ARTICLES

THE CIVIL SERVANT AS LEGISLATOR: LAW MAKING IN BRITISH ADMINISTRATION

EDWARD C. PAGE

How are government policy commitments converted into legislation and what happens in the conversion? The role of civil servants in preparing legislation is far more important than is generally assumed. By looking at the work of four recent bill teams in Britain – teams of civil servants given the task of developing Acts of Parliament – their crucial roles in initiating policies, placing them on the political agenda (even helping secure their place in a party manifesto), developing them, making sure they pass through parliament and enacting them once they have reached the statute books are assessed. The article explores the composition and working methods of bill teams. These teams work with considerable autonomy in developing legislation, but it cannot be assumed that they operate outside ministerial control. Teams see themselves as reflecting the priorities of the government in general and their ministers in particular. Yet ministers typically know relatively little about the law they are bringing in until they receive the submissions and briefings from their officials. Perhaps the biggest danger for democracy is not a civil service putting forward proposals which a minister feels forced to accept, but rather that ministers do not notice or fully appreciate what is being proposed in their name despite having the political authority to change it and a civil service which bends over backwards to consult and accommodate them.

INTRODUCTION

When governments have majorities, as they generally do in Britain, they give the impression of being able to formulate policies and put them on the statute book, as the comedian and conjurer Tommy Cooper would have said, ‘just like that’. But it is not as easy as that. The language of party government that produces broad strategic policy steers is not the same as

Edward C. Page, FBA is Sidney and Beatrice Webb Professor of Public Policy in the Department of Government at the London School of Economics.
the technical legal language that produces the detail of an Act of Parliament. At a very minimum civil servants work as translators. How far their contribution is largely limited to such translation and how far they participate in shaping what may be termed ‘policy’, or broader strategic issues behind the legislation, is, despite all the academic studies of policy-making in Britain and the role of parliament, almost entirely unknown. The question is rarely asked about how legislation comes to be written (except in the limited sense of drafting, see Renton 1975; for an exception see Crow 1973 esp. pp. 35–94). The purpose of this article is to help fill this large gap in our knowledge about the involvement of the civil servant in the legislative process.

When asking how something works about which we know virtually nothing, one must almost unavoidably take an inductive approach. It would not be hard to tweak the usual-suspect theories to address the role of civil servants in the legislative process – including neo-institutionalist, rational choice, network and principal-agent models. To explore the full range of hypotheses or expectations that could be based on such theories on a trial-and-error basis would not only be tedious, but would also drown a limited volume of empirical observation in a sea of apparently technical jargon and fail to provide a coherent account of what goes on in government. The approach taken in this paper aspires to neo-realism of the kind associated with De Sica (1948). By first offering an essentially narrative account one is not claiming to explain ‘just the facts’ and ignoring the broader implications for our understanding of the role of bureaucracy, but rather laying some substantial foundations for a wider discussion of the role of bureaucrats in the policy process.

In keeping with these two ambitions – to describe the role of the bureaucrat in the legislative process and to assess the wider implications of the pattern that emerges for our understanding of the policy process – this article is based on evidence gained from talking to the civil servants who produced four recent Acts of Parliament. There is always the possibility that respondents will seek to exaggerate their role in the policy process. However, the fact that legislation is a public and highly documented process means it is possible to cross-check most of the statements made by the civil servants interviewed. The four bills examined, all passed as Acts in 2002, were Employment, Adoption and Children, Proceeds of Crime, and Land Registration (hereafter labelled ‘Employment’, ‘Adoption’, ‘Crime’ and ‘Land’). Thumbnail sketches of these bills are set out in the Appendix (for a detailed discussion of the relevant bills, see Blair and Broadbridge 2001; Lourie and Vidler 2001; Roll 2001; Wilson 2001). The role of bureaucracy in developing legislation is set out by first discussing which particular bureaucrats we are talking about – primarily but not exclusively officials who are part of the bill teams charged with producing the legislation. Next, the exposition deals with the roles of officials in the process of legislation: how they help place items on the political and legislative agenda, their contribution to policy development and their work on the legislation when it is in its parliamentary stages. The article goes on to deal with the post-parliamentary
stages. The conclusion looks at the implications of this role of the bureaucrat as legislator for our understanding of policy-making in Britain.

THE LAWMAKERS

There are three analytically distinct tasks involved in putting a bill on the statute book: (1) deciding the policy which is to guide any legislative drafting; (2) producing the legislative clauses that make up an Act of Parliament; (3) handling the parliamentary process (including developing briefings that ministers can use in debates on the legislation). While analytically distinct, in practice the tasks were sometimes closely related – as one bill team member argued, ‘Just to get the legislation in a form that would actually go through parliament we had to change the policy a bit’. Nevertheless, civil servants participated actively in all three tasks.

The key organization serving as a focus for the involvement of the bureaucracy in the development of legislation is the bill team. While practice varies on precisely who is in the team – the grades and specific jobs they fulfil – there are some similarities across all four bill teams examined. Members of bill teams are largely from outside the top ranks of the civil service. Those described here were headed by a Grade 5 civil servant – the lowest grade in the Senior Civil Service (SCS) which runs from Grade 5 to Grade 1 at the top – except for one team which was headed by an official from a grade below that. In descending order of rank, the positions immediately outside the SCS are, using what officials commonly term ‘old money’ definitions to describe their positions in the absence of any standard service-wide grading: Grade 6, Grade 7, Senior Executive Officer (SEO) and Higher Executive Officer (HEO), with those in the fast stream generally categorized as HEO(D), a special ‘development’ kind of HEO. The de facto manager of the work on the bill, the person with day-to-day responsibility for making sure that clauses and briefings were being prepared, written and delivered on time, was in all cases a Grade 7 or a Grade 6, the most senior positions outside the SCS (the recruitment, background and experience of team members is discussed in Page and Jenkins forthcoming).

In formal terms the number of additional members of the bill team, excluding support staff, ranged from three – two junior officials in the fast stream (HEO(D)s) and an (SEO) – to ten (two Grade 6s, three Grade 7s, 1 SEO, 3 HEOs and one fast streamer). The variation in size depended in part on the size of the bill – judged by the conventional measure of how many clauses it had – and whether the team was a policy bill team or a handling team. A policy bill team is one in which all three tasks involved in producing legislation – deciding the policy, producing the legislative clauses and handling the parliamentary process – are carried out by members of the team. A handling team is one that concentrates on stewarding the legislation through its parliamentary stages, with policy being handled by ‘policy lead’ civil servants who are not formally in the team. The Crime bill team was big, not only because it was a long piece of legislation (462 clauses) but also
because, as we will see below, its members were responsible for developing the main contours of the policy as well as the more applied policy questions that went into the legislation. As it was a UK bill dealing in areas covering devolved responsibilities, the team included two officials from the Scottish Executive, both at Grade 7 (although one was promoted to the SCS while working on the legislation), who effectively relocated to London for the duration of work on the bill. The Employment bill team was smaller, not only because the legislation itself was relatively short (55 clauses) but also because it was essentially a handling team, and those developing the policy were formally outside the team – some were indeed outside the Department for Trade and Industry (DTI) which had responsibility for the bill. The Department for Work and Pensions (DWP) had responsibility for a major part of the Employment Bill and was represented on the bill team by an SEO. Policy leads, whether in the teams or outside them, tended to be officials ranged in rank from HEO to Grade 7.

