The legislative process: a Government lawyer's perspective

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Introduction

1. The preparation of legislation looks very different from the inside than from the outside. People who have not been closely involved often appear to believe that policy can be turned into law more or less overnight and that there are no constraints on what can be done in legislation or the language employed to do it. In fact the process by which a policy initiative is turned into a Bill to be introduced into Parliament is highly intensive, usually involves a lot of hard work and analysis, operates within many constraints, some more flexible than others and entails some difficult decisions.

2. My aim in this paper is to give some insight into the preparation of legislation. Consultation and engagement with stakeholders is vital to the success of any Government initiative and understanding how legislation is put together will, I hope, enable others to engage with this process more effectively.

3. I will use examples mainly from the Planning and Compulsory Purchase Act 2004, which received Royal Assent in May. I will also say something about the preparation of statutory instruments, where the same broad principles apply and where much of the detailed planning regime is now to be found.

4. My perspective on this is that of an advisory lawyer in a Government Department. I joined what was then the DOE in 1974 and have given instructions over the years on many Bills and drafted many Statutory Instruments. I did not carry out myself any of the detailed work on the Planning and Compulsory Purchase Bill, but I manage the team of lawyers who did. I have also had close contact with the officials in the Department who develop the policy options to put to Ministers and with Parliamentary Counsel, whose job it is actually to draft Government Bills. I have worked in the field of planning law at different levels over the years, although I am not primarily a planning specialist, and in 1989 I went for a year to the Humphrey Institute at the University of Minnesota on a fellowship project to compare the legal and government framework of land use planning here and in the States.

How a Bill is Planned

5. Before a Bill is drafted the Government needs to decide first that their policy requires legislation and secondly that they are prepared to give Parliamentary time to it. There is always competition for space in the legislative programme, so the first step will often be to consider whether the policy can be achieved without a Government Bill, for example, by changing policy guidance or by a voluntary code of practice or by working in partnership with other public bodies such as local authorities. If a change in the law is essential, the next question is what can be done by way of secondary legislation, that is, statutory instruments made under enabling powers in existing legislation. Most powers are given for specific purposes and I will consider the principles that apply more fully later on. But wide powers now exist in the Regulatory Reform Act 2001 to amend Acts of Parliament by Regulatory Reform Orders, so this is also an option to be considered as an alternative to primary legislation. These powers only apply, broadly speaking, where the aim of the proposals is to remove or reduce a burden imposed on people or bodies other than central government. There are also a number of other tests which need to

be satisfied, which mean that Regulatory Reform Orders are not suitable by any means for all legislative proposals.

6. If it is decided that a Bill is necessary, the next step may well be the issue of a consultation paper. There will also need to be detailed consideration of the policy in order to develop instructions to Parliamentary Counsel to draft a Bill. The responses to consultation will feed into that development. In relation to major infrastructure projects, for example, the initial proposal in the consultation paper involved new Parliamentary procedures for processing major projects, in order to have quicker decision making. The proposal was almost universally opposed. The main reasons were that it undermined the ability for people to put forward their views, would not be faster and would be unworkable in Parliamentary terms. In addition, the House of Commons Transport, Local Government and Regional Government Committee reported against it. This led to significantly changed proposals being included in the Planning and Compulsory Purchase Bill. Sometimes an unexpected judgment in a court case may throw new light on the current state of the law and that may change the development of policy and so may wider considerations, such as the Barker report.

General Principles of Legislative Drafting

7. The words used in a Parliamentary Bill are not there for persuasive or expressive force or as a record of agreement between parties. Their purpose is to change the law (or to clarify it, where there is legal doubt about the meaning). This can include creating a new regime to deal with something that was previously only covered by the general law as happened for example in the high hedges provisions included in the Anti-Social Behaviour Act 2003. So before a policy proposal becomes the subject of a Bill provision, it is necessary to establish what the current law is and what change to it is desired. This involves analysing in detail the broad policy idea, the reasons why change may be necessary and the desired outcomes.

