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Just Do It

Immediate Hygienic Measures (Version 1.0)



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BIUS WORKING PAPER NO 10

(THIS DOCUMENT DOES NOT REFLECT THE VIEWS OF SCOTTISH GOVERNMENT)

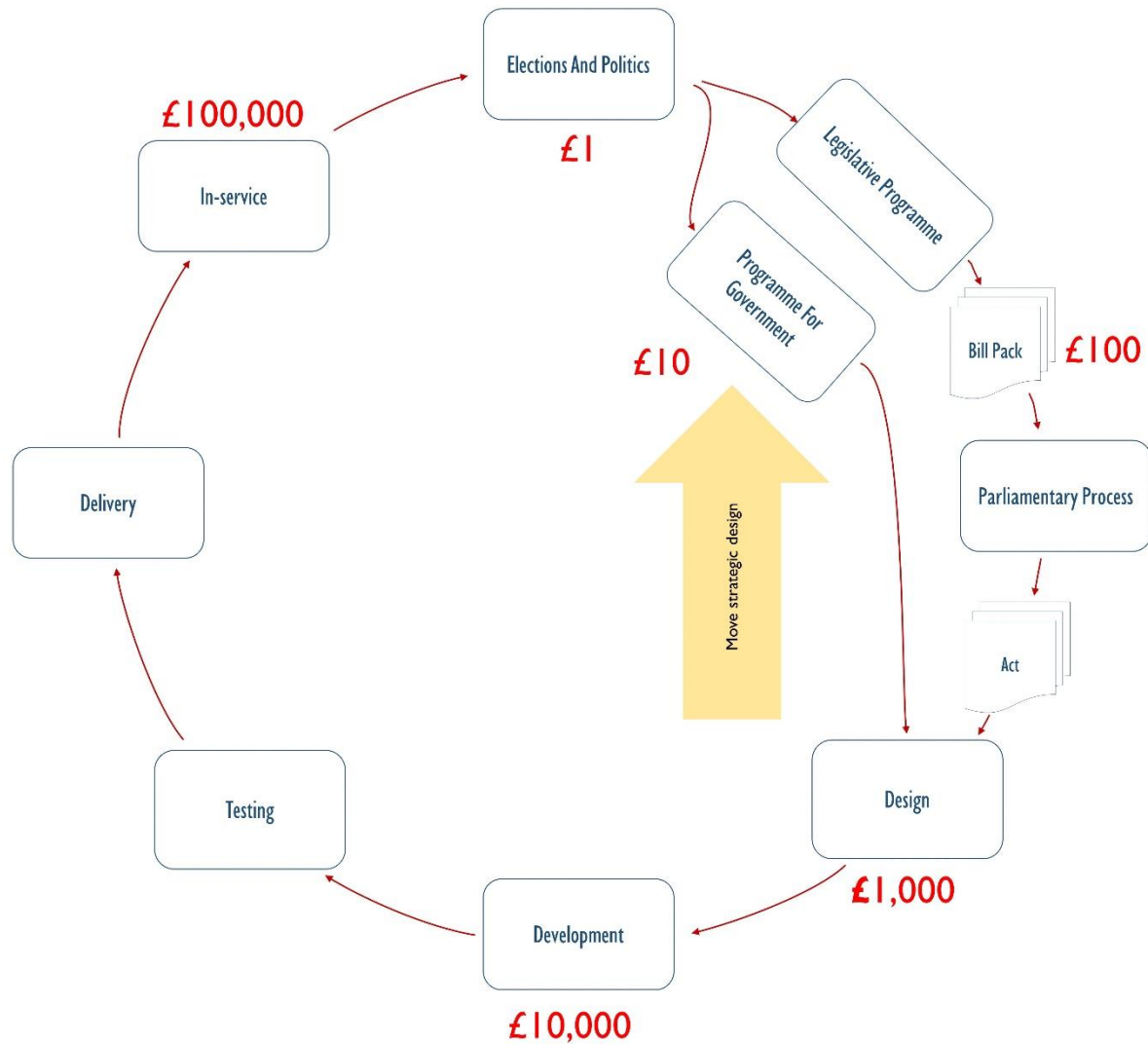
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1 Introduction

1.1 Why hygiene measures?

In digital the costs of fixing errors compounds around the development cycle – the proposals in this paper move error-fixing up the cycle:



The measures are the simplest possible steps to try and shift the critical design decisions to the appropriate place in the end-to-end cycle to ensure that our digital work is more effective.