Others who were outside the teams in a formal sense, but in practice working closely with the teams, included the lawyers. The government’s legal service has legal advisers – qualified (usually departmental) solicitors. They see themselves primarily as serving the department, with the policy officials as their clients, and thus do not tend to have direct interaction with outside groups and interests. One legal adviser commented:

You try to limit contact with stakeholders. It can be difficult when you get identified as the lawyers on the bill. If we are there at meetings – we do go to meetings, last week I went to a meeting [with a large interest group], which has its own legal group with the lawyers from the groups and you get contact with them that way – [they might talk to us about the bill]. But we are in an awkward position. It is our job to give legal advice to the departments, and that is our role.

Two teams (Crime and Adoption) had one full-time legal adviser. The Crime bill team had one additional adviser working part-time, the Adoption Bill two (with three others ‘on a lesser part-time basis’). The legal adviser for the Land Bill worked for the team part time because of the special nature of the bill: since it had been produced by the Law Commissioners, almost all the legal drafting had been completed by the time the bill team started work. The Employment Bill also had a part-time legal adviser, but additional advice came from lawyers working for the different policy leads outside the team, since the bill team itself was essentially a handling team. The other lawyers involved in drafting bills, but not in the bill teams, are Parliamentary Counsel. One or two lawyers from the 50 or so within Parliamentary Counsel Office (PCO) are assigned to the bill and they actually draft the laws. PCO employs lawyers who specialize in writing legislation, although they do not specialize in writing legislation for particular subjects.

There are other officials closely involved in the work of the bill team, though not part of the team proper. ‘Policy leads’ are officials responsible
for particular parts of the legislation. That the Employment team was a handling team meant that the ‘policy leads’ worked in close proximity to the team – physically around the workspaces of the bill team in the DTI building. The policy leads in the Department of Health filled in the gaps left by the small core Adoption bill team. The Land bill team was assisted by two leading officials responsible for developing the policy in the first place (a senior Land Registry lawyer and the former Law Commissioner responsible for pushing through reform) who made themselves available to the team as consultants. For the Crime Bill there were no major outside policy leads as the policy was almost entirely handled by the core team.

Working on a bill team has often had the reputation of being good for a civil service career. Dealing directly with ministers – ‘ministerial exposure’ – as well as contact with top civil servants, working in parliament, the ability to prove that one can work under pressure, the opportunity to deal with issues ranging across wide areas of concern to the department were reasons given by those who felt it was a ‘good thing to have done’. While this view was held by a majority of those interviewed, it was only just a majority. For some, the benefits were not as obvious – those at a later stage in their careers or those within a body like the Land Registry which hardly ever produced primary legislation and where the skills gained from having helped develop legislation were unlikely to be in demand again in their working lifetime.

The view that the current climate within the civil service was tending more than before to favour officials who had worked in ‘delivery’ and had ‘operational’ experience was taken by some to mean that the attractions of the policy experience provided by bill work had lost some of its former shine, while others still believed it an important part of ‘building up a portfolio of skills’.

OBTAINING THE COMMITMENT TO LEGISLATE

A bill team comes into existence gradually. A bill team takes clear shape – that is, people are appointed to head it and staff are recruited to it – as it becomes almost certain that a bill covering the topic will be given parliamentary time. How long this period is before the bill is introduced is variable. For both the Land and Employment Bills, predominantly handling Bills, this period was three months. For the Crime and Adoption Bills, the teams which had the greatest involvement in policy development, the teams were set up 11 and 10 months in advance of the introduction of the bill into parliament respectively. (A qualification is in order here. The first version of the Adoption Bill was introduced in March 2001, so in fact the team was set up only three months before the first introduction of legislation. Yet this early introduction was unexpected and failed (see below), so the legislation that became law, announced in the June 2001 Queen’s Speech, was not introduced until October 2001.)

Commitments to legislate come in varying degrees of firmness. At the weakest end is a broad indication that a minister might be interested in
introducing reform in a particular area, on the basis of which it would be unwise for a department to invest too much time and energy to develop legislation. At the strongest end is the guarantee by the Cabinet Legislative Programme (LP) Committee that the legislation will be introduced. By the time of LP approval most of the policy is likely to have been developed by either the bill team or the policy leads – the officials who will eventually feed policy into the bill team. In between initial intimations and LP approval come working party reports, White Papers, draft bills and ministerial and prime ministerial statements and manifesto pledges. For the Crime Bill, Cabinet Committee clearance – through the Home and Social Affairs (HS) Committee, now the Domestic Affairs (DA) Committee – was required before work could be started on preparing the bill ready for LP clearance. It should be noted here that high level clearance is not only required at the outset of the legislation.

In the case of what officials referred to as the ‘post-Kilshaw’ additions to the Adoption legislation (see below), one official wrote as follows:

“Clearance… would have been at Cabinet Committee level…. [C]learance (policy ‘cover’) can be given for a whole area of policy in one go (e.g. the proposals contained in a White Paper) but… significant policy change/ add-ons following that clearance process would require distinct clearance through the same route. Essentially the policy cover will not ‘stretch’ to cover the new areas. This is one of the checks and balances in the law-making process.”

In addition, the progress from weak to strong commitment is not always smooth and there can be delays and reversals. The Employment Bill incorporated provisions originally intended for a separate Department for Work and Pensions bill which had got as far as being included in the Queen’s Speech but was later abandoned. We can outline the role of civil servants at two broad stages in the process: helping items reach the political agenda and helping items on to the legislative agenda.

**Political agenda**

Each of the four bills had a manifesto pledge covering significant portions of it (see Labour Party 2001), yet it would be mistaken to regard the manifesto commitment as the *origin* of the legislation, whether as the source of the basic policy idea which then is passed on to the civil servants to fill in the detail or even as the earliest expression of a commitment to legislate. While Rose (1980) makes a distinction between legislation that results from a manifesto commitment and that which results from the ‘ongoing Whitehall process’ – the general processes of deliberation in which civil servants play a dominant role – the distinction is hard to sustain in reality. In all four cases manifesto commitments resulted to a greater or lesser degree from the ongoing Whitehall process.

In two cases – the Crime and Land Bills – civil servants who served on the eventual bill teams played a pivotal role in placing items on the political
agenda and seeking to make sure that the government committed itself to legislation. With land registration, there had been discussion of reform of the existing framework set out in the 1925 Land Registration Act since the 1960s, yet it was not until the arrival of Charles Harpum as a Law Commissioner in 1994 that a viable proposal for a major reform was designed. Harpum was able to initiate a substantial collaboration between the Land Registry and the Law Commission – seen by all insiders as a major achievement. The achievement was all the greater because, as one official from the Land Registry put it, ‘the Law Commission are very much seen as academics and [the Land Registry] has practice’ and up until then ‘there was a tendency for the property trust Law Commissioners to work out their own prejudices and theories. Although Charles had prejudices and theories, he was prepared to listen and adapt on the basis of what he heard’. The vision and skills of one Law Commissioner appeared to be crucial, not only in developing the idea for reform but also in enabling collaboration with the government department that could produce it. Two members of the bill team were involved in the early days of the Law Commission/Land Registry working party and two advisers were also involved with the early generation of the legislation (Law Commission 1998, 2001a).