8. For example, under the Planning Acts, decisions in planning appeals are taken by the Secretary of State or by a Planning Inspector on his behalf in decisions letters, which set out the reasons for the decision, the full terms of any planning permission, including any conditions, and so forth. There has been a long-standing concern, in ODPM and no doubt elsewhere, that no formal legal mechanism existed for correcting clerical errors in decision letters, which were not spotted in time, before the decisions were issued. Letters are checked very carefully but every now and then an obvious mistake is not picked up. Because of the rule of *functus officio*, once a decision has been issued, the Secretary of State and his officials or the Inspector have no power to take it back or make any changes to it and until now it has been necessary for the parties to apply to Court to have such a decision quashed and then retaken.

9. This was a problem with, at one level, an obvious answer—the introduction of a slip rule to give power for decisions to be corrected. This is now provided for in ss.56 to 59 of the Planning and Compulsory Purchase Act. But a lot more thought had to go into those provisions (which take up three pages) than the brief explanation I have given of the problem. It was necessary to work out what the procedure for corrections should be, which types of decision should be covered, whether to try and define in the Act what sorts of mistakes can be corrected in this way and so on.

10. That was an example of a narrow point. Most policy ideas, of course, are much broader than that and the analysis has to cover a lot more ground. For example, Parts 1 to 3 of the Act result from the Government's desire to make major changes to the development plan framework for England for the reasons set out in the Green Paper of December 2001. This led to a new framework, which changes the

functions of local planning authorities, planning inspectors and others. And these provisions as they now appear in the Act were themselves changed as the Bill went through Parliament: a matter I will come back to.

11. The process I have described typically starts with an idea from Ministers, which may come from a pre-election Manifesto or may be developed in Government and set out in a Green or White paper. The detailed development will then be done by policy officials in consultation with Departmental lawyers, who will prepare the instructions to Parliamentary Counsel. They are a separate Office of specialist Parliamentary drafters, whose job goes further than translating the instructions into statutory language. They analyse thoroughly the proposals in the instructions, so that they can fully understand the concepts that lie behind the proposals. This makes it much easier to decide what language and structure will be most appropriate to achieve the policy intention. All this is a highly iterative process: testing what the practical consequences of a proposal will be often leads to modification or even complete rethinking. Officials in the Department try to work through questions such as how will this provision be enforced, what happens if people try to evade it; are there any hard cases that could be caught by it. But sometimes it is only when Counsel prepares a draft or asks probing questions that the full implications became clear and this may lead us to think again.

12. One of the results of all this work tends to be that ideas get more complex, as people think of qualifications or exceptions that will be needed to produce a fair result, for example safeguards for some or all who may be affected. In any event, clarity and certainty for legal provisions are often not easy to achieve in short and simple language. To go back to my first example, if I talk about a slip rule, it is easy enough for an audience to get the general idea: much more difficult to express the concept with sufficient precision to turn it into law. In fact the relevant sections of the Act do not try: instead they are limited in other ways, through the requirement for consent, for example.

13. Although the principles remain the same, drafting styles do change over time and do reflect the changes in everyday use of language, although perhaps more slowly. One issue which has caused some debate over the years is the use of gender specific wording. The Interpretation Act 1978 says that the masculine includes the feminine, or vice versa, unless the contrary intention appears. In everyday usage, it may be possible to avoid the clumsiness of "he or she" by using the plural or by informal phrasing but legislation needs to be precise and often requires identification of one person rather than another. One approach is to repeat nouns more often than would have been done in older Acts, to avoid saying "he" but this is often clumsy and will not always work, while it is not yet grammatically acceptable to use "they" as a singular pronoun in formal drafting. So, for example, s.52, which introduces new provisions about temporary stop notices, says "a person commits an offence if he contravenes a temporary stop notice".

14. There are certain requirements with which any legislative proposal must comply. The most obvious are to ensure that there is no breach of the European Convention on Human Rights or of European Community law. These days, we also need to think about the devolution implications of any proposals and work out how these should be addressed in consultation with the devolved administrations. In addition, the drafter and the Bill team will be thinking about what will happen if the legislation is tested in Court. The aim will be to draft with sufficient precision and fairness for this to happen as seldom as possible: but one way of achieving this is to consider as lawyers what kind of points people may take to Court and what the legal arguments would be. So it is important to bear in mind that the Courts traditionally have not been interested in the Government's intentions in legislating or the explanatory material, which surrounds the Bill. A judge will interpret the words of the Act and ask what was the intention of Parliament in enacting them. In recent years, however, there has been a growing tendency

for the courts to consider other material (including Hansard) in cases where there is doubt or ambiguity about the meaning of legislation. For the purpose of seeking to ensure compliance with rights under the European Convention of Human Rights, the Human Rights Act 1998 requires courts to seek to give effect to legislation in a way which is compatible. So the court will for that purpose read in words or read down words. But despite that the aim is always to make the words of the Act self sufficient and unambiguous.

