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# JUST LANGUAGE CONFERENCE

**Pre-conference Clinic  
on  
Writing laws**

**Getting better instructions  
for legislative drafting**

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### **First words**

This paper suggests ways in which Legislative Counsel Offices can encourage and help government departments to provide better legislative drafting instructions. It does not deal with improving the quality of legislative proposals as such, no doubt a worthy aim, but outside the scope of this paper.

It is useful to make a stab and say "what if" things worked well - how should a drafting project unfold - even though, for whatever reason, the abnormal tends to be normal in legislative drafting projects.

Recording how legislative projects should develop and commenting on what helps and what hinders legislative drafting gives legislative counsel something to refer to (especially those new to the Office), helps departments think about and plan legislative projects, and shows the shortcomings of particular projects. All this is of course with the ultimate aim of improving the quality of the law presented to and enacted by our Legislatures.

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## GETTING BETTER INSTRUCTIONS FOR LEGISLATIVE DRAFTING

### Introduction

The importance of legislation in today's society does not need to be stated - but I will. Written law governs us before birth, in life, and after death. A glance at the statute book of virtually every Canadian jurisdiction shows the growth of primary legislation. A peek at the volumes of regulations shows even more growth in statutory instruments. Our courts spend more time in interpreting or applying legislation than in any other function. In 1981 Allan Roger<sup>(1)</sup> noted that the British Columbia Court of Appeal dealt with issues of statutory interpretation in at least 75% of the cases heard by it. It can hardly be less today or a lower percentage in other jurisdictions.

This is not merely a Canadian phenomenon. In a recent submission to the Hansard Society for Parliamentary Government, the English Law Society compared the volume of public Acts in the past 50 years. In the 1940's and 50's the number of pages of public Acts averaged 1000 a year, it has since steadily increased to average 2540 pages a year in the 1980's.<sup>(2)</sup>

Lord Hailsham of St. Marylebone, then Lord Chancellor, said in his 1983 Hamlyn lectures that nine out of ten cases heard on appeal before the Court of Appeal and the House of Lords either turn upon or involve the meaning of words contained in enactments of primary or secondary legislation.<sup>(3)</sup>

Yet, despite its importance and currency, statute law is seen as outside the mainstream of the law. It is paid scant attention by most Universities, most lawyers are ignorant of most of it,<sup>(4)</sup> and the public is either intimidated or dismissive of it.<sup>(5)</sup> Even this Conference relegates the subject to a pre-conference clinic - though many items on the Conference agenda are dependent on some form of legislation and interestingly approximately 20% of the total registrants for the Just Language Conference are attending today's session. Statute law will continue to increase in importance. Canada is fortunate in having a fine tradition of dedicated legislative counsel but if they do not continue to take an active lead in making legislative drafting improvements, either no significant improvements will be made or others will impose changes.

One way in which the quality of legislation can be improved is if legislative counsel get better drafting instructions in a timely manner - another is by removing as many of the obstacles to drafting quality as possible.

Despite the criticisms of our system we should keep in mind that it is much admired by others. The late Professor Reed Dickerson in particular admired the system of channelling all Government measures through a drafting office and professionalization of legislative drafting.<sup>(6)</sup> And in a review of Government legal services in England the Parliamentary Counsel Office was described as "a unique interface" between the executive and Parliament.

### Origins of the legislative drafting office

Legislative drafting has not only been nationalized<sup>(7)</sup> by Commonwealth Governments but monopolized by a very few lawyers in those governments. The origins of a drafting office through which all Government Bills must be processed was explained by Sir Courtney

Ilbert.<sup>(8)</sup> In an 1869 masterstroke the Lord Chancellor of England established an office within Treasury through which, for the first time, control over both expenditures and the legislative proposals of Ministers could be exercised.

Having directed that all Government sponsored legislative measures must be channelled through one office the issue becomes how best to communicate to lawyers in that office what legislative measures are needed. It is then, as Reed Dickerson put it, for the drafter to help clients "do legislatively exactly what the client wants to do in fact and help do it in a way that will work as smoothly as possible".

## PART 1 THE PROBLEMS

### **Criticism *by* legislative counsel**

A common criticism by legislative counsel is that the instructions they receive for legislative drafting are inadequate.<sup>(9)</sup> Yet few Canadian Offices have taken concrete steps to improve the quality of instructions they receive.<sup>(10)</sup>

### **Criticism *about* legislative counsel**

Some drafting offices are seen as obstructive. Others are seen as elitist. The UK Parliamentary Counsel Office is often referred to a "priesthood". Sometimes these criticisms are justified, often they are not. But the result is that sometimes departments deliberately avoid dealing with legislative counsel for as long as they can. This then exacerbates timeliness problems.

The responsibilities of legislative counsel often mean that they must say "no" or "what about . . .?" in order to fulfil their obligations to the Government. Because the role of legislative counsel is not well understood legislative counsel are sometimes seen as a hindrance rather than a help in designing sound legislation.