The Crime Bill was similar to the Land Bill in that the activism of policy officials created proposals for change which the government later accepted. Three of the Home Office civil servants who were on the 1998 Working Group on Confiscation, on whose Third Report the legislation was based (Home Office 1998), were members of the later bill team, including the head of the bill team and Chair of the Working Group, Godfrey Stadlen. The 1998 report ‘was not just fine tuning the mechanics but about radical and revolutionary change’ as one bill team member put it. In order to look at civil recovery (seizing criminal assets through civil court procedures), the radical proposal from the 1998 Report, the Home Office set up a small unit to look into the feasibility of a civil recovery scheme – four civil servants headed by a Grade 6 – that produced an (unpublished) report in September 1999. At this time ‘Number 10 got involved. It had always had an interest in proceeds of crime, and the Performance and Innovation Unit decided to look at this’. The Performance and Innovation Unit (PIU) was the policy unit within the Cabinet Office with close links to the Prime Minister – later to become the Prime Minister’s Strategy Unit. The significance of the PIU was above all in its ability to gain political attention for the issue, and several respondents also argued that its report was the document from which they worked when coming to developing detail in the legislation (see below). While the PIU (2000a) Recovering the Proceeds of Crime report may not have contained much more detail than what was already in existence, given that this topic had already been subjected to extensive discussion within government, it enjoyed the support of the Prime Minister. Moreover two Home Office officials who had served on the Working Group and later on the bill team were members of the team that produced the PIU report.
The Adoption Bill arose more closely from a prime-ministerial initiative. While there had been attempts to reform adoption law in the last years of the previous Conservative administration (Roll 2001, p. 1), Prime Minister Tony Blair’s personal commitment to reform the adoption system, born, as he said later, of his own family experience (his father Leo was fostered, see ‘Blair: “Why adoption is close to my heart”’, Guardian 21 December 2000), helped generate and maintain momentum for reform. The first main public expression of his commitment came through his official spokesman in a lobby briefing on 18 February 2000 in reaction to the Waterhouse Report (2000) on child abuse in Wales: adoption was, he argued, part of the solution to the problems identified by Waterhouse, as children were spending too long in care, and the Prime Minister committed himself personally to taking the issue forward. The taking forward came in the form of a report from the Performance and Innovation Unit (PIU 2000b). It served the major function of reviving further political interest in adoption reform. What was new about the PIU report was, according to those involved, the ‘link to the modernizing agenda’. However tenuous it seems to the outsider, this link appears to have helped maintain the issue as a priority for the Prime Minister – the PIU Report is even given the title ‘Prime Minister’s Review’. In this respect, the PIU, as with the Crime Bill, was important above all as a means of raising the political importance and profile of the issue. The eventual Adoption bill team principal was seconded from the Department of Health in Leeds, where he was working on matters unrelated to adoption, to work in the PIU team.

The Employment Bill originated above all in units within the DTI and DWP. As with the Adoption Bill, the issues involved arrived on the political agenda primarily through an express political commitment. Commitments to family-friendly working arrangements and, less explicitly, a change in the tribunals system were contained in Labour’s 2001 manifesto. In one part of the Employment Bill, the reform of the tribunals system, civil servants arguably had a much larger role in bringing the item on to the political agenda. The main focus of this part of the legislation was to mandate the requirement that attempts be made to resolve employment disputes in the workplace before recourse to litigation. Included in this part were provisions to reduce ‘vexatious’ claims before Employment Tribunals – an issue on which the preceding Conservative administration had expressed an intention to legislate. This issue emerged once again from a review conducted within the branch covering tribunals in the DTI before the June 2001 election and became part of the Employment Bill. This part of the legislation had to be prepared at relatively short notice in time for its planned introduction in autumn 2001. As one outside observer commented, it ‘really it seemed to be the officials, if anyone, who was driving this and it was unclear why they were doing it or where it came from…. The policy changed and there was a shift of emphasis. The whole focus was to get rid of “vexatious” cases. Now there are some vexatious cases, but not as many as
would justify this provision’. Indeed, one prominent critic, His Honour John Prophet, President of Tribunals in England and Wales, questioned the accuracy of the figures on which the DTI appeared to base its approach to this question (‘Judge warns of disaster for sacked workers’, Guardian 18 January 2002).

**Legislative agenda**

The momentum of political support that built up as the policy issues were being developed made Legislative Programme approval of the timing of the legislation – that is, giving the legislation a slot – relatively less problematic for the Crime and Adoption Bills than in the other two. With the Adoption Bill, the commitment to allocate time to legislation was made, unusually, by the Prime Minister in early 2001 in response to a notorious case of intercountry adoption. It involved Alan and Judith Kilshaw who paid £8,200 in the USA to adopt six-month-old twins whom they brought back to Britain. Not only was the legality of this adoption contested but also their fitness as adoptive parents – there were allegations in the tabloid newspapers, among other things, that Judith Kilshaw was a witch and voodoo practitioner. The couple kept up the news profile of the story by replying with raucous accusations that the press was involved in a conspiracy against them. It was at this point that the Prime Minister committed the government to ‘introduce legislation on it in this Session’ (Hansard 17 Jan 2001: Column 336, emphasis added), a change from the existing commitment to introduce legislation in 2001. According to one newspaper report, ‘The prime minister’s intervention caused a flurry in Whitehall among officials who did not expect adoption legislation until after the election and were still consulting on proposals in a white paper published in December’ (‘Blair demands law on internet baby trade’, Guardian 18 January 2001). The Prime Minister’s promise was met by the production of a shorter bill in March 2001 that was unlikely to reach the statute book before the imminent general election. The March 2001 Bill fell at the election and a replacement bill, promised in the Queen’s Speech in June 2001, was introduced in October 2001.

For the Crime Bill, team members had few doubts that they would obtain an early legislative slot. As one said, ‘You’ve got to get a place in the legislative programme and we got that because of No. 10’s interest, the PIU report and this was also a manifesto commitment. We knew we were on a roll with this one. After the election they were keen to do as much as possible in this area’. This approach contrasted with that for the Land Registration Bill where the officials were less certain of gaining a slot. One person described the process

We went to a meeting and [a young person] from the Cabinet Office [walked in]...I remember the meeting. Things were not going well – it looked like it would be a disaster. When we got to the Land Registration Bill we thought it would be terrible as we only had the draft half written
by then. But when ours came up the sun started to shine. Obviously a deal had been done at the top level. They were going to put it in. ‘Why wait until November? Let us have it straight after the election (assuming we get in)’, they said. We were delighted. We cracked open the champagne. People don’t realize that it is amazing that anything gets on to the statute book, not because of opposition but because of all the hoops and committees you have to jump through to get a slot.

Similar to the Adoption Bill, the Land Bill had in its favour the notion, according to one member of the team, that it was linked to ‘modernization’, a key government buzzword at the time, above all because the proposed bill included measures to bring developments in Information Technology to land registration through electronic registration. ‘With the Lord Chancellor, who has a big say in writing the manifesto we also had an advantage. He managed to get three plugs for himself and his own legislation in the manifesto’. One official suggested that the fact that the Lord Chancellor was proud of the quality of the legislation – a big complex bill bringing about major change – helped ensure it was given ‘a fair wind’.

The Employment Bill had a less straightforward background. It can be characterized as a patchwork made up of a variety of different types of policies – such legislation is often termed by civil servants as a ‘portfolio’ bill. It dealt with, among other things, reform of the tribunals system, ‘family-friendly’ labour market policies and changes to the social security system. The legislation on family-friendly policy could have gone in another DTI Bill produced at around the same time, the Enterprise Bill, but ‘we decided that the Enterprise Bill was complicated enough and we’d be over-complicating it’. The social security parts of the legislation, for which DWP was responsible, came even later, since DWP was supposed to have had its own bill, and even had a bill team already working on it. Some policy changes meant that the proposed DWP legislation was going to be shorter than expected and the decision was taken at LP level to abandon the DWP bill (even though it had been in the Queen’s Speech) and divide its contents among other bills where possible. The whole process exemplifies why ‘portfolio bills’ can be known by civil servants as ‘Christmas Tree’ bills – ‘as different people see a nice tree, they all want to come along and hang their own bits of tinsel on it’ as one official put it.

