

**Their Word is Law: Parliamentary
Counsel and Creative Policy Analysis**

By

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Reprinted from Public Law
Issue 4, 2009

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

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Their Word is Law: Parliamentary Counsel and Creative Policy Analysis

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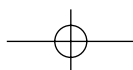
 Drafting; Legislation; Parliamentary Counsel; Public policy

Despite the blossoming of theoretical approaches to public policy in the past 40 years, the dominant view of policy-making remains top-down: a policy is “made”, in the sense of general principles agreed, approved and legitimised by leading politicians, bureaucrats, interest group members or judges; and then it is carried out (or not carried out) by those lower down. Yet policy is better seen as a production process involving people at all levels adding different bits to the overall product, although it is hardly a linear process that starts with agreement on principle which is followed by elaboration of detail. Issues can be raised at a very late stage in the process, ostensibly about matters of fine detail, that fundamentally shape the nature of the resulting policy. The settling of strategic objectives and agreement on the tactics to be used to pursue them is only part of the production process.

This paper looks at one aspect of this production process, writing the text of a law designed to give effect to a policy, and how this activity can shape policy. The importance of looking at how measures are put together has been discussed in the UK context with particular focus on the activity of developing policy by (often junior) civil servants.¹ These studies have looked at how secondary legislation is put together, and at the work of policy officials in government departments as they work through policy problems to help shape the instruments that will be used to address them. These analyses have stopped short of examining directly the point at which major planks of the Government’s programme become converted into legislation. We know little about the process of drafting primary legislation, despite it being the vehicle used to develop the

*Department of Government. The research on which this paper was based was supported by a grant from the Economic and Social Research Council (reference RES-000-22-1451). I am grateful to First Parliamentary Counsel Stephen Laws and former First Parliamentary Counsel Sir Geoffrey Bowman for making this research possible and to the drafters and other officials in the Office of the Parliamentary Counsel who explained their work to me with patience and generosity. I also thank the departmental lawyers and policy officials who participated indirectly in this study. Carole Harlow, George Jones and Michael Zander (LSE) provided advice and encouragement in the design of the research and Jack Hayward (Hull), Alan Page (Dundee), Philip Cowley, Jan Meyer-Sahling (Nottingham) and an anonymous referee provided valuable comments on drafts of this paper.

¹ See E.C. Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making* (Oxford: Hart, 2001); E.C. Page, “The Civil Servant as Legislator: Law Making in British Administration” (2003) 81 *Public Administration* 651; E.C. Page and B. Jenkins, *Policy Bureaucracy: Government with a Cast of Thousands* (Oxford: Oxford University Press, 2005).



Government's key policy priorities. Thus we know little about how policies may be shaped during the process of legislative drafting. As we will see, the impact of decisions made and changed at this stage is not accurately assessed by the cliché that the devil is in the detail: the impact is far broader than this implies.

Earlier work on the officials in the United Kingdom charged with developing policy into legislation in Bill teams,² contained strong indications that parliamentary drafters of legislation had influenced the thinking of the policy officials responsible for its development. Moreover, in the UK system of government where few officials have any level of specialisation, the parliamentary drafter is a rare example of a specialist—a person with technical qualifications and experience who tends to make a career within the same small department. The drafting stage is likely to be the first at which the policy as a whole is subjected to a form of rigorous scrutiny, and a scrutiny with a high degree of legitimacy. If a drafter says that a policy cannot work it is taken extremely seriously. However, at present we can only hypothesise that the process of drafting shapes policy, and the central questions this paper addresses are: does it, and in what way? What sorts of policy issues get raised at this stage in the development of policy, how important are they and how are they resolved?

The focus of the paper is exclusively on the Office of the Parliamentary Counsel (OPC)³ and the officials who work in it. It is based on examination of OPC files containing the correspondence between the drafter and the department instructing Counsel for four Bills and interviews with seven members of the Office. All quotes are from these interviews and files unless otherwise stated. Because the way the Office is set up and works is not very well understood,⁴ the first part of the paper sets out basic information about the Office. The second part moves on to discuss how Counsel set about the work of drafting legislation and introduce the kinds of issues that get raised at this stage in the policy process. While Parliamentary Counsel studiously avoid becoming involved in “making the policy”, the nature of the job means that they invariably have an impact on it, and the third part offers some examples of this impact. The conclusion attempts some direct answers to the central questions of the character and importance of the impact of Parliamentary Counsel on legislation.

The Office of the Parliamentary Counsel

Unlike many other jurisdictions, including the United States, France, Germany and the European Union, in the United Kingdom the legislative drafting for primary legislation (Bills that will become Acts of Parliament) proposed by

² Page, “Civil Servant as Legislator” (2003) 81 *Public Administration* 651.

³ Parliamentary Counsel Office appeared to be the official name for the Office until 2007 when it changed to Office of the Parliamentary Counsel.

⁴ For an overview see the OPC website, <http://www.cabinetoffice.gov.uk/parliamentarycounsel.aspx> [Accessed August 30, 2009]; D. Miers and A. Page, *Legislation* (London: Sweet & Maxwell, 1982); T. Daintith and A. Page, *The Executive and the Constitution* (Oxford: Oxford University Press, 1999).

the Executive is not the responsibility of the ministry or agency concerned. Certainly Government Ministers are politically responsible for the legislation and the development of what will actually be put in the law is a matter for the department's officials and Ministers. However, the process of drafting the legislation—writing down the legal provisions that try to give effect to a policy—is a matter for a specific office which has drafting as its almost exclusive job. The United Kingdom shares this characteristic with (among others) Canada, India, Australia and New Zealand in the British tradition. Other countries also have systems of extra-departmental vetting of the legislative proposals of the Executive: in Germany the Ministry of Justice has officials whose main task is to examine proposed legislation by departments and who can refuse to allow the legislation to be put before parliament if they identify problems with it; in France the role of scrutinising legislative drafts falls to the powerful Conseil d'Etat, and in the United States the Office of Management and Budget has responsibility for scrutinising the administration's legislative proposals (the House and Senate have their own Offices of the Legislative Counsel as a drafting service for members of Congress and committees). A drafting monopoly held by a small group of officials such as found in the United Kingdom is not a common arrangement.⁵ Nevertheless, in many other systems officials whose primary concern is policy development have to deal with officials given prime responsibility for ensuring the propriety and appropriateness of the legal form these policies take. This confrontation between policy aspirations and their legal enactment is not confined to the United Kingdom, though we may expect its form and impact to vary substantially across different political systems.