15. The 2004 Act contains both free-standing provisions and provisions which amend earlier Acts of Parliament, and this is a common pattern. The Planning Acts were last consolidated in 1990 and it is sometimes argued that legislation should be consolidated every time amendments are made: but this would be a vast undertaking and would significantly reduce the opportunities to make new law. The decision whether to amend textually or have free-standing provisions is essentially one for Parliamentary Counsel. He will try to choose the option which produces the clearest result while, at the same time, trying not to make life too difficult for the reader of the legislation. Where policy is being implemented by amending an existing Act, this adds further constraints to the legislative process because of the need to consider the frame of reference given by that Act, both in terms of underlying schemes and the language used.

Parliamentary Scrutiny

16. Many Bills these days go through what is called pre-legislative scrutiny. They are published in draft and may be considered by Parliamentary Select Committee. But this is very much a matter for decision on a case by case basis and did not happen with the Planning Bill. Instead, the Bill had an unusually long passage through Parliament, and was one of the first to be carried over to a second Session. This enabled significant additions to be made, including the provisions removing Crown exemption from the Planning Acts.

17. During its passage through Parliament, any Bill is considered several times in each House. The general policy aims of the Bill are debated at 2nd Reading and then the provisions are scrutinised in detail in Committee. There are then further opportunities for amendment and debate at Report stage and 3rd Reading. An example of how this process can result in significant changes can be found by looking at Part I of the Act and, in particular at ss.4, 5 and 6. The proposals for regional spatial strategies were first outlined in Chapter 4 of the Green Paper, *Delivering Fundamental Change* of December 2001 and one of the most controversial aspects was the reduction in the role of County Councils. The Bill as introduced into Parliament did not include any express functions for counties in the formation of regional spatial strategies, although Ministers made clear throughout the Passage of the Bill that County Councils were intended to be engaged in the process, and at 2nd Reading in the Lords, for example, Lord Rooker explained that they would be consultees and that it would be possible for them to act as agents of regional planning bodies. However, the Government then accepted that the Bill should be amended to address the concerns that had been raised. As a result, s.4 now requires the RPB to seek advice of the County Councils in each region (and bodies with equivalent status) and the Councils in turn have a duty to give that advice.

18. There were then further amendments designed to further strengthen the consultative process in the preparation of the regional spatial strategy, which led to the insertion of what is now s.6 on community involvement. At that point, the Government took the view that it had made sufficient concessions to deal with the point. But they were unable to persuade the House of Lords and further amendments were carried against the Government's wishes. The Bill then returned to the Commons for consideration of all the amendments made during the passage of the Bill in the Lords. The Commons

voted down these particular amendments, so the Bill had to go back to the Lords again. This is the stage in the passage of a Bill colloquially known as ping pong and the convention is that if in such circumstances both Houses insist on their position, the Bill is lost. However, if instead of insisting on their disagreement, the Commons put forward an alternative amendment for the Lords to consider, then the toing and froing can continue. So in such a situation, there is in theory scope for the Government to carry on seeking to find a satisfactory compromise more or less indefinitely, subject to the constraints of the Parliamentary timetable. In this case, however, the House authorities in the Lords took the view that the changes to the Bill brought back from the Commons were technically speaking not enough to avoid invoking the ping pong rule, even though they accepted that this was not the Government's intention. The outcome was that a further concession was made, to avoid the risk of losing the Bill altogether, and the Bill will go down in Parliamentary history as an example of a departure from the normal practice of the House of Lords, see *Hansard* for May 11, Vol.661, No.81, column 151.

19. This process was what led to the addition of ss.5(3)(f), (5) and (6) to the Bill. These provisions give the County Councils a particular role in developing sub-regional provisions in the spatial strategy. So all these amendments taken together make a significant modification of the legal framework for this aspect of Government policy. The role of the Government lawyer and the Official team, in close liaison with Parliamentary Counsel, when amendments like this are in contemplation, is to keep track of possible options for amendment and to make sure they can be fitted into the Bill in a way that makes sense and that will work in practice, without causing any problems with the rest of what is already there.