On the basis of the experience of these four bills, civil servants routinely play a major role in the development of the policy behind legislation, even helping to ensure the legislation reaches the party election manifesto. This practice suggests the widely held assumption in political science that manifestos offer measures of the independent impact of parties on public policy might need some qualification. For example, while Hofferbert and Budge (1992, p. 181) recognize that their analysis of manifestos ‘does not require parties to initiate policies’ set out in them (emphasis in original), the pledges they contain still represent ‘priorities’ that parties ‘impose on the state
apparatus’. This analysis has only examined four bills, yet the fact that it has found two where the ‘state apparatus’ played a part in developing manifesto commitments suggests that under some circumstances they may be less independent of it than appears to be commonly assumed. Of course, this is likely to be a feature of legislation passed, like our four examples, in the first session after the re-election of a party already in government. But it illustrates the wider point that civil servants involved in bill team work play a significant role in policy initiation, and making sure that even bills that attract major party political interest reach the legislative agenda.

POLICY DEVELOPMENT: PREPARING THE LEGISLATION

The job of civil servants working on bills is to convert policy intentions into legislation. The mode of production is simply outlined. The policy civil servants give instructions to the relevant solicitors in their department, and the solicitors send their instructions to Parliamentary Counsel (PC). The draft will be passed backwards and forwards between these three groups – generally termed ‘toing and froing’ by the officials interviewed. Politicians are involved in the process. Most importantly, the brief given to the solicitor, which will be used to write the instructions to PC, will have been submitted to the minister for clearance, and any substantial changes in the policy will have to be cleared with the minister along the way. Yet any notion that politicians have general policy ideas which are then processed in a technical way so that they become legislation is plain wrong. We have already established that the policy ideas do not invariably come from politicians (although we will see in the conclusion that civil servants do not make decisions on their own or without ministerial control). It is also wrong because the raw material – whether a PIU Report or a set of consultation documents – that civil servants were asked to turn into legislation was generally short of exactly what is needed to make it work as the basis for writing a law: detail.

As one solicitor talking of what she has to hand to PC put it, ‘we need to give detail. They need an idea of how to approach the issue. So we have to go into great detail – it has to be really, really, really detailed’. Several officials pointed out that even the level of detail incorporated in the PIU report was not sufficient to provide a firm guide for developing instructions. The point that instructions to counsel entail enormous detail was made by one lawyer:

You should tell PC everything that should be in the bill. The intention [behind the bill] is the basis for instructions and we have to take it to such levels of detail that nobody who thought of the original intention would have thought of [the level of detail and issues we cover]. Our job and that of PC is intellectually stretching. Some of the things we get into are difficult. Really tough things and you get a real satisfaction from getting them right. If the policy is not clear then it won’t work.
Administrators generally recognized that the lawyers – departmental solicitors and parliamentary counsel – were ‘crucial’ in developing this detail. Moreover, elaborating legislative clauses is not dealing with mere detail. As the detail is fleshed out, broader issues touching the strategic objectives of the legislation have to be developed, or even sometimes initiated, and addressed. As a policy official with substantial bill team experience put it:

The relationship with Parliamentary Counsel is quite a dynamic one. It is common for them to come back with a number of questions on the instructions, to clarify just what it is that the policy aims to achieve. It is by no means uncommon for substantial issues of policy to arise at this stage – often generated by a series of ‘but what if…?’ questions through which either the instructions or the early drafts are tested to destruction (an interesting process, though not always a comfortable one). It is largely for this reason that discussions with Counsel on the draft are frequently more than a straight check that he or she has done what we asked.

What sort of fundamental issues needed to be resolved at this early stage? Some examples of the type of issue are given here. In the Crime Bill the details of the whole legal framework for civil recovery (that is, how to use the civil courts to take away assets believed to be the proceeds of crime even if there has been no criminal conviction) was left to the officials, administrators and lawyers to develop and it involved selectively borrowing from practices in Ireland and South Africa, among other places. Another major policy question was the range of assets that could be recovered. As an experienced bill team member put it:

Take civil recovery. We had a broad scheme but we had to make sure that it exempted some things we wanted it to exempt. Crown Property could be by some quirk a part of crime property. We had to think about pensions and pension funds – could they be ransacked for proceeds of crime? These were hugely complex questions.

The question of whether the matrimonial home should be liable to be recovered in the Scottish sections of the Act as it was in the English and Welsh parts was a key difference between the Home Office and the Scottish Executive. It was argued to be a tradition in Scots law that the matrimonial home was protected in similar circumstances in other legislation. The matter was resolved in favour of a Scottish exemption (achieved by the persuasive powers of the Scottish officials who ‘did not have to wheel on the First Minister for this one’).

For the Adoption Bill, one of the early priorities was working out what new legislation was needed to develop the ‘modernization’ agenda set out in the PIU (2000b) Report and the White Paper that followed. These documents contained a variety of proposals, not all of which required new primary legislation. In addition, the degree to which the provisions of the draft Adoption Bill, produced under the Conservatives in 1996, remained
relevant for the types of reforms under consideration needed to be evaluated. As one member of the team put it:

The White Paper said little about what legislation was needed, actually, as we had not gone through the old legislation to see what we needed to keep. We were working through what was required for the adoption law aspect of things. This meant meetings with people…a review of existing legislation, and of the changes proposed in the 1996 draft bill. It was me and [my colleague] meeting with the lawyers.

Once the Kilshaw case hit the headlines, and intercountry adoption had grown from a minor part of the legislation to a major concern in it, a priority was to find out what was needed to prevent similar cases. It had been widely believed that the exploitation of intercountry adoption to avoid being subjected to UK adoption controls was covered by existing legislation. The Kilshaw case showed up gaps in existing legislation and closing them was not straightforward, as one respondent commented:

It was hard. You would not want to penalise people who lived here but had been living abroad and brought an adopted child back with them who was a member of the family…and you had to frame the legislation so it did not affect them. There was pretty extensive discussion about this point.

Evaluation of what different options would produce was facilitated by the fact that in addition to having policy responsibility, the official responsible worked in the part of the Department that had casework responsibilities for the operation of intercountry adoption:

All of the intercountry casework comes through here. I…would talk to the caseworkers about this. We were ahead of the game because we had hands on experience of intercountry adoption casework. I also talked informally with contacts in the field on a confidential basis.

In the Employment Bill, while the general outlines of changes in unfair dismissal cases had been agreed, this agreement did not go far in determining the major contours of the legislation

What was not sorted [by the time the bill team started its work]? Just exactly how things were going to work. For example the statutory disciplinary procedures and if they impacted on the chances of taking things up in a tribunal. It had been hoped to put this in a broad clause with the right to make regulations.

But it became clear there would be opposition to this use of delegated powers and the team had to develop a means of dealing with it adequately in the primary legislation.

The Land Bill, as a joint initiative between the Law Commission and the Land Registry, went through a somewhat different type of drafting procedure from the other three. The Joint Law Commission-Land Registry
Working Party not only produced the consultation document, it handled the responses to the consultation and produced the second consultation document, a draft Land Registration Bill as well as the bill itself (the Law Commission has its own Parliamentary Counsel seconded from the OPC). Nevertheless, the officials had substantial scope for shaping the legislation. It was a technical area of law and

Between them the Commissioner, the Solicitor to the Land Registry and people looking to automate the Land Register produced the policy themselves. They produced a detailed set of draft proposals in the consultation document.

Of all four bills the role of the officials was the greatest in this legislation and the initiative, conception and eventual form of the legislation was almost entirely the result of their work.

