

Enacting Legislation – a Civil Servant’s Perspective

A talk given to the Statute Law Society

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I am very honoured to have been asked to speak to you this evening. Looking at the list of eminent speakers whom the Statute Law Society and the Institute of Advanced Legal Studies has attracted, I feel something of a fraud.

I’m not eminent and, perhaps more shockingly, I’m not even a lawyer! What I am is a civil servant and I therefore need to begin by saying that all views that I express are personal views. I should also say that if most of the examples that I cite either in my talk or during questions relate to Acts enacted under a Labour administration, it is only because more of my recent career has been under a Labour Government than under a Conservative or coalition Government, rather than because I am seeking to make a partisan point.

I am one of a relatively small number of civil servants who has specialised in Bill work. In the decade from 1996 I worked on over a dozen Bills and led on eight of them, several of them quite contentious. It is perhaps also worth relating in passing that I think I hold the distinction for having lost more Government Bills, and parts of Bills, than any other civil servant, with two of the Bills I have worked on only making it to the statute book with the convenient help of the Parliament Acts. I did mention that to the Statute Law Society before they invited me but it didn’t appear to put them off!

It is probably worth explaining why I have worked on so many Bills. In part it is self perpetuating. Bill work is a particular skill and once you become familiar with it, you’ll always be in demand for another Bill, particularly in a department such as the Home Office which has Bills every session and where postings are largely done through connections and word of mouth. But it’s more than that. I positively relish the chance to work on Bills and I think there are three reasons for that:

Firstly, I confess to being one of those people who is intrigued by Parliament and all of its working. I can name most MPs and their constituencies and the procedure fascinates me. I get a thrill every time I enter the Palace of Westminster and doing Bill work gets you as close to participating in the process as it is possible for a non-member. You sit very close to the action and I’m particularly proud that one of my loud whispers to a Minister during a Committee session on a Bill made it into Hansard, albeit attributed to the whip who was sitting next to the Minister.

Secondly, there is always something to show for it. Much of Government is about inching forward and quite often about trying to avoid doing anything or attracting attention. By contrast Bills are all about change. I led the team responsible for the Extradition Act 2003. Whether you like or not – and plenty of people don't – it was the first major change to our extradition law for over 100 years and there is no doubt the team's efforts had made a real difference.

Finally, there is a sense of immediacy. Government is a machine that, probably rightly, moves very slowly. Different Departments have conflicting interests and a policy can only be changed if all affected Departments consent so, as civil servants, we're brought up to consult and check. Contrast that to the the situation that arises frequently during a passage of a Bill where an MP or Peer says: "I will happily withdraw this amendment if the Minister can give me the assurance that..." and the Minister looks plaintively to the officials' box and you have a split second to decide whether to nod or shake your head. It's liberating (and occasionally terrifying).

So far as the House authorities are concerned, civil servants are the lowest of the low. There are virtually no facilities for civil servants attending Parliamentary business – despite the long hours that we spend there – and it would be hard to design anywhere more uncomfortable than the officials' boxes in both House. When Fathers for Justice misbehaved in the public gallery the immediate response was to reduce the number of Palace of Westminster passes issued to civil servants even though there has never been any suggestion of civil service misuse of them.

This is unfortunate – though we bear it fortitude, conscious of our inability to hit back – particularly as we see ourselves, as I hope I shall demonstrate, as absolutely crucial to the legislative process. Quite simply, Bills could not be enacted if it wasn't for civil servants (nor, for that matter, could any other business, whether debates, statements or questions sensibly take place).

Policy officials can come to a Bill at various stages of its gestation. In some cases they may have been working on the policy for several years and the Bill is the natural culmination of a long period of work. In some cases they'll join up when the decision is taken to legislate and may well be involved in the preparation of Green and White papers and pre-legislative scrutiny. And in some cases the Bill team may only be created very late in the day when the policy is settled and, quite possibly, drafting of the Bill is well advanced.

In each event, the policy officials form part of a tripartite relationship with departmental lawyers and Parliamentary Counsel. All of them are working to a common end but have a distinctive role. For the policy officials the key objective is to try and preserve as much of the original policy as possible and to try to avoid too much complexity being contained in the Bill.

