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Thinking about Law and Policy: Lessons for Lawyers

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Summary

1. This paper sets out the key points I made in seminars to the Law Commission and Crown Law Office on 23 and 27 November 2006 respectively. The observations here are derived from my experience of legal and policy analysis as an official in the Treasury and the Ministry of Justice as well as academic study of law and policy. The paper:

1.1 outlines a simplified view of the paradigmatic legal approach to legal issues;
1.2 outline a simplified view of the paradigmatic policy analysis of policy issues;
1.3 examines the strengths and weaknesses of the inherent biases likely to emanate from each approach when applied to matters of policy advice within Government; and
1.4 suggests that, when approaching policy issues, those with legal training should be aware of the need to: identify the government’s objective; identifying all relevant policy options; and the need to undertake a broad analysis of all relevant considerations.

Law and Policy Defined

2. Books have been written and jurisprudential theories constructed on the subject of the nature of law and policy. I don’t propose to do that here. For the purposes of this paper:

2.1 Law is taken to be authoritative rules that exist to govern behaviour;
2.2 Legal analysis is analysis of what the law is;
2.3 The policy of a law is the reason for the law;
2.4 Policy analysis is analysis of what the law should be.

Why is this Important for Crown Law and the Law Commission?

3. I suggest that CLO and Law Commission staff need to understand what policy is, what policy analysis is, and what the policy-making process of government is. I further suggest that legally trained staff need to be aware of the potential effects of own legal training on that understanding. There are four reasons for this, as below.
So that can understand and communicate with government

4. CLO’s client is the Crown, collectively, as directed by Cabinet. The Law Commission’s advice is directed to the Government. The collective interests of the Crown and Cabinet often focus on policy issues. More disaggregatedly many of the departments and Crown entities are oriented towards policy. Those that are oriented to operations are carrying out policy. Given this core focus, CLO and the Law Commission need to understand that focus in order to understand and communicate with government.

So that can perform own role in providing legal services

5. It is desirable for CLO to understand the nature of policy in order to provide sound legal advice to the Crown collectively or to departments and Crown entities. This is especially so where CLO has to give an opinion about whether a policy option is illegal or an opinion about whether a policy process is illegal. It is also desirable in representing the Crown in court, where a policy is being challenged or a policy-making process is being challenged.

6. I even suggest, that it is directly relevant to the preparation of some legal arguments in court. As the final level of appeal, the Supreme Court itself often makes policy. I suggest that a useful cross-check to preparing a legal argument about the policy behind a law could involve an internal CLO application of a formal policy analysis to the issues.

So that Perform own role of involvement in policy advice

7. The Law Commission is frequently and increasingly involved in government policy-making processes. On some occasions CLO will and should be involved in policy process, especially when the Cabinet and/or Attorney-General so directs, where policy is being made about the legal system that CLO has operational knowledge of, or where policy is being made that the Attorney-General or Solicitor-General has responsibilities for as law officers of the Crown. In performing their own functions in all of these spheres, the Law Commission and CLO need to understand the policy process and the nature of policy advice.

So that can meet others’ expectations

8. My experience is that the Attorney-General and Cabinet collectively expects both the CLO, as public servants who provide legal services, and the Law Commission as the provider of policy advice, to understand the policy environment. I expect that courts will often have a similar expectation, at least sufficiently to enable CLO lawyers to “translate” from policy-speak to legal-speak. Certainly other departmental Chief Executives and public servants, including central agencies, regard the Law Commission and CLO as able to take part in the policy-making machinery of
government. And the legal profession probably expects that if any group of lawyers understands government, it is these two agencies.

9. My overall message here is that if CLO and Law Commission staff don’t understand what policy is, what policy analysis is, and how the policy-making process works, then they are at a disadvantage in doing their job well and credibly.

10. The following material outlines one view of the nature of policy analysis, in comparison to legal analysis. It does so in order that those who are legally trained can understand what biases they may be bringing to policy analysis. It does not examine the policy-making process in practice – which deserves separate consideration.

Legal Analysis and Policy Analysis

11. I outline here a view of the paradigmatic nature of legal analysis as a distinctive mode of analysis. This is the way of thinking in which lawyers are trained at Law School and are expected to apply in legal practice – in the preparation of opinions and the conduct of litigation, and in judging.

12. Legal analysis does often inherently involve policy considerations. However, my experience is that lawyers often do not realise that public policy advisers use an entirely different mode of analysis. Public policy analysis is the subject of a whole separate academic discipline, academic literature and degree programme in Universities (usually the Masters of Public Policy). Lawyers need to know that this exists, and to understand its broad nature, for the reasons outlined above.

13. The paradigmatic versions of legal and policy analysis outlined below are simplified caricatures. My simple point is that the inherent differences between the paradigmatic versions of legal analysis and of policy analysis can cause problems if they are unappreciated. If they are appreciated, the strengths of each approach can be valuably applied. A sophisticated and experienced legal or policy practitioner can transcend the differences. Inexperienced practitioners, approaching issues with which they are not familiar, in a hurry, can fall in to avoidable traps. In my experience they do – all too often.