The leading officials who created the Land Bill were not, however, members of the bill team, and by the time of the bill team proper, much of the policy work was concerned with small areas of refinement. Among the most important policy issues dealt with by the team proper was the right of the Land Registrar to form a company or participate in a company. It was regarded as a big 'policy' issue less because of its intrinsic impact (it was primarily designed to allow the Land Registrar the flexibility to promote through contracts a range of services electronically) than for its legal-technical implications for how it fitted in with other legislation on government contracting powers. As one bill team member put it:

One policy issue that came up, and this is a normal sort of big bill point, whether the legislation gave the Land Registry sufficient powers to form partnerships outside government to do specific things. It looked like a detailed point but turned out to get thornier and thornier...You sometimes get a detail which takes you into major policy and to thinking about what you can do about it...– a minor tweak becomes a huge issue.

The whole process of developing policy, largely driven by the policy civil servants but also involving lawyers and ministers, was iterative: once the draft comes back from Parliamentary Counsel it needs to be fine tuned or even substantially amended and some aspects may require renegotiation. One source of the need for further ministerial approval is that PC may feel the solicitors and policy officials have not given sufficiently detailed instructions for some part of the bill, and he or she may try to fill the gaps, identify consequences or seek ways round obstacles that the lawyers and administrators may not have envisaged:

When things came back the legal adviser would point out things, and we noticed them too, and we would draft a letter to the minister pointing out what was being proposed and why and asking ‘are you content with this as a matter of policy’. The PC is trying to put in what the minister wants.
and makes guesses about what we want and [PC] might also [write and]
point out the implications of what is being proposed: ‘do you realise that
this follows from that?’

As we will see, this iterative process, involving counsel, legal advisers,
policy civil servants and ministers, continues even after the Bill reaches
parliament.

TAKING THE BILL THROUGH PARLIAMENT

There is a similarity across the four teams in the type of work involved in
getting a bill through parliament – hardly surprising since the parliamen-
tary process makes bills go through broadly the same hurdles before they
can become law. Other chores have to be completed for the legislation to
proceed through parliament. Explanatory notes offering plain language
descriptions of what the legislation does have to be written – and are
checked by Parliamentary Counsel – and formal submissions to the House
of Lords Select Committee on Delegated Powers and Regulatory Reform,
which scrutinizes the legislation for the powers that it delegates to ministers,
completed. These processes are, as one official emphasized ‘tricky and very
time consuming projects’.

For civil servants the parliamentary process involves, above all, getting
briefings to ministers so they can handle questions and answer points in
parliament and the media on both the main policy thrusts of the Bill as well
as its detail. Bills thus generate huge amounts of paperwork since at this stage
the written brief is the basis of all briefing. The dossier for ministers on one of
the bills ran to nearly 500 pages. Because the dossiers and briefings are tailored
to the particular parliamentary stage of the bill, and are changed as new
amendments are proposed, the cumulative volume of paperwork makes its
management a substantial part of the parliamentary work of the bill team.

Briefings, written and oral, are not only about informing parliamentary
debate, or even avoiding embarrassment and smoothing the passage of the bill,
they also have to be drafted for what civil servants term ‘Pepper and
Hart’ purposes – the doctrine that what is said by a minister in the passage
of legislation can be used subsequently in court to help determine the mean-
ing of the legislation (after the 1993 Pepper v Hart case – see Steyn 2001).
While these officials often bore this issue in mind, none seemed to be particu-
larly anxious about it. This comment was typical of the attitude of others:

One time [the Minister in the Lords] gave [a personal] example to
illustrate the point, and [used that to embellish it a little]. That was a step
too far because that took it into an area our legislation does not deal with,
but is dealt with elsewhere.

Another official referred to ministers (not involved in any of these four
Bills) who used to offer unscripted summaries. ‘Occasionally I’d…think
“I should not have written it like this” as they’d got the wrong end of the

© Blackwell Publishing Ltd. 2003
stick. [Interviewer:] Did any of this matter? [Respondent:] No, not really’. If something was said that might have caused problems later, the minister can always be briefed to ‘clarify’ later on and reverse the potential damage done by inaccurate or incautious statements. Although another pointed out that ‘the seriousness of the mistake [also] depends on when in the process it is made. An inaccurate or incautious statement before a vote is trouble, but one made during general debate will . . . be corrected later with little damage [done]’.

The main policy work during the parliamentary stages of the bill is dealing with amendments. Bills can expand substantially in the course of the legislative process. The number of clauses and schedules in the Adoption Bill increased by 11 per cent during the parliamentary process; for Crime and Employment, this was a more modest 5 per cent while the Land Bill gained only 1 per cent (these figures might hide the real extent of the change as they give only a summary of net changes).

What role do bill teams have in deciding which amendments become incorporated in the final legislation and how are they involved in their development? In general many respondents pointed out that ‘policy work’ went on well into the parliamentary process. On one team, a non-lawyer argued, ‘We had to do a lot. The policy was still being formed at a late stage . . . right up to a couple of weeks before the Assent, policy was being formed, and we were doing revised sets of amendments right to the last minute’ and similar views were expressed in other teams. The ‘policy work’ entails three broad types of activity at the amendments stage: dealing with unfinished business, deciding what amendments need to be taken on board and developing amendments once a political need for them has been accepted by ministers.

**Dealing with unfinished business**

From the perspective of those in bill teams, some amendments have to come in the legislation because the legislation was always envisaged as including them. Sometimes a bill is not completed by the time it has to be introduced, so it will be sent incomplete on the understanding there will be a chance to amend it later on. All four bills were introduced with this understanding. For the Employment Bill the Secretary of State announced in Second Reading (27 Nov 2001: Column 867) there would be amendments to implement the results of The Work and Parents Taskforce (2001), and all Bills received amendments that ministers and civil servants knew right at the time of introduction were likely to be included later.

For the amendment to the Employment Bill, introduced while the bill was in Committee Stage, the ‘policy lead’ outside the bill team (a unit within DTI served as the secretariat of the Work and Parents Taskforce) was charged with developing the legislation. Policy work in this case was making sure what respondents described as a ‘neat balancing act’ was sustained (although other parts of the legislation, including the change in tribunals,
were criticized as being too far in favour of employers). The Taskforce was an attempt to square two separate interests – those of employer and employee representatives. ‘We got agreement on recommendations and this agreement gave the results of the taskforce strength and credibility when it came to taking it through parliament and avoided any particularly nasty debates that might otherwise have arisen – they could say that the Taskforce had agreed this’. The role of those engaged in the policy work was primarily to see that this arrangement was not disturbed:

Our responsibility was to convert the recommendations into policy instructions and make sure that it all kept to the policy that had been agreed…. It was also no secret that although the Taskforce reached agreement, it only did so after hard negotiation, so we were aware that we had to make sure that the agreement held.

As with any amendment, the process of preparing the legislation to give effect to the Taskforce proposals was much like that of developing the text of the bill in its initial stages. It involved producing, in collaboration with lawyers, counsel and with the approval of the minister, a text that reflected the goals behind the legislation after the necessary toing and froing between all involved. The Taskforce did not have time to resolve some issues in fine detail which were subsequently covered in further consultation and regulation.

Deciding which amendments to accept
Bill teams and those they work with closely (civil servants associated with the bill team in an advisory capacity, policy leads and the lawyers) advise on whether governments should accept proposed amendments, other than those foreseen as necessary, in the light of pressure from interest groups, opposition parties, MPs or members of the House of Lords or public opinion. They advise on government amendments arising from government changing its mind or even themselves suggest amendments after coming to realize their original proposals are defective.