As Miers and Page⁶ discuss, up until the late 18th century, government departments commissioned barristers in private practice to draft Acts of Parliament. Alternatively they could also be written by judges or MPs. It was not until the 1830s that departments (the Treasury was the first) appointed their own full time draftsmen, although many Bills were produced by barristers in private practice for much of the century. The diversity in quality of the different drafters within departments led critics, including Jeremy Bentham, to advocate a centralised drafting agency which would also be able to ensure that legislation proposed by departments was consistent with the existing body of statute law. After the 1830s two draftsmen, Arthur Symonds (from the Board of Trade) and later Henry Thring (from the Home Office) were leading advocates of setting up a centralised agency, but it was not until 1869, under the pressure of the mounting costs of paying draftsmen and hiring extra help to keep up with a growing burden of legislation, that the Parliamentary Counsel Office was set up with Sir Henry Thring as its first official.

⁵ The monopoly applies to government Bills as well as those private member's Bills likely to pass: see R. Kelly, "Drafting legislation and the Parliamentary Counsel Office", House of Commons Library Standard Note SN/PC/3756 (2005), p.4. For a discussion of a brief experiment in relaxing this monopoly by contracting out drafting see T. St J.N. Bates, "Contracting out drafting: a British experience" (1996) 17 Stat. L.R. 152. As Sir Geoffrey Bowman, First Parliamentary Counsel at the time, commented: "It was not a success, and has not been repeated".

⁶ Miers and Page, *Legislation* (1982), pp.30–31.

Starting life as part of HM Treasury, where it remained for a century, until 1969, when the Parliamentary Counsel Office was transferred to the Civil Service Department (CSD), it is now a unit of the Cabinet Office, to which it was transferred when the CSD was disbanded in 1980.⁷ First Parliamentary Counsel, its most senior official, is a Permanent Secretary. As OPC is part of the Cabinet Office, First Parliamentary Counsel is not an accounting officer but has similar corporate responsibilities for the Office, and a similar corporate role within the civil service as a whole, as Permanent Secretaries have in other departments. Unlike a ministry and most agencies its Minister, the Prime Minister, has little direct or indirect role in its work. Policy issues are not passed up to the Prime Minister for approval in the way that departmental civil servants look for guidance and approval on policy matters elsewhere. The day-to-day business of the Office is shaped less by Ministers from the Cabinet Office than by the institutions that determine the parliamentary timetable, above all the Leader of the House of Commons and the Legislation Committee (formerly the Legislative Programme Committee)—a committee of Cabinet chaired by the Leader of the House and concerned primarily with the timetabling of legislation and assessing its readiness to be introduced into Parliament. The arrangements for getting a legislative slot and for planning legislation are complex and beyond the scope of this paper.⁸ Suffice it to say that nobody can assert in advance with any confidence how long it will take to draft a piece of legislation—as we will see below there may be policy issues (it is rarely technical issues that hold things up) that remain to be resolved. Yet assumptions are and must be made about the length of time needed to prepare the draft. The fact that it has never let a client down is a source of some pride within OPC. As one said:

“We do not formally keep targets of Bills. We just deliver on time and to the specifications. This place is as good as it gets in terms of delivery. We [don’t] . . . phone up Ministers and say ‘you cannot have the Bill you want now but you’ll have to wait a bit’. People here work through the night to get the thing done. We have a strong delivery ethos. It is remarkable as a team at delivering and at short notice. You have the Northern Ireland Agreement on the Friday and the legislation is ready for the next week.”

The Office’s workload—which laws it has to write and by when—is determined by the Legislation Committee which also monitors progress on legislative drafting, mainly through the Secretariat of the Committee and regular meetings with the First Parliamentary Counsel. OPC, through the First Parliamentary Counsel, advises the Legislation Committee on timetables.

⁷ For a discussion of lines of accountability between OPC and other parts of government see Daintith and Page, *The Executive and the Constitution* (1999), p.221.

⁸ For an excellent discussion see M. Lodge, “Section 4 Planning in Context: The United Kingdom and Germany” in R. Zubek, K.H. Goetz and M. Lodge, *Legislative Planning in Central Europe: Towards Strategic Management of Government Legislation* (Warsaw: Better Government Programme Ernst & Young Poland, 2007), [http://www.ir-network.org/document/359/Zubek_Rados%C5%82aw_-Goetz-Klaus_H_-Lodge_Martin_\(2007a\)_Legislative_Planning_in_Central_Europe_-_Towards_Strategic_Management_of_Government_Legislation.html](http://www.ir-network.org/document/359/Zubek_Rados%C5%82aw_-Goetz-Klaus_H_-Lodge_Martin_(2007a)_Legislative_Planning_in_Central_Europe_-_Towards_Strategic_Management_of_Government_Legislation.html) [Accessed August 30, 2009].

In its everyday drafting work, the hand of the Cabinet Office touches the everyday work of the Office only lightly. The Office makes only brief, and rather bland, appearances in Cabinet Office management documents; its appearance in the Cabinet Office Annual Report is essentially limited to a line setting out personnel numbers and a terse statement of its function “supporting cabinet”. The budget of OPC is set by agreement between OPC and the Cabinet Office on the Office’s funding request. While the size of the budget follows the normal procedures of the public spending round, the Office’s method of finance is distinctive. The degree to which different government departments call on the services of Parliamentary Counsel is extremely variable. Some departments, such as the Home Office with its recent habit of passing legislation in the law and order field or HM Treasury with its large Finance Bill, make heavy use of Parliamentary Counsel, while others, such as Culture or Defence make lighter use. Before 2003 the whole budget came from the Cabinet Office vote. After 2003 a formula was negotiated which requires that heavy users of Parliamentary Counsel pay more. Part of the budget is paid for from a basic Cabinet Office contribution (currently fixed at the 2003–04 level), the rest comes from payments from departments proportionate to the number of pages of legislation they have had drafted for them over the preceding five years.

The new budget deal was struck during a period of rapid expansion for OPC. From its inception in 1869 until 1916 it had two draftsmen, by 1934 it had grown to six.⁹ Steady increases during the Second World War (including the appointment of the first woman barrister to the Office in 1940) and after meant it had reached 18 drafters by 1961. By the time of the Renton Committee¹⁰ (1975) it had reached 23 and by 1994, 28. The big increase came after the mid-1990s, when Robin Cook, as Leader of the House of Commons, identified the shortage of parliamentary drafters as “the real bottleneck on government legislation”.¹¹ By 2000 the Office had 40 drafters, rising to 60 full time drafters by 2007.

The expansion over the past 10 years has had the effect of bureaucratising the Office in requiring that issues that used to be handled less formally become subject to defined and formalised procedures. As one respondent put it, “we’ve changed from being a village to a small market town. That means you have to change things. Now you have to have a zebra crossing and traffic lights and you change the nature of the place.” Even IT provision used to be handled in a way uncharacteristic of even a small public organisation. The IT network was originally set up and run by a parliamentary drafter and the Office used, until 2001, a computer programme written by Counsel to lay out drafts of legislation in a form that could be typeset. Much of the organisation of the Office and many of its procedures for dealing with its own staff as well as the

⁹ *The Preparation of Legislation: Report of a Committee appointed by the Lord President of the Council* (Renton Committee). Cm.6053 (1975).

