

## Tacticians, Stewards, and Professionals: The Politics of Publishing Select Committee Legal Advice

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*At Westminster, there are increasing pressures on select committees to publish in-house legal advice. We suggest that examining the process of deciding to publish provides useful insights into the provision, reception, and use of legal advice, and the dynamics of select committees generally. We argue that the autonomy of select committees to decide what use they make of evidence and advice they receive is, in practice, constrained by the intra-institutional dynamics and practices of select committees. Committee actors – parliamentarians, clerks, and parliamentary lawyers – each have overlapping, sometimes competing, roles. Most of the time, these roles and the responsibilities they encompass coincide, but the prospect of publication reveals clear tensions between the different actors. This is the politics of publication: the tactical approach of politicians is in tension with the stewardship of clerks and the professional norms of parliamentary lawyers. We suggest this tension will only increase in the near future.*

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## INTRODUCTION

In 2017, the House of Lords European Union Subcommittee on Financial Affairs took a highly unusual step: it published the advice provided by the EU Committee legal adviser, Paul Hardy, as part of its inquiry on Brexit and the EU budget.<sup>1</sup> Hardy argued article 50 of the Treaty on European Union (TEU) allowed the United Kingdom ‘to leave the EU without being liable for outstanding financial obligations under the EU budget.’<sup>2</sup> The implications of such advice were politically controversial. But the act of publishing in its entirety the in-house legal advice provided to the Committee, with the legal adviser named, also merits serious attention.

Publishing legal advice in this way is rarely done, and then only on an ad hoc basis: seven times in the past decade. But there are intensifying pressures on the Westminster parliament – and indeed in other legislatures – which make it more likely to happen. The shift in the centre of influence at Westminster from the debating chamber towards select committees is one reason.<sup>3</sup> In the House of Commons, the Wright reforms (under which chairs and members of committees are now elected by their peers) will intensify this trend.<sup>4</sup> There have been high-profile hearings in select committees in recent years which have involved charged legal issues: tax avoidance by Goldman Sachs and phone hacking by News International, for example.<sup>5</sup> Parliamentarians feel increasingly compelled to seek and publish advice as evidence to justify particular conclusions and ensure influence.<sup>6</sup> Brexit, and all the complexity it entails, is another pressing reason. The process has forced government and legislature alike to wrangle with the publication of legal advice. In Westminster, opposition parties have repeatedly pushed the government to publish its internal advice, such as the legal implications of the withdrawal agreement.<sup>7</sup> The Welsh and Scottish legislatures have also faced pressures to publish during this period. In early 2018, their presiding officers took the unusual decision to disclose the legal reasoning for their

1 House of Lords EU Committee, Fifteenth Report, *Brexit and the EU Budget*, HL (2016–17) 125.

2 *id.*, p. 63.

3 A. Brazier and R. Fox, ‘Reviewing Select Committee Tasks and Modes of Operation’ (2011) 64 *Parliamentary Affairs* 354, at 365.

4 L. Fisher, ‘The Growing Power and Autonomy of House of Commons Select Committees: Causes and Effects’ (2015) 86 *Political Q.* 419.

5 M. Hodge, *Called to Account: How Corporate Bad Behaviour and Government Waste Combine to Cost Us Millions* (2016); House of Commons Committee of Privileges, First Report, *Conduct of witnesses before a select committee: Mr Colin Myler, Mr Tom Crone, Mr Les Hinton, and News International*, HC (2016–17) 662.

6 M. Geddes, ‘Committee Hearings of the UK Parliament: Who gives Evidence and Does This Matter?’ (2018) 71 *Parliamentary Affairs* 283.

7 H. Zeffman, ‘Labour to demand backstop legal advice’ *Times*, 3 November 2018.

determinations on the legislative competence of the EU ‘continuity’ bills.<sup>8</sup> However, publication may increase concerns about the ‘juridification’ of politics – that politics is becoming increasingly subject to legal norms.<sup>9</sup>

We therefore need to examine more systematically the processes of provision and reception of in-house legal advice to select committees, and the considerations for and against the publication of that legal advice. We undertake that task by drawing on published parliamentary reports and interviews conducted with three sets of core actors in the select committee setting at Westminster – parliamentarians, clerks, and parliamentary lawyers.

We argue that the autonomy of select committees to decide what use they make of evidence and advice they receive is, in practice, constrained by the intra-institutional dynamics and practices of select committees. Committee actors each have overlapping, sometimes competing, roles. Most of the time, these roles (and the responsibilities they encompass) coincide, but the prospect of publication, and any move towards publication as the default, reveals clear tensions between the different actors. This is the politics of publication: the *tactical approach* of politicians is in tension with the *stewardship* of clerks and the *professional norms* of parliamentary lawyers. And in practice parliamentary staff – clerks and parliamentary lawyers – exercise a soft power capable of constraining committees. This tension has led to legal advice being published on an unpredictable, ad hoc basis. It is therefore in the interests of all actors that official guidance be introduced.

This article proceeds as follows. Section I examines how the expansion of select committees at Westminster has focused on outcomes and impact, at the cost of examining the processes of decision making. Section II sets out the methodology for our empirical work. Section III sets out the institutional framework of select committees: their function and the broad ideal roles of the three sets of committee actors, namely, parliamentarians, clerks, and parliamentary lawyers. Section IV then explores these actors’ views on the publication of legal advice.

8 National Assembly for Wales, ‘Law Derived from the European Union (Wales) Bill: summary of legislative issues’ (27 February 2018), at <<http://www.assembly.wales/laid%20documents/pri-ld11431/pri-ld11431-e.pdf>>; Scottish Parliament, ‘Withdrawal from European Union (Continuity) Bill: statements on legislative competence’ (27 February 2018), at <[http://www.parliament.scot/S5\\_Bills/UK%20Withdrawal%20from%20the%20European%20Union%20\(Legal%20Continuity\)%20\(Scotland\)%20Bill/SPBill28LCS052018.pdf](http://www.parliament.scot/S5_Bills/UK%20Withdrawal%20from%20the%20European%20Union%20(Legal%20Continuity)%20(Scotland)%20Bill/SPBill28LCS052018.pdf)>.

9 For example, D. Nicol, *EC Membership and the Judicialization of British Politics* (2001); A. Tomkins, ‘In Defence of the Political Constitution’ (2002) 22 *Oxford J. of Legal Studies* 157.

## I. THE EXPANSION OF SELECT COMMITTEES: FOCUSING ON IMPACT OVER PROCESS, OUTCOMES OVER ACTORS

Since the 1970s, the select committee system at Westminster has progressively expanded, in terms of remit, activity, and power.<sup>10</sup> It is now seen as the primary mechanism through which the Executive is held to account, and increasingly as a means by which the conduct of third parties can be scrutinized. Select committee work is now seen as an alternative career path for MPs, a means for backbench MPs to influence policy and government.<sup>11</sup>

Research in political science has mostly focused on showing the influence and impact of select committee work.<sup>12</sup> It forms part of a broader reconsideration currently taking place: Parliament is now understood to have a much greater influence over both legislation and policy than previously thought.<sup>13</sup> However, research on the internal dynamics of committees and the process of committee decision making remains limited.<sup>14</sup> Examination of the work of Westminster parliamentary staff has yet to be seriously undertaken.<sup>15</sup> The literature that does exist (mostly on the European Parliament) suggests that legislative staff have an important influence over the work and decisions of committees.<sup>16</sup> Understanding legislative staff and their work is therefore key to unveiling the processes through which select committees may exert influence.

Legal academics have used committees to interrogate the relationship between law and politics. In recent years there have been concerns about the juridification of politics: the colonization of the political sphere by legal norms.<sup>17</sup> Thus, committees have been conceptualized as a means through

10 C. Johnson, 'Select Committees: Powers and Functions' in *Parliament and the Law*, eds. A. Horne and G. Drewry (2018, 2nd edn.) 103.

11 Fisher, *op. cit.*, n. 4.

12 M. Benton and M. Russell, 'Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons' (2013) 66 *Parliamentary Affairs* 772; H. White, *Select Committees under Scrutiny: The Impact of Parliamentary Committee Inquiries on Government* (2015).

13 For example, M. Russell and P. Cowley, 'The Policy Power of the Westminster Parliament: The "Parliamentary State" and the Empirical Evidence' (2016) 29 *Governance* 121.

14 For an exception, see A. Kelso, 'Political Leadership in Parliament: The Role of Select Committee Chairs in the UK House of Commons' (2016) 4(2) *Politics and Governance* 115.

15 But see E. Crewe, 'Magi or Mandarins? Contemporary Clerkly Culture' in *Essays on the History of Parliamentary Procedure*, ed. P. Evans (2018) 46.