The general bias is against making amendments unless they are absolutely necessary. As one respondent put it, in the context of opposition amendments, ‘What do you do with amendments? You resist. All opposition amendments are to be resisted’. A variety of reasons explain why there is a strong bias in the legislative process against amendments. According to members of the bill teams, Parliamentary Counsel does not like making them – they are believed to view amendments as threatening the coherence of the carefully crafted structure that their drafting has produced: ‘Parliamentary Counsel will not unpick things. He’ll say that something you are proposing to do will have repercussions throughout. We [asked him to draft an amendment but he] said it would ruin what he did and take a whole week of work. It is up to your lawyer to advise him of the political need to get this done’. Since ‘the chances of…[even minor non-government] amendments fitting precisely into the drafting scheme of the bill are not high’, even where civil servants
advise acceptance ‘it is almost always as an acceptance in principle with an
undertaking that the Government will bring forward amendments with a
similar effect at a later stage’. Neither do government business managers
like amendments. As one bill team manager observed,

Over recent years there has been parliamentary complaint that some bills
were amended to the extent that they nearly doubled in length as the
government thought of new things to do and bunged them in. The Whips
said they did not want to have that and were policing things that
departments were trying to do to reduce the quantity of amendments to
legislation.

Yet the figures show that amendments are routinely taken in the parliamen-
tary stages. What is the role of officials in bill teams in deciding which
amendments will be accepted?

Many amendments are government amendments made in response to
perceived shortcomings in the existing provisions of the bill. As one official
put it, ‘Government amendments depend on our ability to spot mistakes
and deal with the policy after spotting where the legislation is vulnerable
and where we know there are criticisms floating around’. It is difficult to
determine how many of the changes that officials recommend originate
from the officials themselves or are ideas that emerge during the process
from outside comment or criticism. A number of members of the teams
made an argument similar to an official on the Employment bill team, ‘We
make amendments as we go along. The [parliamentary] process, if it works
properly, will uncover things not right in the bill’. Who uncovers may be
difficult to determine. Interest groups, generally cited as the most common
source of amendments, may simply be expressing points that had already
become clear to those involved in developing the bill.

To have a significant chance of success, an amendment proposed by an
interest group, a member of the House of Lords or an MP has to be accepted
as a government amendment or at least be supported by the government.
Because this process requires ministerial support, the advisory role of the
members of the bill team is crucial. One described the advisory role simply:
onece the amendments come in ‘you have to give advice saying “rotten idea”
or “there’s something in this”’. The normal practice when an opposition-
proposed amendment is accepted as having ‘something in it’ is for the oppos-
ton to withdraw the proposed amendment following an assurance that the
government will take appropriate action (which might be a government
amendment or a promise to address the issue in some other way such as
dealing with it in the implementing regulations). The importance of the bill
team in advising the minister which amendments to accept or act on is
underlined by the practice of interest groups, identified by members of the
bill teams as the source of the majority of opposition amendments, sending
their amendments along with the briefings on the amendments, to the bill
teams. As one official explained ‘[A large interest group] inundated us with
amendments. It happened, funnily enough, while I was on holiday, so [my colleague] had to deal with them. These came as a series of amendments with explanations. These appeared word for word as opposition amendments’. Another explained: ‘We will have the pressure group briefings – they will send them to us because they know that if they are going to go in we have to get the minister’s agreement first, so we get the full briefings from the groups on amendments that get taken up as opposition amendments too’.

Members of the team can, effectively, make decisions without ministerial clearance on technical drafting amendments. However, one bill team manager saw this process as posing an important managerial issue:

It is quite common to receive a large number of amendments 48 hours or less before the debate. They will vary quite widely in importance and complexity, so a significant slice of the bill management process is deciding which can be handled by the junior members of the team, and which will need more serious consideration with policy leads, Counsel and perhaps even ministers before briefing can be prepared.

In the four bills only once was it suggested that a more substantial change could be accepted without approval, and this case arose from a particular time pressure:

We tended to use our judgement...we took executive decisions. We did not clear every amendment. Where there were significant issues we went to [the minister....But sometimes there] was not enough time to refer upwards. Apart from big amendments we did not have time to refer. We made decisions. We might have referred to the [relevant department]. Rightly or wrongly we dealt with these as they came in....There was no point referring them to anyone else as they wouldn’t have known anything about the issues.

However, for the most part, rather than make decisions on their own, the role of the civil servants is to advise the minister of the acceptability of amendments.

What sort of issues do officials advise on? One issue in one of the bills was the possibility that charities would be adversely affected. In this case the role of the officials was not to recommend accepting amendments, but putting together a package, including more briefing for the minister and ‘sweeteners’ for the groups concerned:

We had not expected that the bill would hit charities particularly hard or could bear hard on larger estates. I was sure on first seeing them that both were just wrong, but since this was the House of Lords and there was no majority in the House of Lords you have to get them onside, or as close to onside as you can. We had to do lots of work on what the story is and what sweeteners and help we could give and setting up ministerial and bill team meetings to check that we had not done anything wrong.
In the Crime Bill:

We had a lot of trouble with the constructive trust issue. Banks are not allowed to tip off clients if they have tipped a nod to [the National Criminal Intelligence Service (NCIS) that they suspect their client is involved in money laundering]. Banks can make a report but not hear a thing from NCIS. We took the opportunity to set a time limit. NCIS should respond to the financial community in seven days, and if they don’t [it can be assumed that NCIS is not interested in following this up]. To achieve the change I had to get agreement very quickly with Police, NCIS, the banking community and the Treasury to be able to instruct the lawyer what we wanted to do. Eventually we get a clearance and we write the policy instruction to the lawyer to write to Parliamentary Counsel and they put in references and such like to the PC instructing him to produce clauses. Back they come and we look at them – does every one of them work?

Other amendments in which bill team members participated included, in the Adoption Bill, the provisions governing access to adoption information, in the Employment Bill an exemption for armed forces and an extension of the role of ACAS to cover flexible working arrangements, and in the Land Registration Bill an amendment to limit the secondary legislation powers in response to criticisms by the House of Lords Select Committee on Delegated Powers and Regulatory Reform.

Responding to political changes of heart

When ministers themselves accept a political need to change legislation, whether from pressure from government backbenchers, prominent interest groups, opposition MPs or members of the House of Lords or public opinion, or some combination of them, the advisory role of bill team members changes from one of examining the merits and demerits of amendments to one of exploring how to incorporate the changes in the bill, and how these changes impact on other parts of the proposed legislation. As one bill team member put it, following a successful campaign to amend a clause in one of the bills, there ‘was not exactly consensus [on the need to change the bill], but it was clear you would be flogging a dead horse if you opposed it’. Such cases are, as one official suggested, ‘rare. The more normal [case] is that concessions and compromises are made which placate concerns but at the same time protect key policies. This is a balancing act and the role of the official is to advise on where ground can be given...to relieve pressure with minimum damage’. Yet where pressure cannot be relieved and the political imperatives to change are more powerful than any intellectual reason for keeping things the same, the role of the team is to design clauses that meet political needs. The two most significant political initiatives to amend legislation in the four bills came in changes to the Employment and the Adoption Bills.
The Employment Bill faced serious opposition in the House of Lords, voiced by Lords Wedderburn and McCarthy on the issue of ‘compromise agreements’ on the grounds of the claim that the proposals made it possible for workers to sign away the future exercise of some of their basic rights (such as the right to sue their employer). Opposition in Lords Grand Committee led the government to drop the relevant clause (clause 39). The breadth of the attack came as something of a surprise and officials were faced with the task of developing a response – by demonstrating that the fears of the critics were misplaced, redesigning the clause to take the fears into account or dropping it altogether. Given the immense pressures of time at this stage and the fact that all concerned – officials and politicians – were occupied with the other aspects of developing, advocating and defending the legislation, the government withdrew clause 39. As one official put it: although ‘we all felt that our policy on compromise agreements was sound… it was easier to drop than verify it’.

