



Drafting Legislation and the Parliamentary Counsel Office

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The Parliamentary Counsel is a team of lawyers which drafts government bills before they are introduced into Parliament and works on other legal aspects of parliamentary business. This note describes the work of the Parliamentary Counsel Office, and its structure. It also briefly considers the implications of the growing use of pre-legislative scrutiny on the work of the Office.

Contents

A.	Duties of the Parliamentary Counsel	2
1.	Government bills	2
2.	Private Members' bills	4
3.	Scottish bills	4
B.	Structure of the Parliamentary Counsel Office	5
1.	Ministerial responsibility	5
2.	Staffing	5
C.	Modernising Parliament: implications for drafters	7
1.	Explanatory notes	7
2.	Draft bills and carry-over	8
D.	Privatising the drafting of legislation?	9

A. Duties of the Parliamentary Counsel

1. Government bills

Parliamentary Counsel draft Government bills that are presented to Parliament. The Parliamentary Counsel Office was established in 1869 by a Treasury minute which appointed Henry Thring – later Lord Thring – as its full-time head, with the title of Parliamentary Counsel to the Treasury.¹ The Office's work is described in the *Civil Service Yearbook*:

Parliamentary Counsel are responsible for the drafting of government bills (except those relating exclusively to Scotland). When the bills are introduced, Parliamentary Counsel advise the departments concerned on all aspects of Parliamentary procedure and draft Government amendments to them. They also draft any motions, including financial resolutions, to be tabled in connection with.²

In evidence to the Constitution Committee of the House of Lords, Sir Geoffrey Bowman KCB, First Parliamentary Counsel – the head of the Office, provided some flesh to the bones of the description above. In written evidence, he described the relationship between the Department from which a bill originated and the Parliamentary Counsel Office:

A Bill is a joint effort, and there are many participants – Ministers, administrative and legal civil servants, drafters, Members and officials of both Houses, and members of the public affected by the Bill. The drafter's main contact will usually be with the departmental lawyers, who draw up written instructions to our office.

There is an inherent tension in the process of producing Bills. On the one hand there is the political need to get legislation prepared and enacted quickly. On the other hand there is the need to get legislation right. If it does not stand up to logical analysis or it is legally defective, it will be prone to attack as it passes through Parliament and (once enacted) it will be challenged in the courts. There is always a balance to be struck. If you go too quickly you risk producing a faulty product. If you go too slowly you risk getting nothing done. But any Bill needs a certain time to mature. Everything needs to be thought through and tested in order to make sure that it stands up. The iterative process in which successive drafts are tried out and discussed prior to introduction into Parliament is vital. And it takes time.³

He subsequently told the Committee that as well as drafting the legislation, Parliamentary Counsel also has to subject the policy and the ideas in the Bill to analysis. It questions the concepts of the Bill to destruction:

Policy ultimately emanates from ministers and they are advised by various people, including their political advisers and their administrative civil servants. If a project requires legislation, the legal civil servants within the department concerned will draw up written instructions for our office. The legal civil servants within the department will

¹ George Engle, "Bills are made to pass as razors are made to sell': practical constraints in the preparation of legislation", *Statute Law Review*, Spring 1983, pp7-23

² Cabinet Office, *The 42nd Civil Service Year Book*, p231

³ Constitution Committee, *Parliament and the Legislative Process*, 29 October 2004, HL 173 2003-04, Memorandum submitted by Sir Geoffrey Bowman KCB, p96, paras 8-9

be our main point of contact, but we often have contact with administrators and sometimes with ministers. ... It is appreciated in departments that we nowadays try to act more as a team with the department. At the same time, we cannot get too close because one of our great functions is to stand back and analyse the departmental ideas to make sure that they stand up logically. If we get too involved with the policy making, we cannot stand back. We need to take a dispassionate view. It is quite a balance.⁴

In the Statute Law Society's Annual Lecture, 2004, Sir Geoffrey expanded on the analytical and intellectual functions of drafters:

The popular belief is that the drafter's main function is to turn policy ideas into some kind of special statutory language. This is a misconception. The drafter's main and most valuable function is to subject policy ideas to a rigorous intellectual analysis. It is no good putting on the statute book something that simply will not stand up. It has to stand up to scrutiny in Parliament and (once enacted) to scrutiny by practitioners and the courts. If the analysis means that the ideas collapse, the client will be sent away to think again or might even conclude that the particular project should be abandoned.⁵