¹⁰ *The Preparation of Legislation*. Cm.6053 (1975).

¹¹ R. Kelly, “Drafting legislation and the Parliamentary Counsel Office”, House of Commons Library Standard Note SN/PC/3756 (2005), p.5.

world outside were informal. The Office used to be managed from the private office of First Parliamentary Counsel, traditionally the leading drafter, though over the past 20 years the amount of drafting done by First Parliamentary Counsel has declined. A Chief Executive was appointed only after 1997 when John Gilhooly, an official from HM Treasury, was seconded on what was expected to be a short-term basis to help sort out a variety of managerial issues, above all pay.

A second consequence is that expansion strengthened the capacity for the role of Counsel to extend beyond drafting and towards a wider provision of legal advice to government departments. Parliamentary Counsel have long been involved in tasks outside drafting. The Office has seconded drafters to the Law Commission since its inception in the 1960s to work on improving legislation. Kent's account of his life in the Parliamentary Counsel Office from the 1930s to the 1960s has examples of advice being sought and given on Government White Papers.¹² Sir Henry Thring famously collaborated directly with Gladstone and Disraeli in drafting legislation.¹³ In addition, departments have for a long time, albeit infrequently, turned to OPC for advice on regulations. As one Counsel put it:

“. . . We do a lot more other stuff than we used to. There is lots more aftercare now, the Office gets involved in implementation—this new . . . Law, for example is a huge piece of legislation. There are lots of orders to be made under it and we advise on some of them. I did . . . [a piece of legislation] recently and that had 200 order making powers. Quite often they [the department concerned] will consult you on what they are doing—they'll ask whether the *vires* in the Act permit it. They'll phone you up and ask you about the legislation.”

The expansion has led to a wider process of questioning the way the Office works and at the time of the interviews, in 2007, there was a debate between the traditionalists and the modernisers about a range of core issues. According to one of his colleagues, the new First Parliamentary Counsel, Stephen Laws, when appointed in 2006,

“spent quite a while before he took over thinking through how to manage an expanded Office. The informal style of management would not work with 60 Counsel. So he spent time preparing himself for the job. What he is seeking to do is to look at all the management systems in the Office, see if they are working and if they are not, to change them.”¹⁴

One core issue was whether the traditional way of organising draftsmen through “teams” should persist. According to the team structure a senior official at the

¹² H.S. Kent, *In on the Act: Memoirs of a Lawmaker* (London: Macmillan, 1979).

¹³ Anon, “Editorial: Henry Thring—A hundred years on” (2007) 28 Stat. L.R. iii.

¹⁴ Shortly after Stephen Laws became First Parliamentary Counsel in 2006 a “Development Committee” was established to “assist the First Parliamentary Counsel to decide what structural and organisational changes (if any) are needed in the Office”. The Committee reported in February 2007. Its recommendations, such as revised team structures for Counsel and the establishment of an Office Board, are not covered in this research.

level of Parliamentary Counsel or Deputy Parliamentary Counsel is assisted by one or two junior members of the team (Senior Assistant Parliamentary Counsel or Assistant Parliamentary Counsel) and together they work on a single piece of legislation. While it was possible to divide work up between 10 teams, with each team getting a Bill each, with an expanded OPC and 22 teams, the work might have to be divided differently between teams with teams sharing Bills. Also under consideration were the arrangements for promotion of draftsmen up the ladder from Assistant Parliamentary Counsel to Parliamentary Counsel. As one commented:

“Promotions used to be done in an old-fashioned way. It appeared to people in line for promotion that it was a bit like the old lottery advert with a finger pointing from the sky and saying ‘It’s you’. Nobody knew exactly why someone was being promoted. That was not so bad in a small place where everyone knows each other and gets to know who is next in line. When you are bigger it is harder to do it in this way.”

A third core issue under scrutiny is the traditional tendency for the Office to wait for a department to ask it to draft legislation and then find a team to do it—senior officials within OPC were exploring the possibility of setting up arrangements to allow longer-term planning of workloads.

The full implications of the bureaucratisation of OPC remain to be felt, and a Development Group within OPC was examining a wide range of features of the operation of the OPC and was expected to come up with radical changes at the time of the interviews in 2006 and 2007. Certainly expansion is not the only driver of change—new accounting systems as well as handling the increasingly intricate expectations and requirements have also contributed to this process. However if the changes following expansion meet the expectations of many members of OPC, and some of these changes already appear to have begun, the arrangements for the organisation of its work described in this article could soon be rendered obsolete.

Eats, shoots and drafts laws

The model for the way OPC is organised, staffed and structured is heavily influenced by its origins: it resembles that of a chamber of barristers. Officials are lawyers—most come from private practice and have a probation period of two years after joining. Kent refers to the work of a junior counsel as “devilling”—a legal slang term referring to a form of work for more senior counsel—but this appears to have fallen out of use.¹⁵ A drafter starts as Assistant Parliamentary Counsel and can be promoted to Senior Assistant Parliamentary Counsel (equivalent to Grades 6 and 5 respectively in the old civil service grades, i.e. the highest rung outside the Senior Civil Service and the lowest rung inside it). Only once a senior position (Deputy Parliamentary Counsel, the last grade before becoming full Parliamentary Counsel) is reached, six or so years after the probationary period, is sole responsibility given for drafting

¹⁵ Kent, *In on the Act* (1979).

legislation. As one member jokingly put it, “You don’t get your licence to kill until you are Deputy Counsel or team leader, and you don’t reach that for 8 years or so”. The role of the First Parliamentary Counsel is, in the words of one recent FPC, like “a senior partner in a legal firm responsible for the general relationship with the client”, meeting senior officials and intervening where matters need to be handled at the most senior level, such as when dealing with the Legislation Committee, or where relations with a Department become difficult. The way that other Parliamentary Counsel work also reflects the barrister model—working in teams and assigning jobs to teams according to the “taxi rank” principle of who happens to be free at the time. There is no conscious development of specialisms and the taxi rank principle for allocating jobs to teams might sometimes be modified, among other things, to avoid over-specialisation. Moreover the way OPC works, in principle, on the basis of instructions sent to them by the lawyers from the instructing department, is a further inheritance from the origins in the English Bar.

While Counsel regard themselves as specialists in writing law, they do not regard using their technical legal skills as the most significant part of their work. Their main work is analysis. This central point is crucial for understanding the way that Parliamentary Counsel work and how Parliamentary Counsel shape the policy process. While one might imagine that drafting legislation is first and foremost a matter of legal skill, the technical-legal side of drafting was emphasised by respondents less than their ability to apply language and logic to a policy problem. As one of them put it, this makes them a distinctive type of lawyer:

“Sometimes you can recruit a wonderful young lawyer. You give them a draft that you have been working on and they rip it all apart brilliantly. But you give them a set of instructions and ask them to write a draft themselves and they sit staring at the wall and won’t know where to start. It’s an analytical thing, it is actually rather different from being just a good lawyer.”