16 For example, T. Winzen, 'Technical or political? An Exploration of the Work of Officials in the Committees of the European Parliament' (2011) 17 *J. of Legislative Studies* 27; C. Neuhold and M. Dobbels, 'Paper Keepers or Policy Shapers? The Conditions under which EP Officials Impact on the EU Policy Process' (2015) 13 *Comparative European Politics* 577.

17 For example, Nicol, *op. cit.*, n. 9; Tomkins, *op. cit.*, n. 9.

which constitutional values and the rule of law are protected,<sup>18</sup> and as a way of breaking the impasse between the schools of political and legal constitutionalism – the former viewing Parliament as the more legitimate means of ensuring accountability and government under the law, the latter viewing the courts as the better mechanism.<sup>19</sup>

Some legal academics, advocating a shift towards greater transparency, a culture of justification, or commitment to deliberative democracy, have made a broader argument: legal advice to the legislature should be published – or at least there should be greater public detail on the legal reasoning for particular decisions by legislative actors.<sup>20</sup> Publication would encourage dialogue and deliberation amongst parliamentarians, and/or assist members in their duty to evaluate the legality and constitutionality of executive action and proposed legislation. It is worth noting that there is now an expectation that legal advice provided by the European Parliament’s legal service will be published.<sup>21</sup>

Legal research, however, has focused on select committees with legal remits.<sup>22</sup> They do not tell us about how the broader group of select committees engage with in-house legal advice and the work of parliamentary lawyers;<sup>23</sup> it has also been about the impact and influence of committee work, and less on the process by which legal advice is provided and received.<sup>24</sup> The implicit framework is *inter*-institutional: comparing Parliament and the courts. *Intra*-institutional analyses, or analyses of the internal work of

- 18 For example, R. Hazell, ‘Who is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?’ [2004] *Public Law* 495; D. Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] *Public Law* 323.
- 19 M. Hunt, ‘The Joint Committee on Human Rights’ and A. Le Sueur and J. Caird, ‘The House of Lords Select Committee on the Constitution’, both in *Parliament and the Law*, eds. A. Horne et al. (2015, 1st edn.) 249, 281.
- 20 For example, C. McCorkindale and J. Hiebert, ‘Vetting Bills in the Scottish Parliament for Legislative Competence’ (2017) 21 *Edinburgh Law Rev.* 319; G. Appleby and A. Olijnyk, ‘Parliamentary Deliberation on Constitutional Limits in the Legislative Process’ (2017) 40 *University of New South Wales Law J.* 976. On a culture of justification, see M. Hunt, ‘Introduction’ in *Parliaments and Human Rights*, eds. M. Hunt et al. (2015) 1, 2.
- 21 See Regulation 2001/1049/EC regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/48 and Case T-540/15, *De Capitani v. European Parliament* [2018] OJ C161/46.
- 22 For example, Hazell, *op. cit.*, n. 18; A. Kavanagh, ‘The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog’ in *Parliaments and Human Rights*, eds. M. Hunt et al. (2015) 115.
- 23 A rare exception is A. Kennon ‘Legal Advice to Parliament’ in Horne et al. (eds.), *op. cit.*, n. 19, p. 121.
- 24 C. Evans and S. Evans, ‘Messages from the Front Line: Parliamentarians’ Perspectives on Rights Protection’ in *The Legal Protection of Human Rights: Sceptical Essays*, eds. T. Campbell et al. (2011) 329; P. Yowell, ‘The Impact of the Joint Committee on Human Rights on Legislative Deliberation’ in Hunt et al. (eds.), *op. cit.*, n. 20, p. 141.

committees, are rare: we are told about parliamentary lawyers in committees, but rarely about their relationships with other committee actors.

Thus, research in law and political science have concentrated on select committee impact over process, and outcomes over actors. Select committees remain ‘black boxes’. Process and impact, however, cannot be easily separated: processes may strongly influence outcomes. Examining the processes of provision and publication of legal advice may offer us insights into committee decision making, how legislative actors interact, and what committees think about influence. Moreover, examining actors’ views about publication may also tell us more about the ‘internal’ view of Parliament – what legislative actors think is the appropriate relationship between law and politics.

## II. METHODOLOGY

This article draws on data from a project examining the provision and reception of legal support in the four legislatures of the United Kingdom. Our primary research method are semi-structured elite interviews, conducted over 2017–18. We aimed to capture a variety of actors: those who provide legal support – primarily, in-house parliamentary lawyers – and those who receive it, namely, clerks and parliamentarians.

In Westminster, 27 individuals involved in the provision and reception of in-house legal advice have been interviewed: 11 in-house lawyers, eight clerks, and eight parliamentarians. We interviewed an equal number of clerks and lawyers from the House of Commons and the House of Lords (with some lawyers serving joint committees). Of the parliamentarians, three are MPs, five are peers (one of whom is a former MP); and half were or are chairs of select committees. We interviewed former and current office-holders on condition of anonymity. Interviews were semi-structured, recorded, and transcribed; they were then coded using NVivo. We have also drawn on publicly available parliamentary documents – in particular, select committee reports, parliamentary debates, and published legal advice – partly in order to circumvent issues about client confidentiality.

In this article, we look only at the phenomenon of legal advice provided by in-house parliamentary lawyers to select committees which has been officially published in full and separately to the main body of a committee report (as opposed to referred to or interwoven into the text). We do not cover evidence given by witnesses. This work is important, but it is not given by in-house staff and therefore not subject to the internal norms governing permanent parliamentary staff. Moreover, evidence is routinely published; its publication does not incur an obligation on the committee to agree or comply with it.<sup>25</sup> We also do not cover leaked legal advice, although leaks

<sup>25</sup> Thus, we regretfully exclude the House of Lords Privileges Committee, First Report, *The Powers of the House of Lords in Respect of Its Members*, HL (2008–9) 87,

touch upon many of the issues we deal with in this article.<sup>26</sup>

We have identified seven examples through analysis of parliamentary documents and mentions in interviews.<sup>27</sup> That is not many, but the list is not exhaustive. And, for the reasons already set out, we think that pressure to publish legal advice is growing – indeed, six of the seven examples we have identified took place in the past four years. We explain some of the probable rationales for their publication in Part IV (actors’ views of publication). However, on the limited data, there is no overriding reason which transcends the particular circumstances of these examples: the dynamics of select committees are too unpredictable. Thus, we ultimately suggest the introduction of written guidance in order to improve consistency.

which included the full legal advice of both Baroness Scotland QC (then Attorney-General) and Lord MacKay (former Lord Chancellor and ex-Law Lord): neither were ‘in-house lawyers’.

- 26 We have identified two examples of leaked legal advice: ‘Blair’s EU safeguards “may not be watertight”’ *Telegraph*, 26 June 2007, at <<http://www.telegraph.co.uk/news/uknews/1555656/Blairs-EU-safeguards-may-not-be-watertight.html>>; ‘Leaked Commons legal analysis of Brexit deal vindicates Trump, contradicts May and adds to Brexiteers’ concerns’ *BrexitCentral*, 2 December 2018, at <<https://brexitcentral.com/leaked-commons-legal-analysis-brexit-deal-vindicates-trump-contradicts-may-adds-brexiteers-concerns/>>.
- 27 House of Commons Committee on Standards and Privileges, Fourteenth Report, *Privilege: Hacking of Members’ Mobile Phones*, HC (2010–11) 628; House of Commons EU Scrutiny Committee, ‘The Inquiry into the UK Government’s renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny: preliminary note on the outcome of negotiations’ (2016), at <<https://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/news-parliament-20151/legal-opinion-24-feb-16/>>; House of Commons Public Administration Select Committee, Fifth Report, *Lessons for Civil Service impartiality from the Scottish independence referendum*, HC (2014–15) 111; House of Commons Women and Equalities Committee and the Joint Committee on Human Rights, ‘The proposed appointment of David Isaac as the Chair of the Equality and Human Rights Commission’ (26 April 2016), at <<https://www.parliament.uk/documents/commons-committees/women-and-equalities/Correspondence/Letter-from-David-Isaac-26-04-16.pdf>>; House of Commons Public Administration and Constitutional Affairs Committee, Twelfth Report, *Lessons learned from the EU Referendum*, HC (2016–17) 496; House of Lords EU Committee, op. cit., n. 1; House of Lords Lord Speaker’s Committee, *Report of the Lord Speaker’s Committee on the Size of the House* (2017) – although, technically, the Lord Speaker’s Committee was not a select committee, but an ad hoc committee established under the aegis of the Lord Speaker. This report did, however, include the full legal advice provided by the current House of Lords Counsel to the Chairman of Committees, James Cooper.