The political pressures in the Adoption Bill were of a different nature. At Second Reading the Health Secretary announced there would be consultation about the possibility of allowing unmarried couples to adopt jointly. This statement was a surprise since the Prime Minister had seemed to rule it out in the early stages of reform: his spokesman described it as ‘a side issue.…. The Prime Minister believed that children were best brought up in a stable relationship with a mother and a father. [We are] talking about the hurdles in the way of adoption. It was important not to go down side roads’ (No. 10 Briefing 17 February 2000). In the Special Standing Committee, most of the organizations asked about this point (‘29 out of the 30’ as one official reported it) were in favour of changing the provision for unmarried couples. In the end Labour backbench pressure kept the issue alive and persuaded the government to allow a free vote on an amendment put forward by the Labour MP David Hinchcliffe (with some cross-party support) at report stage (‘Adoption boost for gay couples’ Guardian 7 May 2002). The officials saw their role as trying to give the public an accurate picture of what the changes meant:

Unmarried couples were always able to adopt, that was the funny thing. They could adopt separately, but not as a couple. Only one could adopt (and the other could get a residence order). Getting the reality of that across was a huge task and [the fact that we did not] led to all the misleading headlines about gay adoption. They had always been able to adopt.

Second, they had to provide material for the debate: the area, according to one official ‘attracted a load of bogus statistics [interpretations of “scientific” studies of the impact of gay and unmarried adoption on children]. The interesting task was to research the area so one could give ministers a clear set of evidence on that’. Third, once the amendment was carried they had to supervise the thorny issue of securing parental rights for unmarried couples.
over adopted children without affecting the legal relationship between the unmarried couple; ‘we did not want to address the civil partnership agenda’ (referring to the question of whether there should be an alternative to marriage for homosexual and heterosexual couples) since ‘this was something quite wide ranging that the government had separately confirmed it was considering and it was important that our relatively narrow bill did not pre-empt this wider exercise’. 

AFTER ASSENT

Bill teams carry on their lives after the bill has received royal assent. There is a variety of tasks connected with the Act that members of bill teams may continue doing. The first is writing the implementing regulations for the legislation – including the Statutory Instruments and Rules of Court needed to bring the legislation into force. Often consultation on these regulations begins even in the early stages of drafting the legislation. Others displayed a more casual attitude:

Were there many policy issues left for the rules? Well on some things time was pressing so we thought ‘sod it, we’ll do it in the rules, and we’ll consult then’. There were a few legitimate areas you could put in the Act, and the secondary powers are a useful device to put in. Also you would not be popular with the Whips if you wanted amendments.

Second, there is issuing of guidance – circulars, codes of guidance and such like. These can be crucial for the interpretation of the legislation and, where necessary, will be shown to the lawyers who draft the legislation. Third, members of the team may move to a more personal role in promoting awareness of the legislation – through training other officials on how to use the legislation or simply attending conferences as an expert on the meaning and significance of the new Act. The possibility that significant policy issues are dealt with by officials after the passage of primary legislation, above all through their role in developing secondary legislation, and the implications of this process for policy making in Britain, have been discussed elsewhere (Page 2001).

LEGISLATION: THE APPLIED EMPIRICAL REALITY

With primary legislation, one feature of the work of bill teams is striking: the importance of relatively junior civil servants from middle ranking grades, operating with significant autonomy producing key legislation – the background, role and character of these middle-ranking officials is discussed in Page and Jenkins (forthcoming). While it is conventional for a member of the Senior Civil Service (SCS) to head a team, this person is from the most junior rank within the SCS. Grade 7s take a leading role in developing major portions of the legislation, as do officials one or two grades below that. Moreover, civil servants have a substantial degree of autonomy in developing
legislation. That they can appear to operate with such autonomy arises, in part, because policy development is under political control through two broad mechanisms.

The most obvious mechanism is the need for ministerial approval of every major policy choice made in the process of drawing up the legislation. The second is a less direct but possibly even more powerful constraint – anticipating ministerial reactions. While much policy development, such as in the early stages of placing items on the policy and legislative agenda, appears to take place without the direct involvement of ministers, permission to develop any policy work is cleared with ministers before it is conducted. Moreover, such policy work is hardly free-ranging for civil servants seeking remedies for problems they themselves identify. Rather, such policy development takes place in the context of the knowledge and appreciation of the priorities of the government in general and of the minister in particular. While electronic registration of land, confiscation of criminal assets, the extension of work-focused interviews for welfare claimants and changes in adoption law were developed within Whitehall, albeit on the basis of consultations with outside interests, civil servants were conscious they were extending and pursuing the declared and established priorities of government. When asked how they decided to pursue a particular policy, civil servants tended to align it with a wider thrust of government policy – ‘modernization of adoption’, ‘new deal for partners’, ‘e-government’ and ‘anti money-laundering’.

However, ministerial control over the process is not guaranteed. Ministers typically know little about the law they are bringing in until they receive the submissions and briefings that their officials give them. Perhaps the biggest danger for democracy is not a civil service putting forward proposals which a minister feels forced to accept, but rather that ministers do not notice or fully appreciate what is being proposed in their name although they have the political authority to change it and a civil service which bends over backwards to accommodate them and keep them informed and briefed.

What is the character of the work of officials who work on bill teams? The most common approach to such a question evokes the old policy-administration distinction: politicians do the policy – resolve or generate conflict and set out the broad strategic vision – and the administrators have the dull detailed work needed to give effect to the grand design. However, the policy-implementation distinction, even in the more sophisticated theoretical frameworks that have been developed in the past few decades, implies some sort of hierarchy of tasks, with policy being the broader strategic task and implementation the detailed filling in of the gaps (see Hill and Huppe 2002). This view is misleading, on the basis of the evidence of bill team work. If we take the distinction as one between abstract and applied policy work, we come closer to the division of labour between the politicians and the predominantly middle-ranking officials in making policy. Yet the
division of labour remains blurred, as middle-ranking civil servants participate in abstract discussion of the objectives of government policy, and politicians, as with the case of the Kilshaws, can become interested in applied issues.

Applied policy is not, however, in principle subordinate to abstract policy work because applied policy work can initiate abstract policy work: the initiative for significant policy change can and often does come from the work of monitoring and tending existing policies. The Proceeds of Crime Bill started life in a Home Office Working Party on Confiscation headed by the eventual head of the bill team and containing several subsequent members of the team. Abstract policy is not always prompted by those involved in applied policy work, but it can be. It is, in fact, more likely for abstract and applied policy work to shape each other iteratively.

Applied policy work often incorporates a broader range of issues than abstract policy work. At this applied level, key decisions about the scope and character of any initiative are often shaped when officials consider more general questions such as how human rights issues are going to be handled, what are the knock-on effects for European and international commitments, how this change relates to existing legislation in the field and to wider legislation in other indirectly related fields and the policy priorities of other departments.