It is inevitable that when what may have started as a simple policy objective is subjected to increased probing by some very fine minds, difficulties emerge and there is a trade off between watering down the policy or, in the interests of purity, making the legislation ever more complex so that it copes with every eventuality. It is the Bill team who have the task of trying to steer a sensible course and keeping the Bill manageable and readable. Similarly, we may find ourselves pressing the lawyers

to include provisions that are politically attractive even if, strictly speaking, they add nothing of substance. For example, Ministers like putting fine sounding phrases in Bill about having due regard to the ECHR but that is implicit by the UK being a signatory to the ECHR and through the Human Rights Act. Parliamentary Counsel will always try to resist baubles of this kind being added in.

I should stress that relations between the actors involved are generally very good and that discussions round the table at the early drafting stage can be some of the most intellectually challenging and enjoyable parts of a civil servant's job. Nevertheless, all of those in Bill teams dread the emergency summons to Parliamentary Counsel's office at 36 Whitehall. It is almost never a good sign.

Let me, however, make it clear that I yield to no one in my admiration of Parliamentary Counsel – and I say that not just because some past and present practitioners of those arts may be in the audience this evening. I would be the last person to claim that every Bill is perfect but I know they would be a whole lot worse if it wasn't for the skill and dexterity of Parliamentary counsel

Eventually, after a lot of correspondence back and forth and discussion, something that looks like a Bill will emerge. That's just the beginning and there are generally numerous iterations before the finished product comes out of the system. Nevertheless, it's a start and it means that the Bill team can begin work on the Explanatory Notes as well as all of the other things that the lawyers do not need to sully themselves with such as publication arrangements and press lines.

It is also the job of the Bill team to manage relations with the Parliamentary business managers, who are crucial in determining timetabling issues, and the Government central legislative machinery which is run from the Cabinet Office.

It is worth pointing out that the demands on Bill teams seem to be ever increasing. Not just explanatory notes, which I have mentioned and which can be a huge task, but there is also the statement of ECHR compatibility. Bill teams increasingly have to think about devolution issues and pre-legislative scrutiny is an ever more common feature of Bill work. And, of course, the latest factor to be taken into account is coalition issues. All of these are important, and necessary, steps on the way but all of them add considerably to the burden of those responsible for the legislation.

Pre-legislative scrutiny is generally helpful, particularly if you see legislation as a war of attrition. Requiring the other side – whether that's the Opposition, backbenchers or interest groups – to show its hand early is always helpful and, on a more positive note, pre-legislative scrutiny does often throw possible areas for improvement in a Bill.

At some point, with greater or lesser ceremony, the finished Bill will be produced and introduced, though as you'll be aware it is by no means unknown for a Bill in an unfinished state to be produced with subsequent sections being added in the form of Government amendments at a later stage.

Once the Bill has been introduced, for civil servants it can feel a bit like a treadmill. As each Parliamentary stage comes along, so does the requirement for more

material and, particularly, notes on amendments. Notes on amendments are at the heart of it all, as for each amendment that's been tabled they provide for the Minister a simple and clear statement of the purpose and effect of the amendment and a speaking note to use in response at the end of the debate.

I've been doing Bills for long enough that I can remember when cutting and pasting meant literally that and I have to explain to younger colleagues how lucky they are to have the benefit of computers which reduces the administrative burden considerably.

But it's not just a case of recycling the same material at each stage. Part of the skill of a Bill team is listening to the arguments and being ready to respond to them. Some of that happens in real time through the ubiquitous notes that get passed from the officials' box during debates but there's a lot of work between stages dealing with points that have been raised and ensuring that the Minister is fully prepared should the same point be raised again. Just occasionally, we advise Ministers to change tack in the light of the points raised.

The policy officials also maintain what I refer to as the "commitments book" which is a record of all promises that Ministers make during the course of a Bill's passage. In some cases these can be given effect to immediately – for example, a promise to write to clarify a point – but others may have longer term implications for the Bill's implementation.