### III. PROVIDING LEGAL ADVICE TO COMMITTEES: FRAMEWORK, ACTORS, ROLES, AND PROCESSES

In this section, we lay the groundwork to help us understand the intra-institutional dynamics of select committees, and why proposals to publish in-house legal advice may cause tension between actors. We set out the institutional framework of select committees, the processes by which they make decisions, and the actors involved. We then introduce the three core actors in select committees: parliamentarians, clerks, and parliamentary lawyers, and their respective, self-perceived roles – particular ways of behaving within the select committee context, encompassing particular responsibilities or duties.<sup>28</sup> These roles are ideal: no actor conforms exactly to type.

#### 1. *The institutional framework*

Select committees are cross-party parliamentary bodies, which primarily scrutinize executive action and sometimes legislation. They are semi-autonomous in nature, not dependent from a central authority in Parliament, and so there are very few ‘binding’ rules on what they can do. Each committee usually has 11 backbench parliamentarians, including a chair. Committee composition reflects party balance in the particular House, with committee chairs being mostly allocated along similar lines. Members and most select committee chairs are now elected in the Commons, but still allocated by ‘the usual channels’ (that is, party leaders, convenors, and whips) in the Lords.

Select committees are supported by a secretariat, consisting of impartial ‘permanent’ officials who support the legislature. They are permanent in the sense that they do not leave following a general election; and impartial in that they are appointed on apolitical criteria and must support all parliamentarians, regardless of political disposition.<sup>29</sup> Broadly speaking, Commons committee secretariats are larger, with a clerk, supported by a second clerk, and a number of committee specialists, assistants, and media officers. In the Lords, there is usually a clerk, a policy analyst and a committee assistant. Committees with a legal remit will also have a parliamentary lawyer or lawyers permanently attached. For instance, the Joint Committee on Statutory Instruments (JCSI) has seven parliamentary lawyers (although some work part-time); the Joint Committee on Human Rights (JCHR) has two, and the Justice Committee one.

Committees scrutinize by inquiring into particular policy areas, taking evidence from a variety of stakeholders, and publishing reports with recommendations. The aim of this scrutiny is to *influence* different actors: parlia-

28 P. Selznick, *Leadership in Administration* (1984) 82.

29 House of Commons, *Staff Handbook* (2013, 6th edn.) paras. 5.1–5.2; House of Lords, *Staff Handbook* (2012) para.12.1.



ment, the government, and the wider public. Select committees cannot force change: their effectiveness is ‘measured in terms of the influence which committees exercise, both with individual members of each House and . . . with departments.’<sup>30</sup> Committees, and in particular their chairs, must therefore consider how to maximize their influence. There are a range of factors affecting the impact of a committee report, which both academics and interviewees agree upon: the quality of its arguments, the strength of its evidential basis, committee unanimity, the reputation of the committee and its members across the House, and the committee’s media profile.<sup>31</sup> These considerations are interconnected, but of them, interviewees emphasized committee unanimity and reputation as the most important in ensuring the influence of a report.

## 2. *The tacticians: parliamentarians*

The work and objectives of committees are driven primarily by the perceived roles and goals of parliamentarians. Parliamentarians were acknowledged by all interviewees as the actors whose goals should be given most deference. As Crewe argues:

An essential element of the clerkly culture in the Commons is the recognition, forcefully socialised in new recruits, that ‘election’ confers a power and authority that mere appointment can never confer. Elected Members are . . . fundamentally different beings.<sup>32</sup>

Peers lack elected legitimacy, but are deferred to because they fulfil other modes of representation – in particular, they are able to voice views not heard in the Commons, and often have expertise that elected members lack.<sup>33</sup>

MPs usually belong to a political party, and they tend to be amateurs rather than experts. Within the framework of committees, parliamentarians have a number of key goals: re-election, the promotion of party objectives, influence within and outside the House, and the production of good public policy.<sup>34</sup> Lords share similar goals to MPs (except re-election), but differ slightly in nature: most belong to a political group, but many are non-aligned, and many are experts in their field.

The priority given to each goal differs with each member, but within the select committee context, the broad role of parliamentarians, or way of

30 Feldman, *op. cit.*, n. 18, p. 347.

31 *id.*; D. Natzler and M. Hutton, ‘Select Committees: Scrutiny à la Carte?’ in *The Future of Parliament: Issues for a New Century*, ed. P. Giddings (2005) 88, 96; Benton and Russell, *op. cit.*, n. 12.

32 Crewe, *op. cit.*, n. 15, p. 57.

33 P. Dorey and M. Purvis, ‘Representation in the Lords’ in *Exploring Parliament*, eds. C. Leston-Bandeira and L. Thompson (2018) 244.

34 Adapted from R. Fenno, *Congressmen in Committees* (1973). See, also, Geddes, *op. cit.*, n. 6.

behaving, is *tactical*. Finding means to exert influence is usually key: as former MP Nick de Bois suggests, ‘the only power you have as an MP is the power to influence.’<sup>35</sup> In committees, however, influence must be achieved within committees via agreement. This can be difficult, given that parliamentarians are, as a group, both fiercely partisan and highly autonomous – particularly in the elected Commons. Kelso notes: ‘Select committee scrutiny of government, and its policies and decision making, can only be maximized if members operate mostly consensually for most of the time.’<sup>36</sup> Thus, committees deliberate in private, spending much time seeking consensus in order to ensure influence. A committee chair stated:

[A report] obviously always carries more weight if you can get it unanimous, so ... on one or two occasions, I’ve toned down what the officials have put in the draft ... because ... some members of the committee I knew wouldn’t wear it in that formulation, but we could get to a position in the middle ... [S]ometimes these reports are not an end, you know, they’re important themselves, but they also trigger further discussion and debate ...<sup>37</sup>

In our interviews, parliamentarians asserted their autonomy to decide. This was for a variety of reasons: because of the need to seek consensus; because parliamentarians understood politics best; and because parliamentarians were the most legitimate actors within the committee, and therefore best able to exercise effective influence:

You cannot have a committee of House of Commons officials – or lawyers – telling the government ‘your laws are a load of bollocks’ ... It has to have the imprimatur of parliamentarians.<sup>38</sup>

The corollary of this is that clerks and parliamentary lawyers are subordinate: ‘Clerks are there to advise, we decide.’<sup>39</sup>

Parliamentary staff exist to support the work of parliamentarians – here, in the institutional form of committees. Finally, of all our interviewees, parliamentarians were the least inclined to reflect on the medium- or long-term interests of parliament as an institution. They tended to focus instead on tactical matters, and the specific committee they sat on. Thus, one MP argued, ‘there is ... this culture where the clerks are more loyal to their organisation than they are to the committee, and that is a prevalent culture, and that’s not very good.’<sup>40</sup> Parliamentarians rarely make claims on behalf of Parliament as an institutional collectivity.<sup>41</sup>

35 N. de Bois, *Confessions of a Recovering MP* (2018) 30.

36 Kelso, op. cit., n. 14, p. 119.

37 Interviewee 20, MP (26 July 2017).

38 Interviewee 27, peer and former MP (13 September 2017).

39 Interviewee 20, MP (26 July 2017).

40 Interviewee 54, MP (16 January 2018).

41 D. Judge and C. Leston-Bandeira, ‘The Institutional Representation of Parliament’ (2018) 66 *Political Studies* 154, at 162.

### 3. *The stewards: clerks*

Clerks have traditionally been a socially distinct group, a career cadre of impartial officials: the majority have spent most, if not all, of their working lives in Parliament.<sup>42</sup> They have a cohesive set of shared understandings about their roles, and what the other core actors should be doing – a ‘clerkly culture’.<sup>43</sup> They are trained as generalists rather than specialists, and have a broad set of responsibilities: clerking for the chamber, managing committees, or the administration of Parliament. Here, we look only at managing committees.

Clerks see themselves as having a broad set of official responsibilities in relation to select committees.<sup>44</sup> First, they have management responsibilities: they manage the activities of the committee, including line-managing committee staff. Second, clerks advise committees as experts in parliamentary procedure. Third, they brief members on research and witness evidence, and assist them in assessing that evidence. Finally, clerks offer to the committee a degree of political judgement on how to maximize influence. Perhaps in recognition of these responsibilities, the clerk always sits next to the committee chair in meetings, their physical proximity reflecting the importance of the clerk to the committee.