Above all, members of the Office see themselves as analysts of the logic and structure of what policies intend to achieve and how they set about achieving it. This view is at the heart of Parliamentary Counsel’s perception of their role. As Bowman writes:

“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.”¹⁶

He goes on to illustrate the kind of thing he means by discussing a Bill (unspecified) to ban hunting with dogs. This Bill made it an offence for a person to permit a dog to hunt, and “defined hunting as *intentionally* pursuing a wild animal”. Since, in this formulation, humans did the permitting and dogs the hunting, Bowman wonders, “How do you know a dog’s intention? You

¹⁶ G. Bowman “Why is there a Parliamentary Counsel Office?” (2005) 26 Stat. L.R. 69, 70.

can hardly put it in the witness box.”¹⁷ This is more than splitting hairs, as will be discussed below; it is about the logic of what government is trying to achieve and how it goes about it.

One cannot ignore the fascination that members of the Office have for conundrums that mix logic and linguistic analysis. Bowman himself begins his article describing what Parliamentary Counsel do by musing on a table delivered to his office, fresh from the French polisher, with the instruction “nothing must be placed on this table” which raised the questions in his mind—what was the notice doing on it then, for how long should things be kept off the table? “So I mentally redrafted the notice so that it read: ‘Nothing (apart from this notice) shall be placed on this table until such a time as the French polisher allows it’”, and he goes on to consider the problems that would occur if the French polisher died or became insane before he could authorise the use of the table.¹⁸ Another respondent began an interview with the observation:

“When you look at the brass plate outside that says ‘Parliamentary Counsel Office’ it could mean three things a) this is where all Parliamentary counsel live; b) this is the office where Stephen [First Parliamentary Counsel] lives; or c) it is an abstraction: there is an office of parliamentary counsel like there is an office of town clerk.”

It is as analysts looking at logic, rather than as policy-makers deciding the direction of policy, that they see their role as creative. And creativity featured quite prominently in every interview. One official reported that a colleague,

“told me about a chat he had at a party at the house of one of his neighbours. He started chatting with someone there he did not know about work and they were bemoaning the fact that their clients were changing their minds all the time, first do it this way then wanting something different, and being vague. They had a roaring old time comparing notes. And at the end the neighbour asked him ‘what line of work are you in?’ and he said ‘I’m Parliamentary Counsel and I write legislation that gets put before Parliament.’ The other man said ‘I’m a sculptor’.”

Such claims do not reflect a self-serving “you don’t have to be mad to work here, but it helps” perception of distinctiveness or quirkiness: they reflect the nature of what they do and help understand how what they do affects policy.

How Parliamentary Counsel draft laws

Parliamentary Counsel work on the basis of instructions from the department responsible for the legislation.¹⁹ Occasionally there may be contact between

¹⁷ Bowman “Why is there a Parliamentary Counsel Office?” (2005) 26 Stat. L.R. 69, 70.

¹⁸ Bowman “Why is there a Parliamentary Counsel Office?” (2005) 26 Stat. L.R. 69, 69.

¹⁹ The OPC has produced a guide for departments “Working with Parliamentary Counsel” (January 2009), http://www.cabinetoffice.gov.uk/parliamentarycounsel/working/working_methods_principle/role_of_counsel.aspx [Accessed August 30, 2009] which sets out, among other things, clearly what

the department and Counsel before the instructions are received. In one case Parliamentary Counsel was asked to meet a Secretary of State who was planning legislative changes and wanted advice long before instructions were developed (indeed his advice appeared to be critical in shaping what legislation the Government eventually produced). In another, Counsel went to meet members of the Bill team during some early training sessions and several respondents expressed the view that such contacts before instructions were received is likely to become more common in future. Often there may be two or more departments responsible for instructions, but one will usually take the lead.

The instructions are sent to First Parliamentary Counsel who then allocates the work to the teams of Counsel. Which team actually gets the Bill is largely but not invariably determined by who is free. Specialisations are not developed or encouraged and it is part of the training to be suspicious of precedent because it can mislead and narrow the range of thought that goes into the process of thinking about the logic of what it is the legislation is supposed to achieve.²⁰ Very occasionally, as one Counsel said,

“it is convenient for people to do a job in an area where one has experience, especially if there is a hurry. But it is also important that we as an Office have people who can turn to anything. In the past things have worked to produce breadth of experience with some expertise coming from previous projects.”

Instructions go initially to the senior member of the team who divides up the work among the junior members. The division of work within the team will depend above all on the preferences of the senior member of the team, the nature of the legislation and the experience of the juniors. Junior tasks can range from looking over and commenting on the drafts produced by other members of the team to drafting different sections on their own. As one official put it, the Office tries to “achieve the four-eyes principle—nothing should leave the building unless two sets of eyes have looked at it”.

The instructions are of varying quality: some contain detailed suggestions about how a particular policy intention might be achieved and others might be simply a statement of the policy intention. When asked what distinguishes “good” from “bad” instructions Counsel invariably suggested it was “the amount of thought that went into them” by the department concerned. The views of one Counsel were very close to those of the rest:

“What are good instructions? You can look at instructions and they look plausible but when you try and draft then they don’t hold together. Good instructions are those that someone has put a lot of thought into. We had some which were essentially the White Paper. That is just not good

OPC does, its relationship with its clients and how it works. On legislative drafting, see also G.C Thornton, *Legislative Drafting*, 3rd edn (London: Butterworths, 1987), Ch.6.

²⁰ Bowman “Why is there a Parliamentary Counsel Office?” (2005) 26 Stat. L.R. 69, 70–74; G. Bowman “The Art of Legislative Drafting” (Sir William Dale Memorial Lecture 2005), <http://www.cabinetoffice.gov.uk/media/190031/dale.pdf> [Accessed August 30, 2009].

enough. The first job you have is to say ‘do things hang together?’ If they do not hang together they will not work. And that has a lot to do with whether any thinking has gone into them. . . . Occasionally you will get instructions in where you can sit down and draft [the whole thing]. But in most cases you need [more than the instructions you have been given]. . . . You say if you cannot draft from the instructions you have been given. It could be that the Department has thought about what it wants done and just has not put it in the instructions, in which case they’ll come back straight away with the details. Or if they haven’t, they may go away and go quiet for a few weeks until they have sorted it out. The tendency in departments is to underestimate how much detail you need.”