Other commentators have reviewed the role of the Parliamentary Counsel Office. Lord Renton, who as Sir David Renton, chaired an inquiry into the preparation of legislation in the 1970s (see Section B2), provided an account of the way in which the draftsmen's role fitted into the legislative process:

... This mass production of legislation is done in four stages:

- (1) *Policy making.* ...
- (2) *Preparation of departmental officials of instructions to parliamentary draftsmen.* ...
- (3) *Drafting by government lawyers.* These are parliamentary counsel, draftsmen trained in this work: highly skilled people who are obliged to follow the instructions issued by the departmental officials. For the most part these draftsmen do their work well, in spite of being under immense pressure owing to the exigencies of the parliamentary timetable. ...
- (4) *Consideration by both Houses of Parliament.* ...⁶

In *The Executive in the Constitution*, Terence Daintith and Alan Page noted that:

Parliamentary Counsel's essential task is to give effect to the government's intentions in a form capable of withstanding Parliamentary and later judicial scrutiny. Because the legislative timetable is tight, it is equally important that they deliver Bills on time. 'the government must get its Bills on time and they must be in a form which will first stand up in Parliament and then stand up in court' (Bennion 1990: 22), though Bills may be introduced in the knowledge that more text will be added later or that certain clauses will be altered by government amendment. As well as drafting Bills, Counsel also assist their progress through Parliament, advising departments on parliamentary procedure (the Public Bill Office in the Commons also advises departments), drafting

⁴ *Ibid*, Q317, p98

⁵ Sir Geoffrey Bowman KCB, "Why is there a Parliamentary Counsel Office?", *Statute Law Review*, 26 (2), 2005, p70

⁶ Lord Renton, "Current Drafting Practices in the United Kingdom", *Statute Law Review*, Vol 11, No 1, pp11-17

amendments, and where other amendments are accepted or carried against the government invariably re-drafting them in a form consistent with the Bill.⁷

2. Private Members' bills

In general the Parliamentary Counsel Office is not involved in the drafting of private Members' bills that have been prepared by individual private Members. However, if the Government decided to support a private Members' bill, the Office would become involved in analysing the bill and preparing it to ensure that it became a "decent Act".⁸

The Parliamentary Counsel Office also produces what are known as "hand-out bills":

... These are ones which are prepared by the office. The government will decide which ones we can prepare and then the department will ask private Members whether they want to espouse them. They will take them through and they will get some government support because the government wants them too.⁹

In summary, the services of the Parliamentary Counsel Office are only available for bills which "have the backing of the Government".¹⁰

3. Scottish bills

The responsibility for drafting bills that relate exclusively to Scotland has never rested with the Parliamentary Counsel Office. Before devolution and the establishment of the Scottish Parliament, one of the responsibilities of Lord Advocate (the principal Law Officer of the Crown in Scotland) was the drafting of legislation:

The Lord Advocate has many Law Officer functions as a constitutional and legal adviser to the Government, and he is responsible for the drafting of Scottish legislation. These functions are discharged mainly through the Lord Advocate's Department in London, whose permanent head is the Legal Secretary to the Lord Advocate and First Parliamentary Counsel for Scotland. The members of the Department are the parliamentary counsel for Scotland – legal specialists who draft both Scottish Bills and the Scottish provisions in Bills applying also to other parts of the United Kingdom.¹¹

Since devolution, the Lord Advocate has become head of the Crown Office and Procurator Fiscal Service. He is assisted by the Solicitor General for Scotland. They are the Scottish Law Officers and members of the Scottish Executive.¹² The Office of the Scottish Parliamentary Counsel is located within the Scottish Executive. The Office is:

⁷ Terence Daintith and Alan Page, *The Executive in the Constitution*, Oxford University Press, 1999, p250 (they cited Francis Bennion, *Bennion on Statute Law*, 3rd edition, Longman, 1990)

⁸ Constitution Committee, *Parliament and the Legislative Process*, 29 October 2004, HL 173 2003-04, Q329, p101