Statutory Instruments

20. Much planning law is, of course, contained in statutory instruments, not in primary legislation. When Bill instructions are being worked out, one of the important questions to be resolved is to determine how much of the policy is to be set out in the Bill itself, how much to be dealt with by taking enabling powers to make Orders or Regulations. There is often a difficult balance to be struck. The perception of what is acceptable to include in secondary legislation has changed over the years and modern Bills do tend to provide a comparatively sparse framework. But the passage of a Bill through Parliament can be very difficult if enabling powers are considered to be too sweeping, although preparing detailed drafts of the way in which the powers will be exercised for the relevant Parliamentary Committee will help. A sparse framework may make the Bill more difficult to understand in isolation. But secondary legislation, has the advantage that it can be changed more frequently and the input of consultees can be more direct.

21. Statutory instruments are frequently drafted by Departmental lawyers and the drafting principles are the same as those already discussed. The drafter will be trying to think like Parliamentary Counsel, not like someone preparing a commercial agreement. There are certain additional constraints. The instrument will be limited by the scope of the enabling powers under which it is made and these may be narrower than will appear at first sight. For example, there is no power to make retrospective provision in a statutory instrument unless the enabling Act provides for it. Also a power to do something in a statutory instrument does not normally include power to transfer the job to somebody else, again unless express provision is made. So if the Secretary of State has a power to make development orders, he cannot exercise it to confer a similar power to make such orders for their own area on local authorities. This is one reason why the provisions in s.40 of the Act for local planning authorities to make local development orders required primary legislation and could not have been achieved through the use of the Secretary of State's power in s.59 of the Town and Country Planning Act 1990.

22. Statutory instruments may be subject to different levels of Parliamentary scrutiny. The main types are instruments which require Parliamentary approval before they are made (affirmative resolution) and those which are laid before Parliament after making (negative resolution). The Parliamentary Joint Committee on Statutory Instruments looks at both sorts and so does the new House of Lords Committee on the Merits of Statutory Instruments. In addition, it is of course possible for a statutory instrument to be the subject of judicial review on the grounds that the Secretary of State has exercised the enabling power unlawfully or has made an unreasonable use of his discretion. So, for example, in making regulations about fees and charges under s.53, officials will be assessing the sorts of arguments that might potentially lead to Court challenge, as part of their analysis of what will best achieve the policy aims.

European Directives

23. The impact of European law on planning has of course been a major development of the last 15 years. Much of this is done through Regulations made under the enabling powers in the European Communities Act 1972 to implement European directives. The enabling powers in the European Communities Act are wide but their application is subject to the same considerations as any other statutory instrument. In addition, it is necessary to make sure that the Regulations adequately implement the Directive in question. This is often not entirely straightforward, particularly when it is also desired to avoid over implementation or gold plating. One approach which deals with that danger, is copy out—to make Regulations which do little more than repeat the words of the directive. This, however, can cause problems in itself, particularly where the directive affects an area of law already covered by domestic legislation, such as planning. The EIA Regulations, for example, integrate the assessment required by the relevant directives, with the process for planning applications in a way which could not have been achieved by a simple copy-out approach.

Conclusions

24. Finally, a few thoughts on how you and others outside Government can help influence the preparation of legislation and improve the quality of the outcome. The most obvious point is to engage in the consultation process as early as possible and in as practical a way as possible. A detailed explanation of why a particular proposition will not have the desired effect in practice will be much easier for us to respond to earlier rather than later. Amendments can be made to a Bill in Parliament or to draft Regulations but the more time we have, the easier it will be for us to work through the consequences of any changes. Also, so far as possible, tell us about the results you want to achieve or the danger you want to avoid, rather than doing the drafting. Otherwise we can spend a lot of time debating the words, without ever getting to grips with the underlying issue.

Reading List

How to be a Civil Servant by Martin Stanley, Politicos 2000
Parliament Website, Bills before Parliament
ODPM Website, Consultation Papers
Governing by Numbers: delegated legislation and everyday Policy-making, Edward C Page, Hart Publishing 2001