Sometimes the instructions are incomplete, especially when there is a rush to meet a deadline for a parliamentary slot. In one recent Bill the first contact between the departmental lawyer and the OPC team drafting the law was a note outlining the broad aims of the legislation and setting out when more might be ready. The departmental lawyer’s note read:

“[Here I outline] what I understand to be the intended principal features of the proposed Bill and the current state of our work towards a target of pre-Christmas introduction. As you will gather, the greatest challenge set by that target is the preparation of clauses dealing with [one particular key issue] and I expect that early attention will have to be given to options for the introduction of the Bill with that part of it incomplete.”

In this case, the first proper instructions, on one particular set of clauses, came the next month. It contained an apology “for sending you incomplete instructions” and pointed out that the Minister had yet to agree one key aspect of it and, in addition, “[t]he policy in relation to the provision to be made for Northern Ireland has been agreed at official level but not yet by the [Minister concerned] and the Secretary of State for Northern Ireland”.

Occasionally, and how often this happens appears to be a matter of style for different leaders of OPC teams, the department will be probed further on exactly what they think they want before Counsel can start work. While Miers and Page suggest that “most Counsel will arrange a conference with the Department’s administrative and legal civil servants”,²¹ this is probably a matter of style as some Counsel seem sceptical of the value of such meetings in general (whether they are held when instructions are received or later). One said:

“We have meetings to sort things out. But given the sort of detail we need, the meeting is not always the best place to sort it out. They might make an off the cuff decision, when what they really need to do is go away and think about it. When they come round, they tend to want to discuss policy. . . . [T]hey need to go off and tussle with it themselves [not with us].”

²¹ Miers and Page, *Legislation* (1982), p.85.

However, those interviewed felt there was usually enough in the instructions for them to make a start and the next stage is to read and think—reading about the area of law to which the Bill is to make a contribution and thinking about the instructions, how they might be given effect and what they mean for existing law.

“At the beginning of the process a lot of time is spent reading. You need a period of time examining the instructions, often the instructions come in chunks. E.g. [on a recent regulatory Bill] the first part set up the regulator, the second set [out what was to be regulated]. All are separable from the point of view of drafting.”

Those interviewed stressed that the logical analysis of the thinking in preparation rather than the reading was crucial to their work at this stage. All came up with variants of the same theme—that the basic and usually simple underlying logic of how the legislation is supposed to work needs to be set out:

“The most important thing is to identify the concept behind the legislation. If the concept is right the detail will hang together. If the concept is wrong you can fuff around as much as you like and you’ll still produce garbage.”

As will be discussed below, sometimes the concept is not properly identified until quite late in the policy process and the role of Counsel can be crucial.

Counsel will produce an early draft of the Bill, or often a draft of one part of the Bill and pass it back to the department (which will have set up a Bill team to handle the legislative drafting).²² The draft will be accompanied by a covering letter explaining the draft, saying what has been done and pointing out problems with the draft or issues to be faced.

We can use a note accompanying the first draft of some clauses of a recent Bill to highlight the types of issues that are raised in this process (the quotations have to be edited to prevent identification of the precise Bill concerned). The comments studiously avoid seeking to change “policy” but might seek to advise the department that they might want to change the broad model for how the legislation will work. The covering letter explains the drafter’s surprise that the department wanted “[t]he director [of the regulatory body to be] . . . modelled on the somewhat odd model of [a particular investigatory body] than the simpler provisions about the various utility etc. regulators”. The drafter asks whether some of what the Bill team seeks to achieve really can be handled by legislation. According to the instructions, part of the function of the regulator was to “foster good working relationships” among those regulated. Counsel’s comments included the advice that,

“we do not think one can oblige the Director to foster good working relationships: whether someone has a good working relationship with another depends on a number of factors, not least the attitude of that other person”.

²² See Page, “Civil Servant as Legislator” (2003) 81 *Public Administration* 651.

And there is a request for clarification:

“We were puzzled by the idea of the [Director] ‘coordinating a strategy’. We think one can establish a strategy that itself involves the coordination of something. And one can implement a strategy. We were wondering whether helping the Secretary of State do both those things is what you have in mind as the Director’s role.”

Particular details of the department’s approach to the policy can also be questioned. There were questions of detail including why the head of the body was to have “two five year appointments and not, say, five two year appointments, and what ‘exceptional circumstances’ [envisaged in the instructions] would allow one to ignore this?”. Moreover the drafters here made procedural suggestions: “We were surprised that you were asking for Treasury approval for [X]. We understood that the Treasury no longer wanted to be involved in that sort of thing”, and “Why cannot [the Director’s receipts] be used to offset his expenses? If you really do want his receipts to end up in the Consolidated Fund, the more usual course would be to require him to pay them to the Secretary of State”.

The department then comes back with answers to the questions or restating or refining what it wants, the next draft is produced, and there may be more drafters’ comments that the department responds to and so on. Where there are particular problems there may have to be a meeting between the Bill team and Counsel, but these are rare. Counsel will generally try and guess what might be needed. One set of revised provisions was accompanied with the general observation:

“I do not propose to comment on every thought that has occurred to me. I have made a decision about what to do whenever a doubt has arisen. If the draft does not reflect your intentions you will no doubt say so.”

However the same note included some discussion of detailed points including,

“the reference to [an earlier piece of legislation] means that if the defendant dies, the court may make [an] . . . order against him . . . It is an absurdity to order a dead person to pay an amount (unless I have missed something). So I have done nothing on this.”

The same process holds for amendments: departments consult Counsel about matters such as whether an amendment is an improvement, if (and how) it can be incorporated within the Bill without undermining its logic or how criticisms of the Bill implied in an amendment can be addressed or responded to. It is the same process of instruction, drafting, comment, reaction, further instruction and so on that characterises the main Bill and which fills the up to 20 or 30 four-inch thick quarto volumes that contain the written records of Parliamentary Counsel involvement in the Bill. There is a tendency for the Bill to become rather complicated. One Parliamentary Counsel wrote, after quite a lot of to-ing and fro-ing on one set of clauses:

“We are conscious that an already complex set of provisions is becoming even more complicated with each revision. We have done as much as

we can to simplify the drafting approach . . . It is the policy which is complicated and becoming more so. We assume there is little, if anything, you can do to remedy this situation. But we must all bear in mind that the more complicated the policy (and thus, the legislation) becomes, the more likely it is that the legislation could be construed in ways we do not intend.”

The impact of drafting on legislation

Parliamentary Counsel avoid becoming involved in what they regard as “policy discussions”, by which they mean discussions about the broader objectives of the Bill or choices between different approaches to achieving them on which politicians might be expected to have preferences. As one Counsel put it:

“Our remit is to be mere technicians. To put in a legal form the policy idea generated elsewhere. In a formal sense this is true as we have no authority to take policy decisions.”

As indicated in a quotation above, the general thrust of Counsel’s comments on the matter of involvement in policy decisions is that the “policy people” need to sort out the policy with the Minister and then come along and instruct—it is not Counsel’s job to discuss policy. A letter from Counsel to a departmental lawyer instructing on a Bill expresses this attitude:

“You told M that Ministers’ thoughts are leading to changes of policy. There seems little point in attempting to draft until the policy is settled. When it is settled, no doubt you will send a letter to replace the one of 7th August.”