⁹ *Ibid*, Q329, p101

¹⁰ *Ibid*, Q330, p101

¹¹ Scottish Office Information Directorate, *The Departments of the Lord Advocate*, Factsheet 8, October 1996, <http://www.scotland.gov.uk/deleted/library/documents/lord-adv.htm>

¹² Crown Office and Procurator Fiscal Service, <http://www.crownoffice.gov.uk/who/who.htm>

Responsible for drafting Bills to be put before Parliament by the Executive and handling associated work such as the preparation of Executive amendments to Bills.¹³

It is headed by the First Scottish Parliamentary Counsel; and in addition to him, the office has twelve Parliamentary Counsel.¹⁴

However, the Scottish devolution settlement allowed for not only Members' bills (similar to Westminster's private Members' bills) but also for bills to be recommended by committees. Such bills are not prepared by the Office of the Scottish Parliamentary Counsel. The Scottish Parliament has a non-executive bill unit, which provides support for both members' bills and committee bills.¹⁵ It was described in evidence to the Richard Commission on the powers and electoral arrangements of the National Assembly for Wales:

It's basically a drafting resource within the Parliament itself but the members of that Unit are all staff of the Parliament not staff of the Executive and they also incidentally draft Members Bills so it is quite distinct from the Office of the Scottish Parliamentary Counsel.¹⁶

B. Structure of the Parliamentary Counsel Office

1. Ministerial responsibility

Lines of responsibility and accountability to parliament for the Parliamentary Counsel Office were described as "complex" by Daintith and Page, in *The Executive and the Constitution*. They identified three channels. First, as noted above, departmental ministers are responsible for the Office's work on bills they sponsor. Second, the Office also advises the minister responsible for the government's legislative programme, at present the Leader of the House of Commons. Third, from the point of view of finance and management, the Office forms part of the Cabinet Office: the Cabinet Secretary is its Accounting Officer; and the Prime Minister, as Minister for the Civil Service takes responsibility.¹⁷

2. Staffing

The lack of time available for Parliamentary draftsmen to prepare legislation has long been a problem. In 1975, a committee chaired by Sir David Renton reported on *The Preparation of Legislation*. Chapter 8 of its report was entitled "The Draftsmen's Present Difficulties", and the first difficulty was "pressure of time". The report cited evidence from the First Parliamentary Counsel – "The pressure to get things done quickly is usually great".¹⁸

¹³ Cabinet Office, *The 42nd Civil Service Year Book*, p463

¹⁴ *Ibid*

¹⁵ Any proposal for a members' bill requires the support of at least 11 other members, within one month of such a proposal being lodged with the Clerk, for the bill to be introduced [CMG Himsworth and CM O'Neill, *Scotland's Constitution: Law and Practice*, 2003, p327]

¹⁶ Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, *Minutes of Proceedings*, 12 February 2003, <http://www.richardcommission.gov.uk/content/printpage.asp?ID=/content/evidence/oral/scottishgordon/index-e.asp>

¹⁷ Terence Daintith and Alan Page, *The Executive and the Constitution*, Oxford University Press, 1999, p221

¹⁸ *The Preparation of Legislation – Report of a Committee Appointed by the Lord President of the Council*, May 1975, Cmnd 6053, p43. The Committee's term of reference were:

Whilst he was Leader of the House of Commons, Robin Cook identified “the real bottleneck on government legislation” as the shortage of Parliamentary Draftsmen to prepare government bills. He supported the proposals of the First Parliamentary Counsel to increase the capacity of the Office:

... Geoffrey Bowman, the new First Parliamentary Counsel, came round to present a very intelligent paper on how we expand the numbers of the Parliamentary Draftsmen. It is an extraordinary, but little known truth, that the real bottleneck on government legislation is not the Commons, nor even the House of Lords. It is the brute fact that there are fewer than fifty Parliamentary Draftsmen working for the government. They each have a positively Stakhanovite commitment to their job and in the past session we got one bill published in time only by its draftsmen sitting up through night putting the finishing touches to it. But if we are going to improve the quality of the legislation, and if I am going to succeed in getting bills published in draft, we simply have to increase the capacity of the team. We resolved that I will minute the Prime Minister on Geoffrey’s proposal to increase its capacity by a quarter over the next three years.¹⁹

Robin Cook also secured the support of the Modernisation Committee:

At the Modernisation Committee we took evidence from Geoffrey Bowman, the First Parliamentary Counsel. I wanted colleagues to come face-to-face with the extraordinary pressure on the Parliamentary Draftsmen – or ‘Drafters’, as Geoffrey carefully styles them – and Geoffrey’s urbane understatement convinced them far better than any high-blown rhetoric would have done. He described how for a dozen years when he drafted the Finance Bills he would expect to work seven days a week, taking off only Sunday afternoon. With few resources they do a remarkable job ... When he left, I had another dozen allies in the room for my campaign to get more resources for the Parliamentary Drafters.²⁰

In his evidence to the Constitution Committee, Sir Geoffrey Bowman confirmed that more resources had been made available to the Office:

In accordance with ministers’ wishes the office has expanded over recent years, and in particular over the last two years. Once six new drafters arrive, the number of drafters will have expanded from 43 to 62 since 2002.²¹

The following table, based on information given in the *Civil Service Yearbook* illustrates the expansion of the Parliamentary Counsel Office.

“With a view to achieving greater simplicity and clarity in statute law, to review the form in which public Bills are drafted, excluding consideration of matters relating to policy formulation and the legislative programme; to consider any consequential implications for parliamentary procedure; and to make recommendations”.

¹⁹ Robin Cook, *The Point of Departure*, Simon and Schuster, 2003, pp210-211

²⁰ *Ibid*, pp261-262

²¹ Constitution Committee, *Parliament and the Legislative Process*, 29 October 2004, HL 173 2003-04, Memorandum submitted by Sir Geoffrey Bowman KCB, p97, para 12

Parliamentary drafters, Parliamentary Counsel Office (1994-2004)

	First PC	Second PC	Research Counsel	PC	Deputy PC	Principal Assistant PC	Senior Assistant PC	Assistant PC	Total
1994	1	1		8	3		3	12	28
1995	1	1		8	2		2	11	25
1996	1	1		8	2	2	2	16	32
1997	1			9	2	1	5	11	29
1997*	1			9	2	1	6	11	30
1998	1			9	2	1	6	13	32
1998/99	1			9	2	1	6	13	32
1999	1			9	2	1	6	12	31
1999/2000	1			8	6	1	10	12	38
2000	1		1	9	5	1	11	12	40
2000/01	1		1	10	8		8	15	43
2001	1		1	10	9		10	13	44
2002	1		1	10	11		13	8	44
2002*	1		1	9	11		13	8	43
2003	1		1	12	10		12	16	52
2003/04	1		1	15	7		12	16	52
2004	1		1	16	11		8	20	57

* second edition

Source: *Civil Service Yearbook*, various editions

C. Modernising Parliament: implications for drafters

1. Explanatory notes

In its very first report, the Select Committee on the Modernisation of the House of Commons considered the legislative process. It commented on the need for explanatory material to accompany bills:

There is a definite need for explanatory material in simple, readable form. Under current practice, if the Minister in charge of the Bill agrees, Notes on Clauses prepared for the Minister are often made available to members of the Standing Committee before the Committee stage of a Bill begins. These vary considerably in their intelligibility and value. Provided the Government is willing, there is no reason why explanatory Notes on Clauses cannot be produced for the House as a whole when the Bill is published. Such a document would enable more informed debate at Second Reading, and would assist any First Reading Committee that was appointed.²²

In December 1997, the Modernisation Committee reported that it had received a proposal from the First Parliamentary Counsel that “the existing Explanatory Memoranda and Notes on Clauses should be replaced by a single document entitled ‘Explanatory Notes’ which would accompany the Bill on publication”. The Modernisation Committee “wholeheartedly” welcomed the proposals and recommended that the Government implemented them as soon as possible.²³

²² Select Committee on the Modernisation of the House of Commons, *The Legislative Process*, 29 July 1997, HC 190 1997-98, para 36

²³ Select Committee on the Modernisation of the House of Commons, *Explanatory Material for Bills*, 9 December 1997, HC 389 1997-98, paras 2 and 4

In a report on its work, in 1999, the Committee reported that Explanatory Notes were produced with effect from the start of Session 1998-99.²⁴

2. Draft bills and carry-over

The Modernisation Committee has championed the publication of draft bills. Whilst, he was chairman of the Committee, Robin Cook expressed concerns that the publication of bills in draft might not happen, if the number of drafters available was not increased. The increase in personnel has taken place and more draft bills have been published.