Abstract policy initiation is often so remote from everyday reality that large amounts of discretion are given to those engaged in applied work. While Huber and Shipan (2002) claim that politicians determine the eventual shape of legislation (above all, in their formulation, the length of the legislation, which they unconvincingly argue is inversely proportional to the amount of discretion given to those implementing it), it is evident from this examination of the process that this assessment cannot be accurate – certainly not in the UK, and there is no reason to think that UK politicians are at all distinctive in this respect. Politicians have little involvement in the technical details about how a bill should be structured and least of all in deciding its eventual length. Officials are given responsibility for developing legislation from broad initiatives (which they themselves may have had a hand in starting) that often contain few direct cues about how to implement them – indeed, as in the Adoption legislation, it was not clear to those looking at the White Paper precisely how much could be introduced without having to seek new legislation. The idea that the politician is the author of legislation confuses constitutional formality with empirical reality. There is no hierarchy of tasks – first the general policy outlines and then the middle people in bill teams doing the filling in. If there is a hierarchy between abstract and applied policy, it is that the people who do the much of the applied work are lower down in the grading structure than the minister and possibly those immediately around him or her doing much of the abstract work. This form of hierarchy has more relevance to a personnel officer than to a social scientist.
The full texts of the four bills examined are available from the HMSO website (http://www.legislation.hmso.gov.uk/acts/acts2002.htm), as are their explanatory notes (http://www.legislation.hmso.gov.uk/acts/expa2002.htm). The bills examined in this paper were selected on the basis of a variety of criteria. First, they had to be recent, so as to maximize the possibility that respondents could be contacted and were able recall the process of helping to put the legislation on the statute books. Second, they had to be produced by different departments to ensure any cross-departmental variability could be detected. Third, they had to offer prima facie evidence that they contained points of specific interest: one of them should cover the Law Commission as a frequent source of legislation, at least one should touch upon devolution issues, at least one should contain substantial human rights issues. An obvious omission is legislation arising from membership of the EU. However, much of the legislation implementing and otherwise applying EU policies in the UK is delegated legislation and has been dealt with elsewhere (see Page 2001). The four bills examined are not ‘representative’ of legislation. In the wider research of which this paper forms a part (Page and Jenkins forthcoming) other legislation had teams both much larger (one was being run by three Grade 5s) and much smaller (effectively involving only one person full time). However, sufficient similarities between the four items chosen suggest that they do not offer a distorted picture of how legislation is produced within the executive.

The Land Registration Act 2002 (c.9) reforms the system for registering land. It arose from collaboration, through a Joint Working Group, between the Law Commission and the Land Registry. The Law Commission is a Non-Departmental Public Body set up in 1965 to generate proposals for reviewing the law in England and Wales. It is led by five Commissioners, experienced lawyers appointed by the Lord Chancellor (see Arden 2000; Law Commission 2001b; see also the website of the Law Commission: www.lawcom.gov.uk). It produces papers looking at existing law, suggesting areas which need to be improved or overhauled. The Land Registry is a self-financing government department, established in 1862 to register land in England and Wales, responsible to the Lord Chancellor (see HM Land Registry 2003 and also the website of the Land Registry: www.landreg.gov.uk). The Joint Working Group had already proposed changes in the law on land registration in the Land Registration Act 1997. Subsequently the Group produced a consultation document ‘Land Registration for the Twenty First Century’ (Law Commission 1998) and a second report and draft bill three years later with the same name (Law Commission 2001a). There were three main objectives behind the joint work between the Land Registry and the Law Commission. First, it was
designed to take advantage of the digital revolution so that all conveyancing in registered land can be done electronically. Second, it aimed to ensure that the entry in the Land Register offers a more accurate reflection of the title of the land (for example, who has rights in relation to the land). Third, it sought to increase the amount of land that comes within the Land Register.

*The Employment Act 2002* (c.22) developed a number of proposals to ‘modernize the world of work’ (DTI Press Release 8 November 2001). Among other things it mandated paid paternity and adoption leave, altered procedures employers have to follow to dismiss staff, reformed the system of employment tribunals and introduced ‘work focused interviews’ for partners of benefit claimants. As there were diverse strands to the bill, its origins were diverse. The paternity and adoption leave provisions arose from a March 2000 commitment by the Chancellor to review employment legislation to see ‘what improvements can be made to maternity pay and parental leave to improve family friendly employment’. The introduction of flexible hours for parents of young children was a 2001 Labour election commitment. The Employment tribunals reforms were a response to the large growth in cases before tribunals and reflects a long-standing desire by both Conservative and Labour governments to encourage alternative forms of resolution of grievances. Some provisions of this bill arose from the recommendations of a DTI review of tribunal system which produced a consultation paper *Routes to Resolution* (DTI 2001). The introduction of job-focused interviews is part of a wider strategy to encourage claimants into work and was contained in the Labour Manifesto of 2001.

*The Proceeds of Crime Act 2002* (c.29) represents a major step in the development of legislation, begun with the 1986 Drug Trafficking Offences Act, to enable confiscation of the profits of criminal activity. The Act had its origins in a variety of reports. The Home Affairs Select Committee (1995) expressed dissatisfaction with the amounts recovered from existing legislation and argued that the Home Office Working Group on Confiscation should review the legislation. The Working Group produced a report (Home Office 1998). One of its main recommendations was to extend civil forfeiture – above all the seizure of assets through civil procedures even where no successful criminal prosecution has been brought. These and other proposals were the subject of a report by the Cabinet Office’s Performance and Innovation Unit (2001a), an influential unit with close links to the Prime Minister, *Recovering the Proceeds of Crime*. It endorsed many of the recommendations of the Home Office Working Party report. The Act that followed had three key features. First, it set up an Assets Recovery Agency with the power to investigate
suspected criminal assets and apply through civil or criminal proceedings for their recovery. Second, it consolidates and extends existing criminal legislation. Third, it sets entirely new civil procedures to recover ‘property which is, or represents, property obtained through unlawful conduct’ (Section 240). Although the Act covers devolved matters in Scotland, it is a UK-wide act containing separate provisions for Scotland and Northern Ireland.

The Adoption and Children Act 2002 (c.38) overhauls legislation on adoption, and had its origins in discussions about reform of adoption law in the previous Conservative administration, in particular the 1992 report of the Department of Health and Welsh Office (1992) Interdepartmental Working Group review of adoption law which gave rise to a White Paper in 1993 and a Draft Adoption Bill sent out for consultation in 1996. As with the Proceeds of Crime legislation, this topic was examined by the Cabinet Office’s Performance and Innovation Unit (2000) and government showed its intention to legislate in a White Paper of December 2000. An Adoption and Children Bill was introduced into Parliament in March 2001, but fell with the dissolution of Parliament before the 2001 General Election. The Adoption and Children Act of 2002 intended to ‘place children at the heart of the adoption service’ (Department of Health 2001). It strengthened the role that the ‘interests of the child’ have in court proceedings and agency decisions about adoption; it set out new procedures by which the wishes and needs of a child facing adoption should be determined and assessed and introduced measures to seek to minimize delay in adoption decisions. The Act included new powers to oblige local authorities to put in place a consistent range of adoption services. It placed the national adoption register on a statutory basis, gave rights to support for adoptive parents, regulated adoption support services, gave rights of review to prospective adoptive parents who felt they had been unfairly turned down and included new provisions for regulating access to information about past adoptions. It sought to widen the number of adoptive parents by allowing unmarried couples to adopt jointly – an issue which created a crisis in the Conservative opposition since its leader, Iain Duncan Smith, sought to maintain a united opposition to unmarried and homosexual couples being eligible for consideration as adoptive parents: not the first time that issues covered in the Bill made front-page newspaper headlines. Earlier, the activities of Mr and Mrs Kilshaw, whose adoption for payment of US-born twins made news headlines when they brought them to Britain, raised the issue of intercountry adoptions. The Act enhanced controls on intercountry adoption.

ACKNOWLEDGEMENT
I am most grateful to Jack Hayward and Lord Norton of Louth (Hull), Philip Cowley (Nottingham), Bill Jenkins (Kent), George Jones, Martin Lodge and
Richard Rawlings (LSE) and Peter Mair (Leiden) and an anonymous referee for very helpful comments on drafts of this paper. The research would not have been possible without Gabbie Hayes’ assistance. The need to maintain anonymity prevents me from acknowledging in any detail the enormous debt I owe to the civil servants who agreed to be interviewed for this research and who also commented on the draft. I hope that they feel it offers the fair picture of their valuable work that I said I would write.

REFERENCES


*Date received 3 March 2003. Date accepted 16 June 2003.*