It is possible that Counsel is unsure that anyone really knows what a Minister wants. As one put it, “[a]dministrators will come along and say ‘Ministers want this and want that’, but it is not clear that they really know that Ministers want it, or how they know that”, but it is ultimately the responsibility of the policy people to know and express it, not Counsel.

This is not, however, to argue that Counsel avoid any involvement in the political process. Thring’s aphorism “Bills are made to pass as razors are made to sell”, referring to the practical proposition that drafters need to be able to construct a Bill in a form that is likely to be approved in Parliament, has been taken as a motto among drafters inside and outside the United Kingdom.²³ Counsel are certainly aware of presentational points. Even where the need for new legislation, or at least legislation with wide scope, is doubted, Counsel are quite stoical that politicians must be given what they want:

²³ For the origins, meaning and implications of the phrase see G. Engle, “‘Bills are made to pass as razors are made to sell’: practical constraints in the preparation of legislation” (1983) 4 Stat. L.R. 7 and see also G. Tanner, “‘Bills Are Made To Pass As Razors Are Made To Sell’—The Legislative Process in The House Of Representatives: the Role Of Parliamentary Counsel” (2006), [http://www.justice.govt.nz/lac/pubs/2006/The%20Role%20of%20PC%20-%20July%202006%20\(LAC%20Seminar\).pdf](http://www.justice.govt.nz/lac/pubs/2006/The%20Role%20of%20PC%20-%20July%202006%20(LAC%20Seminar).pdf) [Accessed August 30, 2009].

“Yes, sometimes you find that when the business manager says we want to do this or that, you can say that you don’t need a whole new law. There are only isolated new bits you need to be able to do this or that policy. A Bill might really only have to do some isolated bits. It is hard to explain that as politicians want the Bill to tell the whole story not just chapter 4, 7 and 23 here and chapter 19 there.”

When Counsel disagreed with the wording in one Bill, he nevertheless indicated he would be willing to be overruled. The matter concerned the powers the Bill gave to the Minister:

“I doubt if guidance. . . is a strong enough word to describe what the Secretary of State is issuing [according to the instructions you have sent]. . . I think we should refer to the Secretary of State’s directions (or something like that). But it may be that there is some compelling presentational reason for referring to guidance.”

Moreover, it is possible for Counsel to give advice to ease the passage of legislation. One letter from Counsel to the department pointed out that some of the clauses seemed to be beyond the scope of the Bill:

“If nothing is done to limit those provisions . . ., they might cause embarrassment. For instance, the opposition or backbenchers might put down a string of amendments about [a whole range of topics] (or whatever happens to be in the newspapers). It is not thought that . . . [such amendments] would be within the scope of the Bill. Nevertheless, the potential for amendments awkward to the government and long debates on the amendments, is there as things stand.”

Counsel will, however, seek to stop departments bringing unnecessary “spin” into the wording of the legislation and also in the explanatory material, the document produced in conjunction with a Bill or Act (at the time of research this referred above all to the Explanatory Memorandums, now the material is Explanatory Notes) explaining what it does. As one pointed out:

“We have to take a different view from the [policy] civil servants. [The Clerks²⁴] won’t publish anything that tries to spin the legislation. Every now and then you get the department trying to put something tendentious in an explanatory memorandum (‘it made sense to do this . . .’ ‘this is an excellent innovation . . .’). The Clerks will refuse to print this.”

Counsel do not seek to impose or insinuate their own policy preferences during the process in the sense of seeking to move, nudge or tip policies in ways that fit better their own personal preferences or interests. One Counsel argued:

²⁴ Referring to the Public Bill Office of the Office of the Clerk of the House of Commons which, among other things, “examines the drafts of Government and private Members’ Bills to ensure that they conform to the rules of the House”, see House of Commons Information Office Factsheet G16 (Revised October 2006), pp.6–7.

“Our job is to [take apart and examine critically] the work of departments and make sure it stands up. If we have to go to a Minister and explain why [it does not stand up], that is not a major problem. We have to test the proposals, sometimes to destruction. . . . The core principle should be standing when everything around it might be destroyed, then you build something else around it that works. Most legislation has bits that are central and other bits that are less central. And some policy is unmoveable—you simply have to find a way of doing what they want. There might be a commitment to do things in one particular way—maybe the Minister [has made a public commitment] that he’ll do this. You might have a go at dissuading them from trying to do it this way [but you’ll find a way to do it if that does not work].”

However, it is impossible to offer effective advice, above all on the basic logic of the legislation, and have no impact on policy. How might we characterise the influence of Counsel on policy?

To set out how writing laws can affect policy is difficult. Here the research faces a central problem. Parliamentary Counsel have been most generous in sharing their experiences with me, and I was also able to look at some of the copious files of correspondence between Parliamentary Counsel and members of Bill teams which offer blow-by-blow accounts of how legislation is taken through countless drafts before it is presented to Parliament and of what happens to the text during its parliamentary stages. The examples I was offered stretched from the 1930s to 2007. The central problem is that what goes on between the department and Counsel is confidential. Yet it is not possible to produce a coherent account of the types of influence by alluding to it in general terms—for example by saying a piece of legislation contained a provision “that was shaped by Counsel’s idea” or “part of a high profile Bill had to be recast because of the points Counsel raised”. The essence of the influence of Counsel is that it derives from consideration of specific points and issues arising from the instructions they are asked to follow and cannot be understood without outlining the specific context. One way around this problem is to present some of the details in a fictitious case that nevertheless allows for some elaboration of the type of influence Counsel have without betraying the confidence of Counsel-department relations. The fictitious case is of necessity a composite of many years work on different Bills and it is not an ideal way of presenting the material. However, all of the things in the fictitious case have happened to a real piece of legislation passed over the past 30 years and all the quotations apply to a real piece of legislation from the period since 1977, with one or two amendments which alter the context but not the sense of what happened.

A composite case

Our fable concerns a Bill to regulate motor mechanics—people who are entitled to make repairs to motor cars. It followed a series of incidents, reported in the press as a serious problem, of deaths and injuries caused by cars that were unroadworthy due to being repaired or tinkered-with by people who

were not sufficiently qualified. This problem was investigated by the Johnson Committee, set up to explore how similar car accidents could be avoided in future. The Committee produced a report that recommended, among other things, that only suitably qualified people should be able to alter or repair cars, that a national body be set up to make sure that anyone practising as a mechanic had suitable qualifications or experience and to offer some redress to people whose cars had been subjected to repairs or alterations by unapproved mechanics. The Government decided it wanted to legislate and in the Queen's Speech it announced that it would be producing a Bill on the subject.