In his evidence to the Constitution Committee, Sir Geoffrey Bowman noted that although overall the introduction of pre-legislative scrutiny has created more work for the Parliamentary Counsel Office, not only had it led to the publication of bills at less busy times of the Parliamentary Counsel's year, it had also afforded Parliamentary Counsel a second view of those bills:

We deal with draft Bills essentially in the same way as we deal with Bills which are intended for introduction without prior publication in draft. In some cases, we receive instructions for a Bill before there has been a final decision on whether the Bill is to be published in draft or not. Sometimes we do not know. What drafting resources are devoted to a Bill depends on the circumstances. ... The fact that a Bill is or is not to be published in draft is generally irrelevant. In particular, we do not treat draft Bills as being less important than others. After all, eventually, we hope they are going to get enacted, so it is in our interests that they should be in good form. ... As for the balance of the workload, traditionally, there has been a tendency for the workload to vary according to the time of year. There might be a lot of activity in late autumn as Bills are prepared for introduction before Christmas. There might be another peak around about the summer as lots of bills approach enactment. If more Bills are introduced towards the end of a session and make some progress in Parliament before the session ends, there should be a more even flow of work for the office. These two factors (draft Bills and carry over) can be married up. The increased tendency to carry over Bills should lead to more evening out of the workload and publishing more Bills in draft does tend to have the same effect. If a Bill is scrutinised in draft and amended before introduction, it may be that it will take less time to pass through Parliament because it has already been looked at. It will be easier for the business managers, you would think, to introduce it after the bulge that you get before Christmas. In theory, these two developments should lead to a more balanced workload in the office and in both Houses.²⁵

And, Sir Geoffrey concluded that pre-legislative scrutiny did lead to better legislation:

Draft Bills overall probably lead to more work because there is more opportunity to scrutinise, lick them into shape, put them right. The result is that Bills that have gone through prelegislative scrutiny as well as the normal parliamentary processes end up as better Bills and better Acts. That is a good thing. The fact that it leads to more

²⁴ Select Committee on the Modernisation of the House of Commons, *Work of the Committee: Second Progress Report*, 1 November 1999, HC 865 1998-99, Annex

²⁵ Constitution Committee, *Parliament and the Legislative Process*, 29 October 2004, HL 173 2003-04, Q349, p105

work for us is in one sense unfortunate but we are all very pleased if it ends up being a better piece of legislation. I think it does lead to fewer amendments in the House. I can almost certainly say that.²⁶

D. Privatising the drafting of legislation?

Daintith and Page noted that, when it was established, it was not intended for the Parliamentary Counsel Office to have a monopoly on the drafting of legislation. They reported that there have been calls for lawyers in private practice to draft legislation. However, they also noted that there were others who would argue against “any large-scale transfer of drafting work away from the Government draftsmen”.²⁷

In 1996, an experiment allowed part of the *Finance Bill* to be drafted by private practitioners. In his Statute Law Society Lecture, Sir Geoffrey Bowman noted that “It was not a success, and has not been repeated”.²⁸

Daintith and Page reported on the outcome of the experiment:

... the conclusion that would seem to have been drawn from this exercise is that the advantages of centralized drafting continue to outweigh their possible disadvantages [*in a footnote they recorded: As well as being very expensive the contractors' work was thought to be opaque and 'over-drafted'.*] In particular, they make it more likely that legislation will be 'ready' on time, a consideration of paramount importance in a system in which time is at a premium ... Centralized drafting arrangements are also conducive to a general consistency of method and style of in the drafting of legislation, and with it the likelihood that measures will be interpreted as the government intends.²⁹

²⁶ *Ibid*, Q354, p106

²⁷ Terence Daintith and Alan Page, *The Executive and the Constitution*, Oxford University Press, 1999, p251

²⁸ Sir Geoffrey Bowman KCB, “Why is there a Parliamentary Counsel Office?”, *Statute Law Review*, 26 (2), 2005, p81

²⁹ Terence Daintith and Alan Page, *The Executive and the Constitution*, Oxford University Press, 1999, p251