14. I suggest that a simple outline of the paradigmatic steps of legal analysis is as follows:

(a) Identify Issue
(b) State Facts
(c) State Law
(d) Identify arguments for each side as to what the law is
(e) Judge comes to a conclusion
15. At a similar level of simplicity, I suggest that the paradigmatic steps of policy analysis for government are as follows:

(a) Identify government’s objectives
(b) Identify problem that requires resolution
(c) Identify all options for resolving problem in order to achieve objective
(d) Analyse all options, including in terms of:
   (i) Achievement of objective
   (ii) Financial implications
   (iii) Legal implications
   (iv) Other implications (e.g., gender analysis required by Cabinet)
(e) Recommendation

Strengths & Weaknesses of Legal and Policy Analysis

16. Legal analysis is paradigmatically inductive; it reasons from specific disputes to general rules. It is inherently grounded in the context of specific fact situations. By contrast, policy analysis is deductive. It reasons from general objectives to (more) specific policy recommendations. It is more abstracted from fact situations.

17. I suggest that the inherent nature of the paradigmatic versions of legal analysis and policy analysis produces certain characteristics, or more pejoratively “biases”, in the undertaking of policy analysis by those trained in each approach. There are strengths and weaknesses in each approach, as outlined below.

Lawyers very good at issue/problem identification:

18. Identifying the relevant issue or problem is crucial in policy analysis. If it is not done well, the point of the analysis can be rendered irrelevant. Legal training emphasises identification of issues and lawyers can be very good at doing this – precisely and rigorously. Policy advisers can be less good at this.

19. The strength of lawyers in problem identification can also be a weakness. Sometimes lawyers commenting on policy analysis are tempted only to identify problems. This is rarely constructive or in the interests of the client!

But lawyers can forget to identify the objective:

20. Legal training does not explicitly emphasise attention to why an issue is being analysed. Lawyers can sometimes forget adequately to identify the goal that government is, or should be, seeking to achieve. Yet this is an integral part of policy analysis – without it, policy analysis can be irrelevant to government.

21. Sophisticated policy frameworks exist within government that seek to identify government objectives at a high level and varying degrees of lower levels. For example, the government’s current thematic priorities, currently organised under
three priority themes relating to economics, families and national identity are being given increasing emphasis by the current administration. The Justice Sector has a set of identified collective outcomes and a host of intermediate outcomes towards which all justice sector agencies should be working. These things matter. They flow through to organisational performance objectives and, ultimately, money – how budget priorities are allocated.

**Lawyers often better than policy advisers in grounding analysis in practical situations**

22. Lawyers are trained to pay attention to specific fact situations. Advisers trained in policy analysis can have a tendency to abstraction and view such analysis as anecdotal and unscientific. The generalised rigour of social science training can be valuable. But when dealing with Ministers, judicious use of examples of particular fact scenarios can be persuasive. This can be a strength of legal training.

**Policy Advisers can be better than lawyers at identifying all relevant options.**

23. Lawyers are trained to identify arguments available to two parties to a dispute – this can lead legal analysis to take on a binary flavour. Lawyers can relax into identifying one or two options and carefully analysing all arguments and counterarguments.

24. But good policy analysis depends on the identification of all relevant options in order to produce good recommendations. Lawyers need to remember this.

**Lawyers can be better than policy advisers at incisive logical analysis of specific points:**

25. Lawyers are trained rigorously to dissect specific arguments through the use of logic. This can be a strength in undertaking policy analysis. Too often those trained in policy analysis can tend to analysis by arm-waving.

**Policy Advisers can be better than lawyers at breath of analysis leading to a general conclusion:**

26. Those trained in policy analysis are used to analysing various options and including all relevant considerations in their analysis. Lawyers are used to focussing on the single question of what the law is or should be. Other considerations can be tangential. Lawyers undertaking policy analysis can sometimes simply forget to undertake analysis of some policy dimensions – particularly financial analysis. I have seen comprehensive Law Commission reports shelved because of this.

27. Furthermore, in my view, the process of rendering judgment in the paradigmatic legal approach to an issue is opaque. How do judges come to their conclusions? The suspicion is that they instinctively come to a result and then write a judgment to justify it (see Ted Thomas’s recent book!). So do many Ministers. But this is not appropriate professional policy analysis. A policy recommendation should be developed after undertaking the other steps of policy analysis i.e. with an open mind.
28. On the other hand, because policy advisers are so used to thinking normatively, about what the law should be, they can be tempted to forget that any policy problem is unlikely to be able to assume away all existing legal context. Policy advisers can sometimes forget to analyse legal implications of different options sufficiently.

Concluding Lessons for Lawyers doing Policy

29. So, in conclusion, a lawyer undertaking, or commenting on policy analysis, should be aware that their legal training may produce certain inherent characteristics or “biases” in the way they approach policy analysis. Accordingly, I suggest that they must remember to:

(a) identify the government’s objective;
(b) identify all relevant policy options;
(c) analyse all relevant considerations.

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