The Johnson Committee report was not that helpful in saying what needed to be done. It merely said that "there ought to be some scheme" to prevent unqualified people from tinkering with cars. However, the scheme was not straightforward. It might be possible to make any attempt to fix a car illegal in a way similar to the blanket ban on any repairs by unqualified people to gas appliances. However, such a broad application of the idea would mean, for example, that changing a spare wheel or even inflating tyres or fitting a headlamp bulb would be covered by the scheme and it would be unlikely to pass through Parliament without severe opposition even if the Government wished. The idea the Government had was that if you were to do something "safety critical" to cars, you had to have suitable qualifications or experience of fixing them. However in the instructions issued to Parliamentary Counsel by the department, central questions such as defining what safety critical repairs were (almost everything on a car is "safety critical" and even changing a light bulb could be classed as such), what should be the relevant qualification for allowing someone to repair a car (whether a formal mechanic qualification was required or whether having practised as a mechanic for a certain period was enough) had not been considered. And was the resulting offence to be that of the garage owner who employed the unqualified mechanics or the mechanics themselves? As the Counsel responsible for drafting it said:

"The basic proposition was that some people were not to be allowed to do certain things because they do not have the relevant qualifications or experience. Here you have three bundles of problem terms: the people, the qualifications and the things they are and are not allowed to do. It becomes very complex when you start unpicking it. . . . The policy appeared to have developed before the process of looking into the detail about what it is to do. And it starts unravelling as soon as you look at it. It meant the policy had to be looked at again."

It was not for want of discussion or thought within the department that the big issues were not addressed. The drafter continued:

"The original instructions were quite complicated, actually, in a strange way. They'd got so far down one way of looking at the problem, but the problem of drilling down to the real questions—who should be allowed to act as mechanic and on what basis?—revealed a whole lot of issues that had not been uncovered in the process."

Rather, the thinking had all developed “along one route” that turned out to be something of a dead end as it would be impossible to come up with a coherent scheme by thinking about the issue in that way.

The department wanted to allow only qualified people to “become mechanics”. This posed a problem for the whole Bill as visualised by the department’s instructions:

“The instructions were cast in terms of preventing people from becoming car mechanics—members of the class of people who repair or alter cars. However, it all depends on what you mean by a ‘class’. You usually mean a group of people, generally. In fact, what they wanted was licensing scheme allowing people to join ‘a class’. But it is not something that you can actually join like a club. You can ban people from engaging in activities. But this meant that you could not draft the Bill in the same way as the instructions were cast.”

Counsel then had to persuade the department to change its mind and define particular occupational activities for which people could be licensed. When asked how the department reacted to being told that they had spent quite a long time going down the wrong route she replied:

“They took it quite well actually. They are used to it. They find it an uncomfortable process. I call it taking the policy . . . and giving it a good [hammering, in the sense of a] blacksmith hammering something to get it in a good shape. The process can be uncomfortable. Our own personal political view is not at issue. What matters is that it stands up to the criticism it gets in Parliament. That is the sort of experience we as draftsmen have to bring.”

There were several other problems with the department’s proposal including the question of what to do about car maintenance outside the workplace—do you really want to stop people repairing their own cars, or getting friends or family to help them? In the end, the solution, proposed by Counsel, was that the licensing for car maintenance would only apply to those in full-time or part-time work. While this did not catch everybody the Government would have liked to have caught, it did get at the main problem that caused the outcry in the first place: the unqualified mechanics working in garages who produced shoddy and dangerous repairs.

The regulatory body that was supposed to license mechanics had a variety of functions, including assessing the quality of existing mechanics, determining the training and qualifications of new mechanics, maintaining a publicly available register, searchable on the internet, and compensating people where a failure to regulate properly was responsible for damage to them. Because of the Johnson Report the department wanted a bold and clear name for the Agency: the National Independent Car Safety Agency. As Counsel went on to point out the body was not national (unless it was to be the English National Agency) as during the passage of the Bill it was decided that Scotland, Wales and Northern Ireland were to have their own assessment bodies even though car safety is not a devolved issue. It was not really about car safety but about eligibility to

work in the sector. It was not “independent” because it was to be financed and managed by the department, albeit with a governing board, and it was not an “agency” in the sense of “Next Steps” agencies created after the late 1980s. “Apart from that”, Counsel’s letter to the department said, “the name is fine”. The department held several meetings and decided to change the name to the Car Mechanic Licensing Authority for England.

The specific policy impact of Parliamentary Counsel

What, then, is the impact of Parliamentary Counsel on policy? It would be inaccurate to place Counsel as a “political” actor in the sense of pursuing a set of programmatic or interest-based objectives. It might be objected that any intervention in the policy process is political in this sense, and that involvement in legislation in the claimed pursuit of technical improvement either masks the pursuit of substantive political objectives or creates some kind of bias in favour of certain kinds of political objectives. According to this argument, a bias in favour of the status quo could be created by the application of the kind of logic and analysis applied by Counsel since their evaluations of what is likely to work could be based disproportionately on their understanding of what currently works. While the reluctance of Counsel to base advice and analysis on precedent has already been noted, this probably does not dispense with the “technical objectives are ideological” argument. All one can say to this kind of argument is, after having looked at the documentation covering several Acts of Parliament, some of them extremely radical in what they set out to achieve and constituting substantial deviations from the status quo, it is difficult and most likely impossible to see a consistent programmatic or interest-based effect of Parliamentary Counsel’s intervention in policy.

The impact of Parliamentary Counsel on policy derives from the lawyers’ main task, in part shared with the teams of departmental civil servants, lawyers as well as “policy people”, who are given the task of developing the legislation. Those who develop detail determine the final shape of legislation. We can point to three broad ways in which policy can be shaped by Counsel.

Selling razors

While Thring’s words, referring to the need for Counsel to help laws pass the political process, are singularly notorious, this part of the influence of Counsel is probably the least striking influence of Counsel on policy. Counsel can and do give advice, infrequently in the cases I examined, to Ministers when they are considering the political case for legislation, and in the drafting process they occasionally point out potential dangers and traps that could lead to the unravelling of the legislation, especially through hostile amendments. Moreover, part of the point of devising a clear logic to a piece of legislation and trying to ensure that the Bill reflects this logic, as well as of seeking to make sure its contents are defensible (for example, they do not confer unusual powers on a Minister, or create disproportionate penalties, or contain vague or contradictory provisions) is to make it a Bill less susceptible to being pulled apart, or unravelling, in Parliament. However, significant though the

role of Counsel is, in proportion to the degree of attention that Ministers, political advisers and the departmental Bill teams pay to the dynamics of the parliamentary process, the *direct* role in making legislation acceptable is smaller than is suggested by Thring's words as a description of the tasks of a legislative drafter.