Clerks ultimately see themselves as sharing responsibility for the reputation of their committees. This means preventing committees from damaging their credibility through ill-informed conclusions and any other behaviour. As one clerk put it:

You’ve got people making arguments to a committee, whether they are legal or any other arguments. And your responsibility to the committee is to point them to the best range of advice, witnesses . . . to do your best to help them not reach patently unfounded or absurd conclusions.<sup>45</sup>

Management of the committee and protection of its reputation are committee-specific responsibilities. But clerks also see themselves as having a set of long-term, institution-wide responsibilities as well: a *stewardship* role. Crewe notes:

While Members are under huge pressure to respond to the everyday pressures from the media, their parties and their constituencies, Clerks take the longer view, coaxing committees towards greater effectiveness in seeing the bigger picture, or at least seeing it from many angles.<sup>46</sup>

In this respect, they are particularly concerned to protect the impartiality of parliamentary staff, and the autonomy of Parliament.

42 Crewe, *op. cit.*, n. 15, p. 56.

43 *id.*

44 M. Geddes and J. Mulley, ‘Supporting Members and Peers’ in Leston-Bandeira and Thompson (eds.), *op. cit.*, n. 33, pp. 33, 40.

45 Interviewee 21, clerk (27 July 2017).

46 Crewe, *op. cit.*, n. 15, p. 61.

Several clerks interviewed stressed the importance of staff impartiality: it was not for them to offer their views on policy questions. As an extension of this responsibility, some clerks considered it their duty to police the impartiality of parliamentary lawyers, and to counsel chairs if they believed that lawyers were straying too far into matters of policy and advocating particular positions: ‘I think it’s the clerk’s job to monitor whether it’s happening, and to have the first attempt at stopping it.’<sup>47</sup>

Closely linked to impartiality is the clerks’ view that they are responsible for protecting the autonomy of committees and Parliament. This stems from their ongoing engagement with parliamentarians and clerks’ view of parliamentarians as having an elevated status. This responsibility has a defensive aspect: clerks are sensitized to identify any matter which might engage Parliament’s exclusive cognisance – the right to regulate its own proceedings. But it also has a positive aspect – asserting Parliament’s autonomy. Feldman notes the response of the clerks when working as a parliamentary lawyer for the JCHR, and having drafted an initial set of letters for government departments:

I couched these letters in polite (some would say obsequious) terms: ‘The Committee would be most grateful ...’ These expressions were ruthlessly excised by the Lords and Commons Clerks of the Committee, who reminded me that the ministers are accountable to Parliament, not the other way round: the two Houses are the boss ...<sup>48</sup>

The clerks interviewed saw themselves as distinct from parliamentary lawyers: they understood ‘the political’ – parliamentarians, the Houses, the sphere of politics – better, perhaps because of their proximity to parliamentarians and because of their particular expertise. As one clerk put it:

lawyers being lawyers, they’re always going to be cautious. Me being a parliamentary official, I’m naturally, of course, cautious, but I’m also from a political perspective ... more inclined to want to hold the line further up, to be assertive on behalf of Parliament.<sup>49</sup>

#### 4. *The professionals: parliamentary lawyers*

Parliamentary lawyers are in-house lawyers employed by one of the Houses of Parliament to provide legal support.<sup>50</sup> They should be distinguished from lawyer-politicians; parliamentarians’ staff who are legally qualified, but who serve in a partisan capacity; and parliamentary counsel, government lawyers who draft executive primary legislation. This definition also excludes

47 Interviewee 11, clerk (29 June 2017).

48 D. Feldman, ‘None, one or several? Perspectives on the UK’s Constitutions’ (2005) 64 *Cambridge Law J.* 329, at 344.

49 Interviewee 21, clerk (27 July 2017).

50 See, generally, Kennon, *op. cit.*, n. 23.

specialist advisers, who are appointed to support a committee for a single inquiry: they are temporary, not permanent staff.<sup>51</sup> Parliamentary lawyers are small in number: currently, there are 16 in the House of Commons and 6 in the Lords.<sup>52</sup>

In contrast to clerks, parliamentary lawyers at Westminster have traditionally not been a career cadre. Few have spent their working lives in Parliament: rather, they are mostly former government lawyers, with a small group coming from ‘the outside’, that is, academics and barristers. Moreover, parliamentary lawyers at Westminster historically have not formed a unified service. They have been line-managed lightly, sometimes by clerks, sometimes by more senior lawyers, and organized functionally, attached to a particular committee or office. Their organization has reflected the nature of Parliament: a body of separate constituent parts – the Houses, select committees – each of which act in a largely semi-autonomous manner from the other.<sup>53</sup> For all these reasons, parliamentary lawyers lack the cohesive, shared norms of clerks: what links them together is their professional norms.

The work of parliamentary lawyers is not easily defined, partly because of their compartmentalization and ad hoc growth at Westminster. Like clerks, they have a range of responsibilities in Parliament, but here we focus on their work with committees. Within committees their roles vary, because of remit and the particular personalities of chair, clerk, and parliamentary lawyer. Generally, however, in line with committees’ principal objective, parliamentary lawyers work to enhance scrutiny:

my job was to make ... an MP’s scrutiny ... more effective ... Assess, you know, the advantages and disadvantages of a proposal. Effective scrutiny is providing your members with the advice they need actually to be asking the right questions of government, to tease out the stuff the government doesn’t want to share.<sup>54</sup>

These lawyers perform this scrutiny-enhancing work in a number of ways. Much of their work revolves around explanation: explaining existing legal frameworks to members ‘in a way, as far as possible, that non-lawyers could grasp.’<sup>55</sup> They support committees by identifying the key legal issues and suitable witnesses to inquiries, and corresponding with witnesses and government departments. Sometimes they provide legal advice in the

51 The House of Lords Constitution Committee’s two part-time legal advisers sit on the ‘penumbra’. They are appointed on a sessional basis, but remain with the Committee for much longer than a single inquiry, so we class them as parliamentary lawyers.

52 These numbers are calculated from internal documents. It should also be noted that some only work part-time. Neither have we included here paralegal staff (two) and the 1–2 lawyers working for the Joint Procurement Service.

53 B. Yong, ‘The Governance of Parliament’ in Horne and Drewry (eds.), *op. cit.*, n. 10, p. 75.

54 Interviewee 5, parliamentary lawyer (25 May 2017).

55 Interviewee 2, parliamentary lawyer (23 March 2017). See, also, Kennon, *op. cit.*, n. 23, p. 133.

traditional sense: drafting a written opinion giving a view about the law or the constitutionality of a particular action. They also critique the quality of primary and secondary legislative texts and draft amendments to reflect the committee's conclusions. In these various ways, parliamentary lawyers provide what Mulley and Kinghorn describe as 'non-litigious legal advice'.<sup>56</sup> At their most general, they engage in problem solving, offering views 'on a way of approaching a problem, or approaching a report'.<sup>57</sup>

Several interviewees saw the work of lawyers being directly linked to the committee's reputation – and behind that, influence. One clerk suggested that one responsibility of parliamentary lawyers is to ensure that 'the committee is aware of potential criticisms of the position they're considering taking from the legal community'.<sup>58</sup> One parliamentary lawyer explained:

the absolute minimum role is to stop the committee from doing anything embarrassing, either during evidence sessions or in its published reports ... The reputation of the committee really depends on the usefulness and acceptance of its reports. So, it takes time to build up a reputation. But it can be relatively easily lost once you've built it up. So that was my first job, particularly as it related to the law.<sup>59</sup>

But parliamentary lawyers also saw themselves as having a particular *professional* role, which came with particular responsibilities. These responsibilities overlapped, to some extent, with the stewardship role of the clerks – in particular, the preservation of their impartiality and the autonomy of the committee and Parliament. These, however, tended to be narrower, framed in the professional language of the lawyer–client relationship. So, for instance, lawyer interviewees insisted that it was for the client to decide what to do with their advice: '[W]e advise the client and then the client decides what to do.'<sup>60</sup> This stance reflects the 'standard conception' of the lawyer's role – in particular, the principles of non-accountability (that lawyers should not be held responsible for their client's actions) and neutrality (that it is not for lawyers to judge their clients).<sup>61</sup> Both principles are based on client autonomy.<sup>62</sup>

56 J. Mulley and H. Kinghorn, 'Pre-legislative Scrutiny in Parliament' in *Parliament: Legislation and Accountability*, eds. A. Home and A. Le Sueur (2016) 39, 48.

57 Interviewee 2, parliamentary lawyer (23 March 2017). See, also, D. Howarth, *Law as Engineering: Thinking About What Lawyers Do* (2013) 30.

58 Interviewee 11, clerk (29 June 2017).

59 Interviewee 2, parliamentary lawyer (23 March 2017).

60 Interviewee 12, parliamentary lawyer (29 June 2017).

61 A. Boon, *Lawyers' Ethics and Professional Responsibility* (2015) 112–13.

62 S. Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities' (1986) 11 *Law & Social Inquiry* 613.

## 5. *Providing legal advice to committees: everyday practice*

Legal advice may be sought by any committee in an inquiry or when scrutinizing legislation. Usually, this is requested via the clerk, the committee's members or chair. This advice comes primarily from in-house parliamentary lawyers. 'Legal advice' itself is a process and not an event: it can cover the provision of information to the specific application of the law, and any of the various stages in-between. We focus on the more formal side of the spectrum, as it is the most likely to be published.