1.2 What are hygienic measures?

There are some things that you just ought to be doing, that you know you ought to be doing, but you don't always do. Hygienic measures are simply the processes you put in place to ensure that you do them 100% every time.

In the context of the digital state the thing Scottish Government just ought to be doing religiously is strategically considering technology and data at the start of any policy initiative and not after the policy is made, the bill is drafted, and the final act gets Royal Assent.

These considerations include:

- Does this policy require new legislation or can existing powers and systems be used to drive it?
- Does this policy require a new system? Or can it be implemented on an existing system?
- Is this proposal generalisable? Can it lead to a strategic technical solution for both this policy problem and range of future policy problems?
- What data would the best solution require? And does that data already exist somewhere in Scottish government?
- If there is a new system, that collects or generates new data, what existing and future systems could make use of that data?
- What existing common services (payment, communication, etc) could and should it reuse to save costs and increase effectiveness?
- What services does it require that could in themselves become once-and-done future common services across Scottish government?

The Blus project is going to make a range of fiddly-complicated recommendations which include some basic hygiene measures. The interim recommendations have been workshopped with a range of participants and the question was asked “why don’t we just do these hygienic things now?”. So here we are.

1.3 Who are you?

You are an MSP, Minister or Spad, a think-tanker or policy person, somebody in delivery trying to build out or drive joined-up government.

1.4 Why should you read this?

These are the simple measures that can make radical and immediate impact. The benefits of doing in the short term will be minor but will compound like interest and the impact of doing this repeatedly and continuously will have enormous impact in the medium and long term – *if they are proceduralised and made normal, everyday practice* – what we just do.

2 The Blues Project

This is Working Paper No 10 of *Blus - Basic Law-Making for Legislative Computer Systems* which is a research project looking systemically at how the state creates the digital systems underpinning its services.

Working papers are being released gradually for comment:

Working Paper X – *The heart of the beast* (published)

Working Paper 0 – *The locus of change* (published)

Working Paper 1 – *Data and the rule of law* (published)

Working Paper 2 – *Rules as code* (published)

Working Paper 3 – *The Lego state* (published)

Working Paper 4 – *The remixable state* (published)

Working Paper 5 – *Law reform for data* (forthcoming)

Working Paper 6 – *A solera for data cleansing* (forthcoming)

Working Paper 7 – *Experimental digital legislative processes* (forthcoming)

Working Paper 8 – *An Enabling Act* (published)

Working Paper 9 – *Reading legislation with a non-functional eye* (forthcoming)

Working Paper 10 – *Immediate hygienic measures*

Blus working papers are designed to stimulate discussion about key elements of the relationship of the state to digital systems and their delivery. Your feedback, input, and particularly criticisms of this paper are most welcome. Feel free to distribute it however you wish.

Working papers are published via the *Digital Policy* SubStack.

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The author is an independent Research Fellow at Scottish Government under the First Minister's Digital Fellowship programme. The views of this paper do not represent the views of Scottish Government.

¹ <https://digitalpolicy.substack.com/>

3 RFC 2119²

The key words "MUST", "MUST NOT", "REQUIRED", "SHALL", "SHALL NOT", "SHOULD", "SHOULD NOT", "RECOMMENDED", "MAY", and "OPTIONAL" in this document are to be interpreted as described in RFC 2119.

²² <https://www.rfc-editor.org/rfc/rfc2119>

4 Future State

In the future state policy consideration start with:

- Does this policy require new legislation or can existing powers and systems be used to drive it?
- Does this policy require a new system? Or can it be implemented on an existing system?
- Is this proposal generalisable? Can it lead to a strategic technical solution for both this policy problem and range of future policy problems?
- What data would the best solution require? And does that data already exist somewhere in Scottish government?
- If there is a new system, that collects or generates new data, what existing and future systems could make use of that data?
- What existing common services (payment, communication, etc) could and should it reuse to save costs and increase effectiveness?
- What services does it require that could in themselves become once-and-done future common services across Scottish government?