Though the essential kernel of arguments will remain the same in both Houses, there is a subtle difference in how to present the arguments in the two Houses. In the Commons it is much easier to appeal to partisan politics and to get away with party political points. In the Lords it's more important to appeal to reason though you can, if you're lucky, occasionally tap in to the Lords' sense that there are some issues that are more properly the preserve of the elected House. There is also a difference between debates on the floor of either House and those which take place in Committee. The smaller rooms, and more intimate atmosphere, of Committees mean that grandstanding and rhetoric doesn't really work so well. As against that, a conciliatory tone and quiet commonsense, if you have a Minister who can carry it off, work rather better.

I have sought to convey that as the Bill progresses the Bill team are slaves to amendments and that is never more true than when they come in at the last minute. It can, and frequently does, happen that you are faced with 100 new amendments the day before they will be debated.

In many cases the late tabling is because those responsible, generally the Opposition spokespeople, simply haven't got their act together sooner but in some cases you get a sense that they're trying to catch the Government out. If that is indeed their intention, they have failed to grasp an important truth.

That is that the default position for the Government is to reject all amendments which it has not itself tabled. As an official it's easy and straightforward to write a speech for the Minister to use rejecting an amendment. We do that time and time again.

By contrast, to accept an amendment – or, to be more strictly accurate, to give a commitment to bring back an equivalent Government amendment at the next stage – is a complicated and cumbersome process. Departmental lawyers and Parliamentary Counsel of course need to be consulted but so too do many policy colleagues elsewhere in the Department and elsewhere in Whitehall with an interest. The Minister also needs to be consulted and give approval.

So, for an Opposition amendment, or even an amendment from a Government backbencher, to have any hope of making it through, it should ideally be tabled as far in advance as possible. A quick phone call to the Minister's office explaining what it is trying to achieve, and why, also does no harm to its chances of success.

I've mentioned Ministers several times. A sad truism for civil servants is that you don't get to pick your Minister – even if you sign up for a Bill knowing that you'll be working for a good Minister, a reshuffle can quickly put paid to that – but a Minister can make more difference than almost any other factor to the smooth passage of a Bill and, just as importantly, how much fun it is for the officials.

A good Minister is one who reads the submissions puts into his or her red box and responds intelligently. A good Minister is one who is interested in the policy behind the Bill and who never takes his or her eye off what it is trying to achieve. A good Minister is one who does not depart too far from the scripts which the Bill team have prepared for him or her but is also capable of thinking on his or her feet and responding to the occasional googly which comes from the benches opposite.

A good Minister also has a clear sense of the strategy required to get the bill through. No two bills are alike in this regard and a good understanding of the Parliamentary tactics is very useful. Perhaps, I could give an example of this. On one Bill I worked on the Minister told me early on that he did not believe that the main Opposition spokesmen were people he could sensibly work with. But he thought the Home Office Committee might be helpful.

So we encouraged the Home Affairs Committee to hold a hearing and take evidence on the draft Bill and when they reported we made a point of taking on board, or appearing to take on board (which is a very different thing!) all of their recommendations. Throughout the Bill's passage we made constant flattering references to the Home Affairs Committee and frequently prayed it in aid.

We were rewarded with numerous helpful interventions from Committee members on both sides of the House and were able to neutralise many Opposition attacks as a consequence. That's a clear case of Ministerially determined tactics bearing fruit.

Finally, to go back to characteristics of Ministers, a good Minister is one who is always pleasant and grateful to his or her officials and who gives them sensible feedback.

Sadly, not all Ministers possess all of these qualities and it is important for Bill teams, who at the busiest times may be seeing the Minister on a daily basis, or more, to adapt their style and material to suit the needs of the particular Minister they are working with. For instance, I had one Minister who became more and more nervous

before any Parliamentary occasion. When briefing him, I always sought to play down the difficulties I expected the Bill to face that day knowing that it would only make the problem worse. Instead, I reassured him that it would all be straightforward and tried to deal with issues as they arose through notes from the box. He performed much better as a consequence.

At all points you are discussing with the Minister how the Bill is going, which points the Government is vulnerable on, the tactics for getting through the next stage and whether any changes or concessions are necessary. If concessions are to be made, you're then into questions about timing and the degree to which the Minister wants to give credit to the Opposition or to a particular backbencher.