Where written advice is required, it will be drafted by the parliamentary lawyer and sent to the clerk and chair, or circulated directly to the committee. It will then be discussed in a private session of the committee, with the parliamentary lawyer present, if necessary, to explain and sometimes justify their advice.

Non-publication of in-house legal advice is the norm. So, for instance, the House of Commons Privileges Committee in its inquiry on witnesses' conduct before select committees (stemming from issues raised by the Commons' Culture, Media and Sport inquiry on phone hacking) rejected calls to have its internal legal advice published, citing both parliamentary and legal professional privilege.<sup>63</sup> Where in-house legal advice is published without authorization, it is treated as a violation of parliamentary privilege.<sup>64</sup>

This norm of non-publication exists partly because much 'legal advice' is mundane: it is informative, not dispositive. Alternatively, views on the state of the law may differ substantially, so that counsel's legal advice amounts to a form of opinion: it offers the committee no certainty. But the norm also exists because where legal advice is dispositive, it is usually woven into the committee report, or witness evidence covers the same ground. As we shall see in Part IV, the publication of written legal advice has arisen from very specific, unique circumstances. In such cases, the legal advice has taken on an added significance which has elevated it from the advice routinely supplied by parliamentary staff supporting a committee.

The result, however, is that there is no unique process by which confidential advice is authorized for publication. Further, there is an absence of official guidance on what considerations should be taken into account where a committee expresses an intention to publish in-house legal advice.<sup>65</sup>

63 HC Committee of Privileges, *op. cit.*, n. 5, para. 62.

64 House of Commons Standards and Privileges Committee, Twentieth Report, *Premature disclosure of select committee papers*, HC (2007–8) 1212.

65 To our knowledge, this is also true of the devolved assemblies.

## IV. ACTORS' VIEWS ON THE PUBLICATION OF LEGAL ADVICE

### 1. *Consensus on committee autonomy and the value of transparency*

Having established the framework within which legal advice is provided to committees, the goals and roles of its main actors, and the processes through which legal advice is given (and on occasion published), we now turn to a discussion of the consequences of potential publication.

Interviews revealed two key points of consensus amongst all actors on the publication of legal advice. First, select committees have *autonomy* over the use of the evidence and information which they receive. Second, all recognized that, under certain circumstances, select committees can publically disclose legal advice in the interests of *transparency*.

The dominant norm identified on the issue of publishing legal advice was the autonomy of select committee decision making. There were two dimensions to this. First, actors were united in the view that committee decisions are the political responsibility of committee members, not parliamentary staff.<sup>66</sup> A number of clerks and lawyers expressed the view that decisions ultimately taken require 'political backing'<sup>67</sup> and 'committee ownership'.<sup>68</sup> As one lawyer explained,

[I]t's really important that they take responsibility for speaking in their own voice, and issuing reports – which may have been drafted for them by others, but which they'd had to discuss and agree with whether or not they want to put it out there in their name.<sup>69</sup>

This dimension of committee autonomy is reflected in current working practices. Clerks and parliamentary lawyers have low visibility. Most of their work is conducted 'behind the scenes',<sup>70</sup> with the consequence that their work is 'little noticed outside or even inside Westminster'.<sup>71</sup> One clerk said:

To be honest, committees are often totally unaware of the in-house staff that are helping them – beyond the clerk ... [M]ost members of committee will probably be unaware that there were legal advisers working with the committee.<sup>72</sup>

These arrangements reinforce the autonomy of the committee, and also help to ensure that staff are unlikely to become the subject of political controversy. Notably, several of the clerks and parliamentary lawyers interviewed preferred this arrangement.

66 Brazier and Fox, *op. cit.*, n. 3.

67 Interviewee 9, parliamentary lawyer (27 June 2017).

68 Interviewee 11, clerk (29 June 2017).

69 Interviewee 22, parliamentary lawyer (27 July 2017).

70 Feldman, *op. cit.*, n. 18, p. 343.

71 Natzler and Hutton, *op. cit.*, n. 31, p. 92.

72 Interviewee 11, clerk (29 June 2017).



The second dimension of this autonomy was that, in principle, committees have full discretion over how they make use of the evidence and information which they receive, including the advice of parliamentary staff. An MP explained that ‘[t]he members will decide how much weight they give to [advice] in the overall report.’<sup>73</sup> Likewise, a peer argued that ‘you have to think about the freedom of the select committee . . . They’re not obliged to accept the advice.’<sup>74</sup> This was a political judgement, subject to political considerations – such as the potential impact on the House.

Clerks agreed. One argued that there were few constraints on how a committee makes use of advice: ‘. . . the committee might not agonise over legal advice. It might just say, “Oh, there it is”.’<sup>75</sup> Another clerk emphasized that ‘[u]ltimately, a committee can decide to publish anything.’<sup>76</sup> From this perspective, deciding whether or not to publish legal advice forms part of the committee’s overall assessment of the evidence and information it has received – an assessment intrinsic to its autonomy.

Parliamentary lawyers agreed, but often expressed this by raising legal professional privilege (LPP), a right of confidentiality which ‘belongs to the client’,<sup>77</sup> and client autonomy:

[T]o an extent your advice is . . . the clients’ to do what they want with.<sup>78</sup>

My advice is to the committee . . . it’s their advice . . . If they want to publish it for political reasons or policy reasons, then I didn’t feel like I could stand in the way of that.<sup>79</sup>

It was not for lawyers to posit views on what should be done with the advice they had given: publishing the advice was a political judgement for their client, the committee. This stance reflects the principle of non-accountability (that is, lawyers are not responsible for the client’s actions), a core aspect of the standard conception of the lawyer–client relationship.<sup>80</sup> Thus, lawyers’ professional norms further reinforce the autonomy of committees to decide how they weigh up and make use of evidence and information.

Interviewees acknowledged that transparency might require the public disclosure of legal advice under certain circumstances. This turned on the significance of the legal advice to a committee’s work. Interviewees thought that committees should be transparent in terms of what shaped their thinking: this could justify the publication of advice which, though initially given in confidence, had played a significant role in their conclusions. One peer

73 Interviewee 20, MP (26 July 2017).

74 Interviewee 8, peer (22 June 2017).

75 Interviewee 6, clerk (26 May 2017).

76 Interviewee 11, clerk (29 June 2017).

77 *Three Rivers District Council & Others v. Governor and Company of the Bank of England (No 6)* [2005] 1 A.C. 610, para. 37 (Baroness Hale).

78 Interviewee 10, parliamentary lawyer (27 June 2017).

79 Interviewee 5, parliamentary lawyer (25 May 2017).

80 Boon, *op. cit.*, n. 61, p. 113.

explained that where a legal question is the ‘crucial issue’, there may be a need for the committee to ‘make clear the legal arguments . . . which we had found convincing’.<sup>81</sup> Under such circumstances, there was nothing ‘improper’<sup>82</sup> about a committee deciding to publish advice. Clerks and lawyers agreed. One clerk suggested that ‘if . . . it’s something that’s really influenced the committee, the committee might decide to publish it to show why they make a particular recommendation.’<sup>83</sup> Similarly, a parliamentary lawyer indicated that they would not oppose the publication of legal advice where it had formed the basis of a ‘critical part’<sup>84</sup> of a committee report.

Conversely, interviewees saw no point in publishing advice which had little influence on a committee’s conclusions. One peer argued that ‘. . . whether they should publish [advice] or not sometimes depends on whether they accept it or not.’<sup>85</sup> Likewise, a clerk suggested that ‘. . . legal advice is just that, it’s advice. If the committee gets advice and it doesn’t decide to follow it, what’s the point of publishing it?’<sup>86</sup>

## 2. *Where actors diverge: tactics, stewardship, and professional values*

If there is agreement or *convergence* centred around committee autonomy and transparency, why is non-publication the norm at Westminster? It is partly because legal advice is mostly mundane, or, where relevant, woven into committee reports. But it is also because committees have, thus far, generally exercised their autonomy by refraining from publishing advice. However, the prospect of committees publishing advice more frequently, or a move toward publication as the default, revealed a *divergence* between parliamentarians on the one hand and parliamentary staff on the other – stemming from their different roles.

Parliamentarians rarely showed concern about the implications of publication. Their considerations were primarily *tactical*, focusing on whether the published advice was likely to enhance the influence of a committee report. By contrast, no clerk or lawyer interviewed was unequivocally open to the prospect of advice being published more regularly. Actors were guided by different, but often overlapping, sets of considerations derived from their roles. Clerks expressed a variety of *institutional* or *stewardship* concerns over the potential ramifications of publishing advice, based on their responsibilities to the House as a whole. Parliamentary lawyers, on the other hand, were primarily concerned with the *professional* implications for lawyer–client relationships across the legislature.