The policy team is fully integrated – with delivery, technical, data, design and analytics/statistical staff engaged from the beginning.

Policies are registered on a policy register (and retired when they are no longer being pursued) and at registration time the plan for monitoring/statistics/verifying effectiveness are also published.

As services are developed or enhanced, their details (and the data they are based on) are updated on the register of services (which is machine readable, contains URL space, data schemas, etc, etc).

Service on the register of services reference the register of powers which describe the various rules for use and reuse of the data.

These registers will be discussed further in Working Paper 5 – *Law Reform for data* which is in preparation).

If primary legislation is required, it will have a digital impact assessment as part of the Bill Pack. If it grants new powers that can be implemented in digital systems, it will result in a new registration of powers that new or changed services can draw upon as their legal basis.

5 Current State

5.1 Introduction

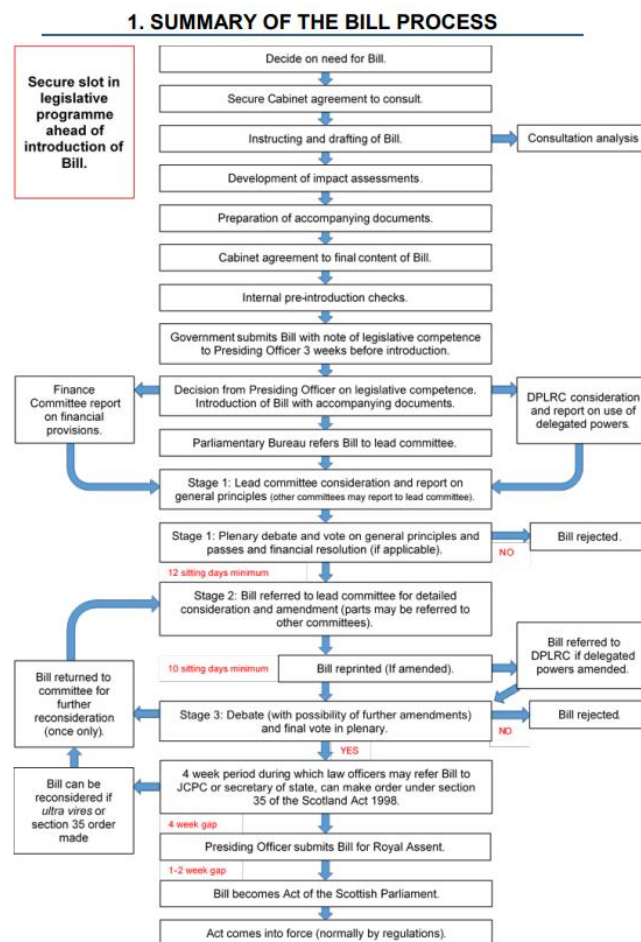
The section will look at:

- The Parliament and Legislation Unit's *Bill Handbook* (the process bible) and their *Scottish Statutory Instruments Guidance*.
- Training provided to bill teams
- The current Digital Impact Assessment
- The Bill Pack

5.2 Bill Handbook and Scottish Statutory Instruments Guidance

The Legislation & Parliament Unit has a *Bill Handbook*³ that describes the process a bill team should follow to create a new Bill.

This is the full process:



³ <https://www.gov.scot/binaries/content/documents/govscot/publications/foi-eir-release/2022/07/foi-202200306018/documents/foi-202200306018---information-released/foi-202200306018---information-released/govscot%3Adocument/FOI%2B202200306018%2B-%2BInformation%2BReleased.pdf>

The Unit also publishes *Scottish Statutory Instruments Guidance*⁴ which has no mention of digital in it.

It is likely that the final report will make recommendations on templating for certain types of secondary legislation dealing with data but the final details of that are still being teased out and will be the addressed in three future working papers:

- Working Paper 5 – *Law reform for data*
- Working Paper 7 – *An experimental legislative process*
- Working Paper 9 – *Reading legislation with a non-functional eye*

It is likely to be part of the architecture of reform outlined in:

- Working Paper 8 – *An Enabling Act*

5.3 Bill Team Training

Bill Teams are trained every year – the current training cycle is 2 weeks into a 10-week programme so there is still the possibility of slipping an extra slot in.

