be brought to a conclusion.

The OPC team will be able to advise on the effect of the Standing Orders and will be able to explain what will happen to unreach Government amendments and to Opposition amendments that the Government wants to accept.

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.

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. Further motions will be needed if changes are wanted to any of the provisions made by the resolutions resulting from the motions mentioned above.

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 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 Minister’s name. The motion is never put because it is usually superseded by the programming sub-committee resolution. The OPC team will warn the department about the need for a dummy order of consideration motion 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.

The OPC team draft the programming motions and programming sub-committee motions that are required. The contents are normally agreed by the GWO, who give the OPC team 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.

#### ***Order of consideration motions in the Lords***

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. It is not unusual for this to occur (for instance, to ensure that Schedules are debated with the clauses to which they relate).

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 legislation to be passed at speed***

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 in the wash up before a general election. The procedural aspects of passing legislation at speed have to be agreed between the OPC team and the PBOs in both Houses. 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.

### ***Government amendments***

The process for producing Government amendments is very similar to the process for producing a Bill. But the time scales are often more compressed, and the opportunities for correction at a later stage more limited. For this reason it is important for the departmental and OPC teams to develop a clear plan for the preparation of amendments and to ensure that they are each keeping the other informed about progress.

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, it is useful to get some indication from the Legislation Team about what should be treated as the highest priority. There is a general authority for some technical amendments.

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.

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. Just as a draft Bill may need a number of rounds of drafting so may a set of amendments.

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.

There are rules that limit the times when amendments can be tabled, and the OPC team will be able to advise about this. The OPC team can also advise if it becomes important that a particular Government amendment is debated or voted on before other amendments.

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

Sometimes the Minister in charge of a Bill will wish to accept an amendment put down by a Member other than a Minister. Sometimes a Minister will want an amendment to be drafted for another Member so that it can be accepted by the Government.

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.

The OPC team is available to draft amendments to be handed to Members. However the procedure for getting authority for the OPC team to table amendments in the name of a Member who is not a Minister is complex and there can be procedural disadvantages to this.

### ***Grouping and selection of amendments***

At committee stage and report stage in the House of Commons the chairman or Speaker 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 remaining amendments will be grouped so that several can be 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.

The chairman or Speaker is 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 PBO 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.

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 of 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. The views of the departmental team need to be fed in through the OPC team. The departmental and OPC teams 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.

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***

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 other House. This initiates a process popularly known as “ping pong” or “to-ing and fro-ing”. The procedural aspects of this can be complex and it is important for the OPC team and the departmental team to work closely together. 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.

The process uses 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 with the Bill 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.

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.

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.

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.

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 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. The OPC team needs to discuss any questions about packages in one House with both PBOs, to ensure that there will be no difficulty with a package being treated as such when it reaches the other House.

In the Commons the default motion is that the House will agree with each Lords amendment.

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.

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. The OPC team will draft the motion and the reason and, if necessary, will attend the Commons reasons committee at which it is settled.

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.

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.

If, after the Commons stage, the Government does not want to accept all the Commons proposals, the OPC team must be instructed as soon as possible after the end of that stage. 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.***

As a Bill passes through Parliament it will be reprinted on a number of occasions to incorporate any amendments made. At each reprint the PBO is likely to produce a proof copy to the OPC team who may ask for the departmental team's assistance with checking it. 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 (e.g. clause and heading titles) 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.

***Carry over***

Carry over is the procedure under which a 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. 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. 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.

***Publication of the Act***

It can take ten days or more after a Bill receives Royal Assent for the Act to be published. Sometimes it is important for an Act to be published as soon as possible after Royal Assent. The OPC team can 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.