81 Interviewee 18, peer (13 July 2017).

82 *id.*

83 Interviewee 11, clerk (29 June 2017).

84 Interviewee 5, parliamentary lawyer (25 May 2017).

85 Interviewee 8, peer (22 June 2017).

86 Interviewee 6, clerk (26 May 2017).

(a) The tactical concerns of parliamentarians

The key consideration for parliamentarians was *tactical*: whether or not the publication of legal advice was likely to enhance the influence of a committee report. Here, there was a mixture of views. One MP, for example, had ‘absolutely no doubt’ that they would publish legal advice if it supported their committee’s agenda; but they also insisted they would not publish the advice if they ‘didn’t believe it was credible’.<sup>87</sup> One peer saw a distinct advantage in publishing advice: issuing legal analysis ‘in the legal advisor’s own words’ could fortify a committee’s conclusions on legal issues, providing ‘authority to our report’.<sup>88</sup> Another MP argued that a committee report would be less influential if its content was too legalistic: ‘the ultimate product . . . is political rather than legal . . . not aimed at lawyers’, and ‘aimed principally at the House of Commons’.<sup>89</sup> The underlying consideration was influence. This echoes a recent report for the Parliamentary Office of Science and Technology on the use of research by parliamentarians, which observed that parliamentarians generally rely on research not only to support effective scrutiny, but to ‘enhance the credibility of arguments put forward’.<sup>90</sup>

Lawyers recognized the tactic of publishing advice to enhance committee influence. One suggested that it is a ‘deliberate step’ purporting to ‘add weight’ to a committee’s views.<sup>91</sup> Another lawyer suggested that MPs were ‘much more interested in . . . the immediate news value’,<sup>92</sup> and so legal advice might be used more opportunistically. Publishing legal advice might offer a ‘convenient’ way to gain a quick political advantage, ‘not in . . . necessarily any sort of party, political sense, but, you know, to be seen to be acting’.<sup>93</sup>

Three recent examples of legal advice being published by select committees in Westminster exemplify tactical and transparency considerations in play. In terms of tactical considerations, the Chair of the EU Sub-Committee on Finance, Baroness Falkner, justified the decision to publish legal advice about the financial implications of Brexit in its report partly on the basis that the subject of the United Kingdom’s financial contributions to the EU was ‘highly contentious’,<sup>94</sup> having ‘received a significant amount of attention in the press and elsewhere’.<sup>95</sup> The Committee was eager to fortify its position

87 Interviewee 54, clerk (16 January 2018).

88 Interviewee 18, peer (13 July 2017).

89 Interviewee 20, MP (26 July 2017).

90 C. Kenny et al., *The Role of Research in the UK Parliament: Volume 1* (2017) 11; Geddes, *op. cit.*, n. 6, p. 287.

91 Interviewee 12, parliamentary lawyer (29 June 2017).

92 Interviewee 19, parliamentary lawyer (26 July 2017).

93 *id.*

94 Baroness Falkner, 782 *H.L. Debs.*, cols. 1133–4 (6 April 2017).

95 *id.*

on a very controversial issue. Transparency considerations were also evident: the Committee acknowledged in its report that its legal assessment drew ‘heavily’<sup>96</sup> on the in-house legal advice, and the Chair explained that the Committee decided to publish the advice in full ‘so that all could see the analysis behind our judgment’.<sup>97</sup>

Tactical and transparency considerations were also apparent in the House of Commons Public Administration and Constitutional Affairs Committee (PACAC) report, *Lessons learned from the EU referendum*.<sup>98</sup> This report included five pieces of written legal advice from then Speaker’s Counsel, Michael Carpenter, on three separate legal questions which arose during the course of the Committee’s inquiry. These were published online in the months immediately prior to the 2016 referendum. At the tactical level, it is worth noting that the PACAC chair, Bernard Jenkin, has long been a proponent of leaving the EU.<sup>99</sup> The Committee’s use and publication of legal advice during this inquiry could be seen as a political act to level the playing field in favour of Eurosceptics, particularly given the relatively pro-European stance of the Prime Minister and his front bench. Transparency considerations were also present. The Committee argued, for instance, that publishing the legal advice of Speaker’s Counsel was necessary, given the ‘significant difference of opinion’<sup>100</sup> which had surfaced between the Committee, the government, and the Electoral Commission in relation to the interpretation of particular provisions of the Political Parties, Elections and Referendums Act 2000.

A final example is the recent 2017 report of the Lords Speaker’s Committee on the Size of the House,<sup>101</sup> tasked with finding a practically viable, non-legislative means to reduce the membership of the Lords. Here, the legal advice from the Counsel to the Chairman of Committees (added in an appendix) was deployed for a tactical purpose. The advice was used to bolster the attractiveness of the specific means proposed by the Committee (requiring new members to make an undertaking to serve for 15 years only) as legally and constitutionally sound.<sup>102</sup> Indeed, the Committee chair, Lord Burns, argued in the debate on the report that the Committee had had ‘robust legal advice that the House has the powers to enforce the undertaking to retire.’<sup>103</sup>

96 HL EU Committee, op. cit., n. 1, p. 30.

97 Baroness Falkner, op. cit., n. 94.

98 PACAC, op. cit., n. 27.

99 The committee voted unanimously to publish, but we do not know the internal dynamics of that decision.

100 PACAC, op. cit., n. 27, p. 25.

101 Lord Speaker’s Committee, op. cit., n. 27.

102 *id.*, p. 18.

103 Lord Burns, 787 *H.L. Debs.*, col. 1966 (19 December 2017).

(b) The stewardship concerns of clerks

By contrast, clerks had grave concerns over the publication of legal advice. These stemmed from the clerks' *stewardship* role in the committee setting and across the House.

First, several clerks expressed concern about the implications of publication for a committee's reputation. If a committee published legal advice which it had chosen to act against, it risked undermining its position by revealing that it was deliberately contravening the legal advice it had been given. Second, at a more institutional level, clerks were anxious that publishing advice risked the gradual erosion of confidentiality between members and parliamentary staff generally. Once there was an expectation that one type of advice should be published, similar expectations could easily develop in relation to other types of in-house advice. As one clerk put it, 'the harm is not so much about it being legal advice as about *any* advice'.<sup>104</sup> This was about maintaining institutional autonomy. For clerks, creating an expectation that any type of in-house advice will be published risked surrendering the autonomy of committees generally to decide whether or not to publish such advice in future. This is consistent with Fasone and Lupo's argument that a sudden increase in legislative transparency can result in a 'runaway process' in which a legislature begins to lose control over the flow and volume of information which it receives and transmits to the public.<sup>105</sup>

Third, and even more significantly, the publication of legal advice was considered by some clerks to engage the defensive aspect of their steward role in upholding the autonomy of Parliament as an institution. Clerks view themselves as responsible for policing on Parliament's behalf the 'very grey area'<sup>106</sup> between the jurisdictions of Parliament and the courts. Thus, several clerks were concerned that publishing legal advice could encourage judicial scrutiny of parliamentary proceedings, contrary to Article IX of the Bill of Rights 1689.<sup>107</sup> As one clerk argued:

... publishing legal advice, and then going against it is just inviting the courts in ... All it is doing is increasing the impression that this is what you might call a court legal matter rather than a parliamentary legal matter.<sup>108</sup>

This reflects a concern among clerks over the use of select committee reports in litigation proceedings. The former clerk of the House of Commons, Lord Lisvane, recently argued that Parliament's principal Article IX problem now

104 Interviewee 21, clerk (27 July 2017).

105 C. Fasone and N. Lupo, 'Transparency vs. Informality in Legislative Committees: Comparing the US House of Representatives, the Italian Chamber of Deputies and the European Parliament' (2015) 21 *J. of Legislative Studies* 342, at 344.

106 Interviewee 21, clerk (27 July 2017).

107 According to which 'the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of Parliament.'

108 Interviewee 6, clerk (26 May 2017).

relates to select committees. The legal content of committee reports, he notes, provide ‘grist to many a litigant’s mill’.<sup>109</sup> Another Commons clerk, Eve Samson, suggests that traditional fears about the judicial erosion of free speech within Parliament are misplaced: ‘The danger, if it exists, lies in the more subtle use of proceedings.’<sup>110</sup> This points to the potential, long-term risks that publishing advice might have on parliamentary autonomy – juridification, or the potential encroachment of judicial norms into both committee proceedings and parliamentary business more generally. Thus, the deference of clerks to committee autonomy is tempered by their responsibilities to the broader institution, Parliament.