The programme is:

<i>Seminar 1 Introduction to Bills, 21 February, 10:00 – 11:00</i>	<i>To provide an overview of the Bill process, Cabinet clearances and Political Acuity and reflections from a previous Bill team on the passage of their Bill.</i>
<i>Seminar 2 Legislative programme assurance and oversight, 28 February, 10:00 – 11:00</i>	<i>Overview of governance and project management, the Bute House Agreement, and the development of the Programme for Government.</i>
<i>Seminar 3 External Engagement, 6 March, 10:00 – 11:00</i>	<i>Discusses the need for consultations and how to engage with citizens and stakeholders.</i>
<i>Seminar 4 Finance and Policy-proofing, 13 March, 10:00 – 11:00</i>	<i>Awareness on how to develop Financial Memos and EU implications.</i>
<i>Seminar 5 Impact Assessments</i>	<i>Discusses the importance of Impact Assessments when developing policy through the whole Bill process, highlighting those with a legal requirement.</i>
<i>Part 1, 20 March, 10:00 – 11:00</i>	<i>Human Rights in policy making and Equality Impact Assessment (EQIA)</i>
<i>Part 2, 27 March 11:00 – 12:00</i>	<i>Business and Regulatory Impact Assessment (BRIA) and New Deal for Business Fairer Scotland Duty assessment (FSD)</i>
<i>Part 3, 17 April 10:00 – 11:00</i>	<i>Child Rights and Wellbeing Impact Assessment (CRWIA), Data Protection Impact Assessment (DPIA)</i>
<i>Part 4, 24 April 10:00 – 11:00</i>	<i>Strategic Environment Assessment (SEA) Island Communities Impact Assessment (ICIA)</i>
<i>Seminar 6 Instructions and accompanying documents, 1 May, 10:00 – 11:00</i>	<i>Awareness on what to look out for when considering policy instructions and completing accompanying documents</i>
<i>Seminar 7 Parliamentary Stages, 8 May, 10:00 – 11:00</i>	<i>An insight on the role of the Parliamentary Legislation Team in the bill process and how the Parliament scrutinises accompanying documents</i>
<i>Seminar 8 Minister for Parliamentary Business, 15 May, 10:00 – 11:00</i>	<i>This seminar is to provide an overview of the Minister for Parliamentary Business role and how officials should engage with Private Office and Special Advisers</i>

⁴ SCOTTISH STATUTORY INSTRUMENTS GUIDANCE V1.1 – personal copy – its in EDRM but I don't have access.

5.4 The current Digital Impact Assessment

The DIA appears fleetingly in the Bill Handbook in Section 8:

Digital (Administrative) *There is not a formal Digital Impact Assessment. Bill Teams, SGLD and PCO are asked to consider how their Bill can be ‘future proofed’ in light of upcoming changes to technology. For further advice on this, Bill Team colleagues should contact the Digital Policy and Strategy Unit. Lead contact: [Redacted] (Ext [Redacted])*

I tracked down the colleague mentioned and read all the background papers. The guidance was to not use language that specified a technology (ie “cassettes” or “DVDs” but generic terms “digital storage” etc, etc). No bill team had contacted the group in a number of years – this ‘informal DIA’ is effectively defunct.

5.5 The Bill Pack

Bill packs contain some or all the following elements:

	Legal Basis	Type	Responsibility
The text of the Bill		Justiciable	Parliament
The Explanatory Notes	Standing Orders (9.3)	Justiciable	Parliament
Financial Memorandum	Standing Orders (9.3)	Charismatic	Parliament
Policy Memorandum	Standing Orders (9.3)	Charismatic	Parliament
Legislative Competence Memorandum	Standing Orders (9.3)	Indicative	Parliament
Delegated Powers Memorandum	Standing Orders (9.3)	Charismatic	Parliament
Auditor General’s Report	Standing Orders (9.3)	Charismatic	Parliament
Business and Regulatory Impact Assessment (BRIA)	Administrative	Charismatic	Government
Child Rights & Wellbeing Impact Assessment (CRWIA) ⁵	Ministerial duty	Charismatic	Government
Data Protection Impact Assessment (DPIA)	Statutory	Indicative	Government
Digital (DIA)	Administrative	Charismatic	Government
Equality Impact Assessment (EQIA)	Statutory	Indicative	Government
Fairer Scotland Duty (FSD)	Statutory	Indicative	Government
Human Rights	Administrative	Indicative	Government
Island Community Impact Assessment (ICIA)	Statutory	Indicative	Government
Strategic Environmental Assessment (SEA)	Statutory	Indicative	Government

Justiciable elements are those things that a court will consider directly when reviewing state actions taken under the specific law (in addition to those listed under some circumstances the record of the debate of the parliament at the time the relevant text was adopted may also be considered).

Indicative elements are ones where there is an external statute (the Scotland Act 1998, the Islands (Scotland) Act 2018, etc, etc) against which the operation of the bill will be assessed by the courts – and they indicate that the bill team did the appropriate work pre-introduction to satisfy themselves that the final bill will comply with the appropriate legislation.

Charismatic elements are declarations by the minister that certain types of work have been done – considering the financial implications, working through the policy and so on – and are essentially quality measures.

⁵ The CRWIA will become Statutory/Indicative once/if the UN Convention on the Rights of the Child (UNCRC) is incorporated into Scots Law – whether at Westminster or Holyrood.

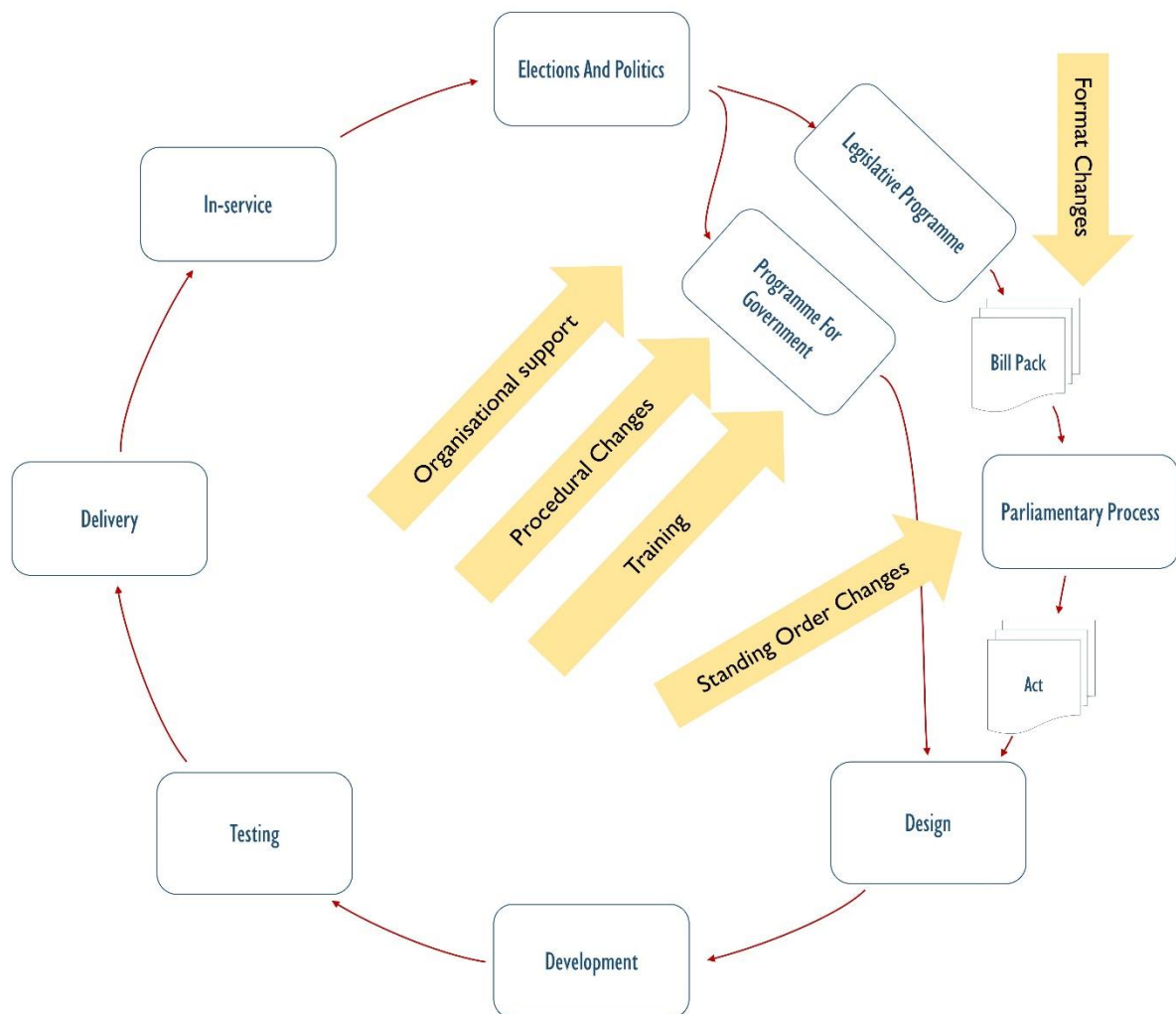
The Clerks at the Scottish Parliament will inspect incoming Bills and Accompanying Documents and ensure that any elements of the Bill Pack mentioned explicitly in the Standing Orders are present. The government is responsible for ensuring that the other elements are done appropriately.