The specific arrangement of definitions, procedures, powers and obligations

Much of the deliberations of Counsel, certainly in terms of volume, concerns the detail of legislation: how are the groups of people to which it applies defined, what obligations do they have, what are the powers of a regulatory body, how are appeals handled and so on. This cannot be dismissed as "mere detail", with no significance for policy. Although not central to the legislation, Counsel's point that "strategies" could not be "coordinated" led to a revision of the role of the director of the regulatory body discussed above. The deliberations of Counsel affect all details of a Bill, some of them can shape the way the law works—how easy or hard it is, say, for police to sequester assets or how long banks have got before they notify the Bank of England about suspected money launderers or whether a particular statutory power can be devolved to a non-English part of the United Kingdom. Detail, some of which is important for the policy to work at all, some of which is important for only a handful of people and some of which is forgotten as soon as the legislation has passed, is where the influence of Counsel is strong, but Counsel do not have a monopoly in this area—shaping detail is also the main task of the Bill teams and of the departmental lawyers.

The architecture of the legislation

Parliamentary Counsel's most important and most distinctive function is based on their ability to perform something very close to what Rose, in a rather different context, terms "prospective evaluation".²⁵ In a nutshell this means seeing how the policy will work using known facts about the environment in which it is to be applied and the behaviour of those that occupy it. The power of the evaluation performed by Parliamentary Counsel and the authority it commands within the political system derive in part from the fact that, unlike the social science concepts and the data on which wider prospective evaluations are based, the body of concepts used by Counsel to examine how a Bill will work are generally less contested and the behaviour of those involved is in some senses more predictable and in some senses less important. It was not, for example, contested that the car mechanic Bill could only go forward with extreme difficulty, if at all, if it had continued to try to apply to "groups" of people rather than to those in paid employment. In another Bill (too difficult to fit into the fictitious car mechanics Bill device without excessive torture), which sought to set up procedures for compensation and redress (the area cannot be specified), it was the difficulty of treating a small group of people, those who were seeking compensation against firms located outside the United

²⁵ R. Rose, *Lesson drawing in Public Policy* (New Jersey: Chatham House, 1993), p.32.

Kingdom, that led to a fundamental restructuring of the way the proposed law was to work. Counsel can offer a form of prospective evaluation because it is more feasible, and less contested, to show what a hypothesised law will mean from the perspective of the existing corpus of law and the legal system than it is for social science to say whether a policy will produce the desired outcome. While the files from a Housing Act from pre-war days aimed at improving housing for the “working classes” showed there was some debate between Counsel, the Attorney-General and the departmental lawyer about whether children and spouses of working people could be considered “working classes”, agreement that they could be so considered did not take long to establish and did not require philosophical or social scientific discussion. Case law and the provisions of existing statutes established the point that they could be so considered and the matter was successfully resolved.

Predicting that a law will create mechanisms that can make it possible (or impossible) for someone to be prevented from acting as a car mechanic is not as hazardous as the wider questions of predicting how many people will in practice be prevented from repairing cars and what effect a ban will have on, for example, the car and motor engineering industries, enforcement agencies, as well as on road safety and social exclusion. Thus the behaviour relevant to legal prospective evaluation is likely to be more predictable (those who are licensed to fix cars will have a legal status that allows them to be employed in a range of occupations defined as “car maintenance”) than the wider aspects of behaviour that go to form judgments about how well the legislation works (whether the law is widely ignored by unqualified people who still fix cars, whether the insistence on qualifications really does prevent shoddy workmanship, whether the implementation of the law spawns bogus or defective training and qualification schemes). These wider aspects are also less important to this particular kind of evaluation.

The legal character of its prospective evaluation gives the views of Counsel enormous force even on core issues in legislation. It is a force sufficient to convince those involved in putting the legislation forward, whether officials or politicians, that the basic architecture of what they are proposing needs to be changed. It is also a force that routinely leads to such changes, if not invariably on the central thrust of the legislation, then on important sections of it: it does not appear to be confined to the odd quirky case.

In all three forms of influence Counsel seek to conform to the widespread “bargain” of political neutrality characteristic of the UK civil service.²⁶ As regards the substance of policy, Counsel, like the other civil servants involved in developing legislation, seek to follow Ministers’ instructions, or where these are vague, contradictory or unclear, or where the Ministers or those who claim to speak for them are silent, follow what they assume to be Ministers’ wishes. It is only in this sense that Counsel, like other civil servants involved in policy work, “have no formal existence independent of those they serve”—while they have substantial discretion, they exercise it thinking that they serve the

²⁶ C. Hood and M. Lodge, *The Politics of Public Service Bargains* (Oxford: Oxford University Press, 2006), p.116.

Minister.²⁷ They can seek to persuade Ministers to change their minds and, like other civil servants, they can be and are overruled by Ministers who can insist on doing things their way. One significant difference between Parliamentary Counsel and departmental civil servants is that Counsel do not directly serve a particular Minister. Moreover, as Daintith and Page point out, as regards the quality and propriety of legislation they “act as the internal guardians of values customarily regarded as integral to the legal order”.²⁸ Some of the examples discussed in this paper offer glimpses of Counsel acting in this capacity—such as by advising caution over how the powers of the Secretary of State are formulated, raising questions about the consistency of one set of provisions with similar provisions in other legislation, determining whether a provision is within or outside the scope of a Bill and seeking to making sure that the law does not contain too much “spin”.

The research in this paper did not come across the exercise of one power arising from this role that marks Counsel apart from their departmental clients: the power to refer their instructions to the Attorney-General when “faced with a conflict between their instructions and what they interpret as their duty to the statute book”.²⁹ That the exercise of this power does not feature in this account of the everyday work of Counsel is not surprising; Daintith and Page indicate that “most disputes are resolved without a reference”.³⁰ The existence of this power alone might be expected to strengthen the influence of Counsel’s advice when they raise questions arising from departmental instructions. However, the big difference between the influence of Counsel and that of others helping shape legislation is that Counsel not only have the legitimacy that comes of the reputation of the Office, its status and independence as “watchdogs of legal policy”³¹ and the experience of its officials as experts at drafting legislation. They also perform a type of analysis on policies which does not necessarily trump a political perspective, but comes so close to doing so that it is generally difficult to ignore.

²⁷ Hood and Lodge, *The Politics of Public Service Bargains* (2006), p.116.

²⁸ Daintith and Page, *The Executive and the Constitution* (1999), p.256

²⁹ Daintith and Page *The Executive and the Constitution* (1999), p.256; for a statement of the relationship between the law officers and Parliamentary Counsel see also The Office of Parliamentary Counsel, “Working with Parliamentary Counsel” (January 2009), <http://www.cabinetoffice.gov.uk/parliamentarycounsel/working/working-methods-principle/role-of-counsel.aspx> [Accessed August 30, 2009], p.14.

³⁰ Daintith and Page, *The Executive and the Constitution* (1999), p.257.

³¹ Daintith and Page, *The Executive and the Constitution* (1999), p.257.