At some point, unless you've been very lucky, you reach the ping-pong stage. Here civil servants really come into their own. Not only are we expected to produce material at ever greater speed but given that the two Houses may have been debating the same issue for half a dozen times or more, it is really a challenge to find new ways, and new words, to express what is inevitably broadly the same argument as at the start.

But more than that, good civil servants will be heavily involved in the final horse trading and dealing that accompanies the end of a Bill's passage. Having sat through all the debates, the Bill team will be aware of which points are really important to the Opposition parties and which have been advanced for form's sake. They'll know, too, what concerns there are on the Government's own side. Most crucially, civil servants need to have a clear picture of what concessions the Government can safely make and where the lines in the sand are.

At some point close to the end of the Bill's passage, the Bill team need to submit advice to Ministers suggesting a package that can be negotiated with the Opposition, with sufficient concessions to buy off all interested parties but with nothing to undermine the fundamental principles of the Bill or Government policy. Of course departmental lawyers and Parliamentary Counsel have to be involved in this work but when you get to this stage where grubby politics and expediency take over, it is very much the policy officials who are in the lead.

Quite often, the final deal is hatched in what would best be described, but for the smoking ban, as a "smoke filled room". Though this is raw politics, civil servants need to be to at their most adroit and very heavily involved in supporting the Minister.

Sometimes it's more than that. On one occasion I was waiting in the Minister's room with representatives from the then two Opposition parties. The Minister was ten minutes late and by the time she arrived, we'd already cooked up the deal. Fortunately, not least for the sake of my career, she was happy to go along with what we'd cooked up even though it wasn't what we'd previously suggested to her.

Once the Bill has received Royal Assent, the focus switches to implementation and again the role of the Bill team varies. Sometimes the Bill team moves seamlessly into becoming an implementation team, sometimes the Bill team will simply be absorbed back into the policy team whence it came and in some cases the Bill team will be dissolved with its members going their separate ways.

It's fair to say that with any complicated piece of legislation, a decent Bill team will have already started planning for implementation and producing the necessary guidance long before Royal Assent. Drafting of secondary legislation should already have started. Equally, it's not hard to understand why this aspect of Bill work can easily be forgotten or moved to the bottom of the priority list when things get hectic. Nevertheless, at the very least a departing Bill team should leave a detailed handover note for whoever assumes responsibility.

There is clearly a potential problem if the people who have overseen the passage of the Bill, who know what commitments have been made as to how it will be operated and how Ministers will use any new powers that have been conferred on them are not around for the crucial first few months' of the new Act's operation. That can be a regrettable consequence of civil service posting policy but also of the fact, I'm sorry to say, that generally much less attention is paid by Departments to secondary legislation than primary legislation (which itself is simply a reflection of Parliament's own attitude).

And so that is the passage of the Bill. Perhaps I could finish with a few general observations.

Firstly, we are much too quick to legislate. Though it has provided me with a series of interesting posts I have to say that my own dear Department, the Home Office is very culpable in this regard. Legislation offers a very convenient way for Ministers to be seen to be doing something in response to public demand. In the case of terrorism it may be the only thing that can be done publicly. Nevertheless, too much legislation is ill thought through and unnecessary.

Secondly, this problem is exacerbated by the fact that the Parliamentary process does not ensure proper scrutiny. The fact that the Government can almost always rely on a majority in the House of Commons, the elected House which always ultimately prevails, contributes to this. Sitting in a Commons Standing Committee watching Government backbenchers work through their constituency correspondence and pay no attention to the business before them, knowing that they are only there to do their duty in the event of a vote is profoundly depressing. Similarly, though things have improved in this regard in recent years, the fact that a Bill can leave the Commons with large chunks that have not been subjected to any detailed scrutiny does not do the system any credit.

And though the Lords is generally better, the fact that their Lordships are much too polite to interrupt or should down one of their number who has completely missed the point, does lead even the most tolerant civil servants to shake their heads in despair.

But, finally, to come back to where I started, despite these somewhat negative ending comments, Bill work is great fun. It's tough, demanding and unrelenting but also immensely rewarding. I'm currently working on the 2012 Olympics. It's a job I enjoy immensely and, as you'd expect, there's another 18 months' work. But if my phone rang tomorrow with someone offering the chance to work on a Bill, I'd be sorely tempted....

Thank you.