6 Hygienic measures

6.1 Overview

The hygienic measures are the smallest set of comprehensive measures that will make the new process explicit. They will be the basis of the development of the final state and should be seen as deliberately transitional and transformative – changing by doing. The goal is to drive cultural change into the various teams and have them drive it on into their departments.

There are 5 tasks required to start this off:



- Organisational support
- Procedural changes
- Training
- Format changes
- Standing Order changes

6.2 The Programme for Government process

The important thing to understand is that the Programme for Government (and its major sub-component the Legislative Programme) are a proxy for the location of this intervention.

Policy development and implementation involves three separate mechanisms:

- Primary legislation (Bills becoming Acts)
- Secondary legislation (Scottish Statutory Instruments or Ministerial Orders)
- Day-to-day work under existing powers previously granted

It follows that digital implementations are effected by the same three mechanisms.

These 3 channels have different political profiles – going from high to low (primary then secondary then day-to-day) and these profiles don't necessarily reflect their importance for the task of delivering the changes that we need. (Part of the overall project is altering those profiles for key tasks, programmes and services in the digital world.)

As a consequence of the profile, these three channels are differently proceduralised. The primary route is highly procedural, the secondary less so and the day-to-day work is done on a departmental basis.

The hygienic changes in this document are all located at the primary legislative level – the most proceduralised and formal. But they should be seen as the thin end of a wedge that needs to get the desired outcomes (thinking about technology, data, their use and reuse done as early as possible in all policy/implementation development) *especially in the hard to influence day-to-day/departmental sphere*.

6.3 Organisational support

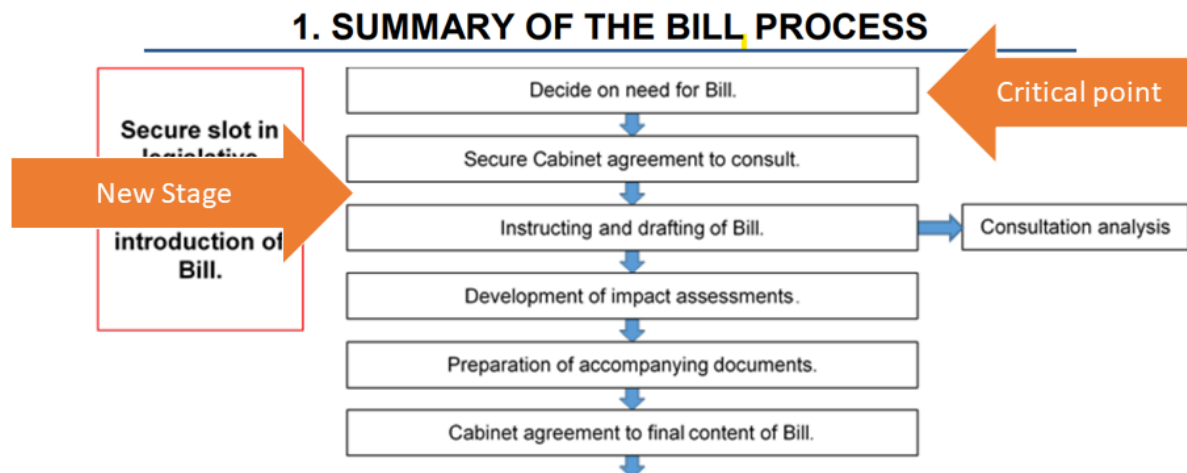
The bill teams are not necessarily capable of assessing technical options – because that (currently) is not what they are trained to do. It is known that integrated bill teams (policy and implementation working together) deliver the sort of systems that we want, and the strategic goal is to make integration of policy and implementation simply *how we do things*.