(c) The professional concerns of parliamentary lawyers

Like clerks, parliamentary lawyers had concerns over the potential ramifications of publishing legal advice. To some extent, these echoed clerks’ concerns about committee autonomy and reputation:

... it feeds an expectation of publication, so that, on those occasions where the committee prefers not to publish the advice ... the expectation may have become difficult to disappoint. And a failure to publish advice in circumstances where there has previously been a tendency to publish it is likely to lead to the drawing of inferences that the committee’s report has parted company with the legal advice it has received.<sup>111</sup>

In contrast to clerks, however, lawyers’ concerns were mostly expressed in terms of their *professional* role and norms. What caused lawyers consternation were the potential implications for core aspects of the lawyer–client relationship in the legislative context.

First, several parliamentary lawyers were concerned that publishing legal advice would undermine a key rationale of LPP: the need for a relationship based on frankness between client and lawyer. The courts have long held that LPP enables ‘... clients and their legal advisers to communicate with each other with complete candour’,<sup>112</sup> ensuring that ‘lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct.’<sup>113</sup> Thus, the lawyers thought that publishing legal advice more frequently could have a ‘chilling effect’<sup>114</sup> on the way that it is given. Several emphasized that, as a matter of ordinary practice, they prepare their written advice on the assumption that it could be published. However, the presumption of con-

109 Lord Lisvane, ‘The Courts and Parliament’ [2016] *Public Law* 272, at 277.

110 E. Samson, ‘Privilege: The Unfolding Debate with the Courts’ in *Essays on the History of Parliamentary Procedure: In Honour of Thomas Erskine May*, ed. P. Evans (2017) 287, 306.

111 Email from interviewee 73, parliamentary lawyer (18 July 2018).

112 *Prudential PLC and Prudential (Gibraltar) Ltd v. Special Commissioner of Income Tax and Philip Pandolfo (HM Inspector of Taxes)* [2013] 2 A.C. 185, para. 100.

113 *Three Rivers District Council & Others*, op. cit., n. 77, para. 61.

114 Interviewee 22, parliamentary lawyer (27 July 2017).

fidentiality which ordinarily exists between lawyers and parliamentarians allowed the former to bring a degree of nuance and individuality to their advice. As one lawyer explained:

That's my legal advice. I'm sort of accountable for it because [it's] my name on the tin ... [M]y views are not always mainstream views, and I can make that point ... [I]f I give a view, I can do it personally, and that would have the proper weight ... and I can explain, if necessary, that this view is not shared by ... the majority of the academic community.<sup>115</sup>

Increasing the publication of legal opinions was therefore considered likely to cause a decline in their frankness and even their advisory character.<sup>116</sup> One lawyer suggested that it could reduce the lawyers' role to the provision of legal information, rather than advice, similar to the research notes already produced by the House of Commons Library.<sup>117</sup>

Parliamentary lawyers were also concerned that publishing legal advice could potentially impinge on their ability to support multiple clients within the legislature. Parliamentary lawyers assist in many areas of parliamentary activity. Moreover, the pool of potential clients has expanded in the wake of the Brexit referendum, with the establishment of the Exiting the European Union Select Committee and the current salience of EU legal considerations across select committee work. This has led to a shift in legal advice being labelled 'committee notes' to 'legal notes' which are potentially made available to multiple committees.

With these expanded and multifaceted client loyalties, the publication of legal advice gives rise to two concerns. The first is the procedural question of how confidentiality is waived where one particular actor seeks to publish advice that may have been supplied to multiple committees. Waiver of LPP depends on identifying the client who is legally entitled to exercise that waiver.<sup>118</sup> While some parliamentary lawyers suggested that the House as a whole could be the ultimate client, determining who is entitled to exercise the waiver at a practical level can be a vexed task:

[I]t's sort of slightly difficult 'cause who is the client? ... [A]nd that's still an issue which is sort of not fully resolved ... If it's to be published ... who would be the client to waive legal professional privilege?<sup>119</sup>

[T]here's no clarity about [who is your client] in Parliament. There's no kind of distilled wisdom about it. You come in as a lawyer, and you have to work it out for yourself.<sup>120</sup>

115 Interviewee 19, parliamentary lawyer (26 July 2017).

116 M. Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law' (2015) 28 *Leiden J. of International Law* 743, at 763, citing M. Weller, *Iraq and the Use of Force in International Law* (2010) 253.

117 Interviewee 19, parliamentary lawyer (26 July 2017).

118 *Three Rivers District Council & Others*, op. cit., n. 77.

119 Interviewee 19, parliamentary lawyer (26 July 2017).

120 Interviewee 22, parliamentary lawyer (27 July 2017).

The second – and related – issue was that publishing legal advice could disrupt a core working practice which enables parliamentary lawyers to support their multiple clients across the legislature. Several interviewees explained how written legal advice in Westminster is often shared informally between parliamentary officials and committees. As one lawyer put it:

You try to work it so that somebody who has an official position where they have themselves do something on behalf of the House as a whole, you work it around so that they have the benefit of your advice. And sometimes, it means, you know, a clerk passing on your advice to a committee that actually isn't your client at all, because once in a blue moon, they want some legal advice. Well, of course, you give it.<sup>121</sup>

Similarly, one clerk explained that parliamentary lawyers provide advice in the knowledge that the clerks will 'circulate it to a fair number of people'<sup>122</sup> internally. The sharing of legal advice, they suggested, is perceived as 'communications between colleagues'<sup>123</sup> rather than the disclosure of confidential advice. This informality allows parliamentary lawyers to bypass the difficulty of identifying who is entitled to waive confidentiality, and maintain what Kennon has described as 'a culture in which lawyers are willing within a small organisation to help out wherever required'.<sup>124</sup> The problems of client waiver involved in publishing legal advice would make such arrangements difficult to maintain.

In summary, interviews revealed that the prospect of publication tugs at the various client loyalties of parliamentary lawyers in Westminster. Like clerks, parliamentary lawyers recognized the autonomy of the committee to evaluate and make use of their advice in whatever way they deem appropriate. However, this was tempered by a resistance to any development which could affect their ability to fulfil their obligations across the legislature as a whole. This finding reinforces American scholarship on the work of legislative lawyers. Like Westminster lawyers, congressional and state-level legislative lawyers often view their role through the lawyer–client framework.<sup>125</sup> But there is disagreement as to whether the loyalty of these actors is owed to particular officials, committees or the legislature as a whole, and scholars have noted explicitly the difficulties which this poses for client confidentiality.<sup>126</sup>

121 Interviewee 9, parliamentary lawyer (22 June 2017).

122 Interviewee 21, clerk (27 July 2017).

123 *id.*

124 Kennon, *op. cit.*, n. 23, p. 124.

125 For example, R. Marchant, 'Representing Representatives: Ethical Considerations for the Legislature's Attorneys' (2003) 6 *New York University J. of Legislation and Public Policy* 439; M. Stern, 'Ethical Obligations of Congressional Lawyers' (2008) 63 *NYU Annual Survey of American Law* 191. However, other authors entirely reject the applicability of the lawyer–client paradigm in the legislative context: M. Glennon, 'Who's the Client? Legislative Lawyering through the Rear-View Mirror' (1998) 61 *Law and Contemporary Problems* 21.

126 Stern, *id.*, p. 196.



(d) The politicization of legislative staff and their work

A final concern, shared by clerks and parliamentary lawyers, was that publishing advice could politicize their work, and thereby threaten the perception of their impartiality among parliamentarians. This concern should be understood in light of a number of general norms and working practices in Westminster.

First, parliamentary officials have a duty of impartiality to members. One clerk explained that impartiality must be ‘demonstrate[d] to members ... [A]s long as they’re content that it’s impartial ... then, that’s me doing my job.’<sup>127</sup> Demonstrating this impartiality to parliamentarians, however, presents challenges. On the one hand, one lawyer suggested that it requires staff to be ‘overtly apolitical’:

You’ve just got to show that you show no leanings at all one way or the other because MPs, and peers as well, will pick up very quickly if you have, and you lose your credibility very quickly.<sup>128</sup>

Similarly, Donald and Leach cite a former legal adviser to the Joint Committee on Human Rights: ‘[t]he minute [parliamentarians] think the advice reflects [the adviser’s] own take on politically important questions, they start to distrust [it].’<sup>129</sup> At the same time, several interviewees explained that staff must build trust by being ‘responsive’<sup>130</sup> to parliamentarians of all persuasions.<sup>131</sup> In the intensely political environment of Parliament, staff must work hard to both establish and maintain the perception of their impartiality among members.