In this initial phase there should be a team who support the bill process – along the lines of the Finance Team that is dedicated to helping teams create their financial memoranda.

This team would be first engagement with the policy makers – ask the questions and probe their intentions before they become hardened and then act as marriage brokers between singleton policy groups and their appropriate delivery/in-service teams and the technical people along the way. Strategically this team is a scouting organisation identifying weak and strong departments, areas where cultural work and training needs to be done.

It should be a small (and possibly involving part timers) 1, 2 or 3 FTEs – there are 16 to 22 bills per year to be advised on.

The key process changes that this team needs to effect are:



The Bill Process is the way in which the Legislative Programme is built – which is just part of the Programme for Government – part of the team’s job is to shape the Programme for Government – and inter alia the Legislative Programme.

Within the Bill Process, the Digital Impact Assessment must precede and not follow the instructing and drafting of the Bill – the technical choices will influence the legal choices (and vice versa) – joint working with the Parliamentary Counsel’s Office and the Bill Team is critical in this phase.

6.4 Training

There is an existing and repeated training programme for Bill Teams – Digital needs to be injected into it. In the first year (the current and running training programme) that should just be a simple presentation along the lines of “hey talk to us, the digital specialists” and then next year when the programme has matured, there should be a full and dedicated session, a new 11th session, talking through the technical stuff.

6.5 Format changes

The Bill Pack needs to have a Digital Impact Assessment and the first iteration should be the simplest one – less than a page of A4.

The introducing Minister should simply affirm that the Bill Team consulted the technical, data, design and delivery/in-service teams appropriately.

The purpose of this declaration is to make “don’t embarrass the minister with respect to tech” as a standing rule of policy and bill development – that’s all. At this point the content of the DIA is a lot less important than the existence of it.

The temptation will be to rush and introduce a full-scale DIA with all the possible bells and whistles now. This should be avoided. The development of accompanying documents has

been a slow and gradual enrichment process (see Appendix 1 – History of the bill pack). The digital part of it has a hundred years to grow up – don't rush it.

6.6 Standing Order changes

The final state is a change to Standing Order 9.3 with the parliament expecting (and enforcing) a digital memorandum of some sort.

The Digital Memorandum should be charismatic – or more correctly it should not be justiciable.

The fact that the existing Digital Impact Assessment which was being done on an administrative basis fell into desuetude is all the motivation for making this properly permanent.

Initially a digital memorandum could unilaterally be injected into the Policy Memorandum – and this is likely to be suggested by a number of people as the <easy way out>.

However, the strategic problem that Blus has identified in Working Paper X – *The heart of the beast* is profoundly structural and one in which the Parliament has a critical role to play in addressing.

A unilateral declaration by the Government would trigger no changes in the Parliament – changes that need to happen – and changes that begin with the Parliament explicitly recognising that it has a critical role in the development of the Digital State. For this reason, these hygienic factors MUST push onto a simple standing order change.

7 Appendix 1 – History of the bill pack

In 1689 Bills were simple dumps of scarcely structured text as can be seen in this tidied up official version of the Bill of Rights:

1688 CHAPTER 2 1 Will and Mar Sess 2

An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crowne.

^{x1}Whereas the Lords Spirituall and Temporall and Comons assembled at Westminster lawfully fully and freely representing all the Estates of the People of this Realme did upon the thirteenth day of February in the yeare of our Lord one thousand six hundred eighty eight present unto their Majesties then called and known by the Names and Stile of William and Mary Prince and Princesse of Orange being present in their proper Persons a certaine Declaration in Writeing made by the said Lords and Comons in the Words following viz

The Heads of Declaration of Lords and Commons, recited.

Whereas the late King James the Second by the Assistance of diverse evill Councillors Judges and Ministers imployed by him did endeavour to subvert and extirpate the Protestant Religion and the Lawes and Liberties of this Kingdome.

Dispensing and Suspending Power.

By Assumeing and Exerciseing a Power of Dispensing with and Suspending of Lawes and the Execution of Lawes without Consent of Parlyament.

Committing Prelates.

By Committing and Prosecuting diverse Worthy Prelates for humbly Petitioning to be excused from Concurring to the said Assumed Power.

Ecclesiastical Commission.

By issueing and causeing to be executed a Commission under the Great Seale for Erecting a Court called The Court of Commissioners for Ecclesiasticall Causes.

In the 18th Century the practice had been to introduce a bill with a 1 page Breviate – the very earliest version of the Explanatory Notes – here is a late Breviate from the 1875 Militia Bill:

Militia Laws Consolidation and Amendment Bill. 57

NOTE.

The following Bill, speaking generally, is based upon the Bill laid before Parliament in 1867, subject to the important modifications about to be noticed.

Since the Bill of 1867 was prepared several Acts have been passed greatly altering the law relating to the Militia, more particularly "The Regulation of the Forces Act, 1871," by which Act the lieutenants of counties are divested, with some small exception, of all powers over the Militia, save in relation to the raising the Militia by ballot, and those powers are re-vested in the Crown.

As the ballot has not been resorted to since the Militia was revived in 1852, or indeed for many years previously, it has been deemed advisable, having regard to the recent changes that have been referred to, to consolidate in one Bill the law relating to the Militia raised in the three parts of the Kingdom while it is raised by voluntary enlistment. The law relating to raising the Militia by ballot is left on the existing enactments.

The object of the following Bill is to effect this consolidation, with such modifications as have been suggested either by experience of the working of the existing enactments or in the process of consolidation.

These modifications, where deemed of importance, are specially noticed in the italic notes at the side or foot of the clauses, and the existing enactments on which the clauses are framed are noticed in italics in the margin, and any departure from them is generally indicated in the same manner.

This note forms no part of the Bill, and, with the italic entries referred to above, is intended to be struck out at a late stage of the Bill.

This bill marks the real birth of the modern Bill Pack of Bill and accompanying documents as, alongside the Breviate, it included the first proper Explanatory Notes – a single line explanation of each clause:

Militia Laws Consolidation and Amendment Bill.

ARRANGEMENT OF CLAUSES.

Short Title. Interpretation.

Clauses.

1. Short title.
2. Interpretation of terms.

Appointment and powers of Lieutenants and Deputy Lieutenants of Counties.

3. Appointment of lieutenants of counties, and certain towns, &c.
4. Appointment of deputy lieutenants.
5. Appointments to be subject to Her Majesty's or Lord Lieutenant's approbation.
6. Number of deputy lieutenants.
7. Provision for absence or disability of lieutenant.
8. Vice-lieutenants may be appointed.
9. Property qualifications for deputy lieutenants. Income of personal estate in possession to be deemed equivalent to the yearly value of land.
10. Qualification to be delivered to clerk of the peace or clerk of supply.
11. Clerk of the peace or clerk of supply to send copies of qualifications to lieutenant, and enter same on a roll, and insert in Gazette dates of commissions, &c.
12. Return to Secretary of State and Parliament.
13. Penalty for acting as deputy lieutenant, &c., without being qualified, &c.
14. Acts of persons not qualified to be valid.
15. Displacement of deputy lieutenants.
16. Commissions not to be vacated by revocation of appointment of grantor.
17. Powers, &c. of lieutenants and deputy lieutenants.