Second, staff interviewed indicated that they considered their place to be in the background of a committee’s work, and expected committee members to take political responsibility for the conclusions and recommendations offered in reports. This was a key aspect of committee autonomy: staff advise, members decide. But this practice was also a means of maintaining staff impartiality. One clerk described this as the ‘committee filter’:<sup>132</sup>

The government [would] really get annoyed if the House was giving advice contrary to government lawyers, it would get very politicised very quickly ... [I]f you do it through the prism of the committee, you’ve got a cross-party

127 Interviewee 21, clerk (27 July 2017).

128 Interviewee 5, parliamentary lawyer (25 May 2017).

129 A. Donald and P. Leach, ‘The Role of Parliaments Following Judgments of the European Court of Human Rights’ in *Parliaments and Human Rights*, eds. M. Hunt et al. (2015) 59, at 76.

130 Interviewee 10, parliamentary lawyer (27 June 2017).

131 Feldblum argues that any lawyer working in a legislative context ‘must establish ... bona fides with the political establishment. The key players must feel that the legislative lawyer “gets the political scene” – so that the legislative lawyer will be fully trusted’: C. Feldblum, ‘The Art of Legislative Lawyering and the Six Circles Theory of Advocacy’ (2003) 34 *McGeorge Law Rev.* 785, at 798.

132 Interviewee 11, clerk (29 June 2017).

committee receiving the legal advice ... choosing what they want to publish and putting it out to the House and saying either 'we do some amendments in this area' or something. So, I think the committee ... filter, it's quite a good one.<sup>133</sup>

Thus, committee consensus and the general practice of integrating advice into committee reports were regarded by staff as helping to depoliticize their contribution.

Against this background, publishing legal advice was considered to risk staff politicization. Several clerks and lawyers felt that the exposure of staff advice would subject them to a greater risk of political criticism, undermining the perception of their non-political status among members, crucial for the performance of their roles:

... There is a risk around exposing too much [of] the advice which committees receive, because it will encourage people unhappy with the way the committee is going to direct their fire at the advisers rather than at the committee, which will make it very hard for the committee to get work done ...<sup>134</sup>

I've also got reservations about it being published ... [I]t encourages the sort of lawyer shopping idea ... People say, how big's your QC compared to their QC? The legal advice shouldn't become itself an issue. It should be facilitating discussion and debate and therefore, it shouldn't become an issue about what the legal advice is ...<sup>135</sup>

Thus, for clerks and lawyers alike, publishing advice potentially strips legislative staff of the protection of the committee 'filter', opens the legal advice up to challenge (particularly if it clashed with the established government position), and risks muddying the lines of political responsibility. From the perspective of lawyers, however, publication also breaches a core aspect of the standard conception of the lawyer's role: that they should not be held responsible for the actions of their clients.

Arguably, these issues point to what Weingart describes as the 'inflationary'<sup>136</sup> use of expertise in politics, whereby all opposing sides of a debate seek to support their views with particular forms of expert evidence. Such inflationary use has the effect of undermining the objective appearance of expert claims, as they become associated with particular interests or values.<sup>137</sup> Viewed in that context, the concerns expressed by parliamentary lawyers are not simply about the potential legalization of politics, but also the potential politicization of law.

133 *id.*

134 Interviewee 21, clerk (27 July 2017).

135 Interviewee 22, parliamentary lawyer (27 July 2017).

136 P. Weingart, 'Scientific Expertise and Political Accountability: Paradoxes of Science in Politics' (1999) 26 *Science and Public Policy* 151, at 157.

137 *id.*, p. 158.

### 3. *The soft power of parliamentary staff*

Despite the formal autonomy of committees over their use of evidence and information, there is some scope for parliamentary staff to resist the publication of advice. Some clerks and lawyers interviewed said they would seek to subtly dissuade parliamentarians from publishing advice. One parliamentary lawyer suggested that they ‘always try to persuade them not to [publish]’.<sup>138</sup> Likewise, a clerk said: ‘If I’d been a clerk to a committee who wanted to do that, I’d say, let’s not publish a separate document, let’s literally take [the] advice and make it part of the reports.’<sup>139</sup>

Parliamentarians are, of course, free to ignore such counsel. However, the views of staff can act as a powerful influence over committee decision making. As one parliamentary lawyer explained:

[W]hat they normally do ... is follow your advice and report to the House in the way that you have advised ... [T]here’s never a situation where you advise them strongly to do X and they won’t do it ... it just doesn’t arise.<sup>140</sup>

This underlines the influence of legal advisers in particular Westminster committee settings noted by various authors.<sup>141</sup> It is also consistent with research on the influence of legislative staff.<sup>142</sup> Staff may not only be influential in their areas of expertise. They may exercise a kind of soft power within the committee setting, a power which is rooted in their particular expertise but also extends beyond it. Turner suggests expert claims may invite deference from non-expert audiences.<sup>143</sup> Thus, experts may be accorded ‘cognitive authority’, which can also extend to the ‘penumbra’ of their expertise.<sup>144</sup>

Thus, clerks and parliamentary lawyers arguably enjoy cognitive authority not only in relation to their respective procedural and legal expertise, but also in relation to issues in the penumbra of those areas, such as the publication of legal advice. Indeed, the rarity of legal advice being published separately, even by committees with a legal remit, suggests an important staff influence at work. It would appear that committee members can be constrained from publishing legal advice in the pursuit of short-term political gain by the long-term, institutional responsibilities of the staff. In short, parliamentary staff can act as a soft constraint on committee autonomy.

138 Interviewee 22, parliamentary lawyer (27 July 2017).

139 Interviewee 11, clerk (29 June 2017).

140 Interviewee 9, parliamentary lawyer (22 June 2017).

141 Feldman, op. cit., n. 18, p. 343; and Le Sueur and Caird, op. cit., n. 19, p. 291.

142 Winzen, op. cit., n. 16; M. Egeberg et al., ‘Parliament staff: unpacking the behaviour of officials in the European Parliament’ (2013) 20 *J. of European Public Policy* 495; Neuhold and Dobbels, op. cit., n. 16.

143 S. Turner, *The Politics of Expertise* (2014) 23.

144 id., p. 26.

## CONCLUSION

This article has opened up the ‘black box’ of select committees and presents a framework to understand the provision, reception, and use of one form of in-house expertise – legal advice. Legal advice provided to a select committee is subject to a negotiation between parliamentarians, clerks, and parliamentary lawyers, the outcome of which determines its appropriate relevance and use. In everyday practice, the roles of these actors converge to privilege committee autonomy: clerks and parliamentary lawyers defer to parliamentarians’ varied attempts to exert influence in whatever way they deem appropriate. Pressures towards the publication of legal advice, however, can lead to a divergence between parliamentarians and parliamentary staff. The tactical approach of parliamentarians is resisted by the stewardship of clerks and the professional norms of parliamentary lawyers.

On this analysis, concerns about ‘juridification’ or the legalization of politics therefore seem exaggerated. In Westminster, it is partly organizational: lawyers are often limited by their compartmentalization within committees. But it is also because, in everyday practice, the reach of law and lawyers is quite limited. Moreover, parliamentary lawyers tend to cleave to a ‘standard conception’ of the lawyer’s role, which strongly respects the autonomy of the client, but also insists on the neutrality and non-accountability of lawyers.

A push for greater transparency and increased publication of in-house legal advice is likely to meet a number of obstacles. It ignores the very real concerns of parliamentary staff to maintain their own impartiality – and therefore, effectiveness – within the deeply politicized arena of Parliament. It ignores the general disposition of parliamentary staff to remain in the background. This is not just about staff concerns for impartiality. It is also because of their strongly-held institutional and professional norms prioritizing the autonomy of committees and ‘the client’, and a related concern about ensuring the focus of attention is on the decision of the committee, and not the advisers. Finally, calls for greater transparency and the publication of legal advice also ignore the fact that many parliamentary lawyers may have multiple clients within the legislative context.<sup>145</sup> An expectation that advice for one particular function or client should be published would not easily be quarantined to that sphere.

Publication of in-house legal advice may be of merit under certain circumstances. But the pressures on and interests of parliamentarians are such that they are unlikely to think carefully about whether or not the short-term benefits of publishing in-house legal advice outweigh the potential long-term institutional costs. They will be more concerned, in the immediate

145 This is even more the case in devolved legislatures, where parliamentary lawyers usually operate in a unified team.

instance, to exert committee influence, and perhaps less cognisant of the potential impact on staff impartiality, various informal practices by parliamentary staff, and the inflationary effect on legal advice. Perhaps one means to address this is to replace the current ad hoc approach by official guidance, which could be provided to committees considering publication. This would at the very least alert committees to some of the broader issues involved. In turn, this could bring some consistency to the decision to publish, and thereby help avoid any unforeseen and undesired consequences.