### **Communicating drafting instructions**

Before legislative counsel can produce a draft, he or she must know what to say. What the drafter wants to say is what will achieve the aims of the instructing department. When departmental aims are well stated the drafters' task is easier - when the aims are not clear or are incomplete the inadequacies are reflected in the drafting.

Part of the problem rests squarely on the shoulders of legislative counsel. If an Office does not set out clearly what instructions and information it needs, it is hardly surprising that it does not get what it wants. On the other hand, some departments seem incapable of putting together a coherent set of ideas to deal with issues no matter what information they have been given.

Legislative counsel tend to overlook the fact that most Government departments are only engaged in a major rewriting project once a decade or so. Departmental officers are unlikely to be involved in a significant legislative drafting project more than once or twice in their professional careers. Even if they are, it is unlikely that they will be in the same position with the same responsibilities. Inevitably there are some departmental officers who are new to the thrills and spills of drafting projects. They need information but often find it hard to get.

Although departmental lawyers can be expected to provide sound advice not every department has in-house legal counsel. Even when it does, the interest and expertise of

departmental counsel in legislative issues is uneven. The best are excellent - the worst, hopeless.

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### **Ministerial responsibility**

Nor can we overlook the responsibilities of Ministers. Impossible time frames, inadequately planned legislative programs, policy changes in the middle of a project, all these tend to be the norm - adding to the difficulties of a drafting project. But these are all facts of drafting life.

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### **Departmental responsibility**

Too often departments undertake or are required to undertake ambitious projects with no experience and inadequate resources. Frequently the co-ordinator cannot make decisions. Major policy decisions are delayed while time ticks on. Internal departmental conflict sometimes means people with important knowledge are not available to legislative counsel. Inter-departmental squabbles also lead to delay.

But understanding these and other problems, how can Legislative Counsel Offices help reduce the difficulties everyone faces in a drafting project?

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## **PART 2 BOOKLET TO IMPROVE LEGISLATIVE DRAFTING INSTRUCTIONS**

Every law-making jurisdiction has its quirks, special needs, and political demands. But there are common threads and themes for all legislative drafting projects. Government departments and legislative counsel would be helped if booklets were available explaining the legislative process and what constitutes good drafting instructions. Here are some ideas for the contents of a booklet to improve drafting instructions.

### **General matters**

#### **(1) Legislative Counsel Office**

A brief description of the Office and its function and perhaps a note about the origins of drafting offices and the roots of the particular office would give the government service a sense of the place and role of Legislative Counsel Office within government. The Office might offer periodic seminars to describe the legislative process or changes to it; explain its functions; answer questions and establish contacts. In a word - make the Office accessible.

#### **(2) The process creating a Bill**

A description of the internal government processes and approvals required before drafting can start is a "must". This should include the committees the proposal must go through, how legislation gets on the Government's legislative program, deadlines, and how late requests for legislation are dealt with. A diagram might set out this information quite simply.

An explanation of how legislative counsel are assigned to bills for drafting may be helpful and a brief description of the normal process of instructions, meetings, drafts, more meetings and so on. Some rough guidelines of time and a reiteration of the things that affect timing, with a caution that every project is different would be helpful.

A description of the committees through which drafts of the legislation must go through, the function of the committees and the role of legislative counsel, Ministers and their officials would be helpful.

The booklet might then touch on introduction of Bills, readings, references to committees and amendments and the involvement of legislative counsel and departmental officials in those processes. A note on the ways in which an Act can come into force may also be helpful.

### **(3) Is legislation needed?**

Seemingly obvious to legislative counsel, what legislation is and the effects it has, the rights and obligations imposed, the distinction between law and policy - is often not understood or misunderstood by others. Legislative policy planners should understand the various ways their objectives can be achieved. A new law may not be the only, the best, or the right way to achieve what the Government wants to do.

The booklet should help guide policy makers towards thinking through a variety of options. For examples

(a) is a law really needed? Are there other ways of achieving the objective? What are the pros and cons of a law over other methods?

(b) if a law is needed, is there a law already in existence that has not been used or that could be used to achieve the aim (for example could regulations be made?)

(c) what are the economic implications of a new law compared to other means of achieving the aim?

### **(4) Role and responsibilities of legislative counsel**

It should be made clear that legislative counsel have responsibilities that go beyond preparing legislation for particular departments. As the situation in a particular Office warrants, the booklet should make plain that legislative counsel are under a duty:

#### **(a) to maintain an orderly statute book**

This includes maintaining a consistently modern style of drafting; avoiding unnecessary renumbering of Acts; maintaining the integrity of the Interpretation Act by using its provisions; making appropriate textual consequential amendments; avoiding conflicts between one Act and another; making proper use of the Regulations Act.

#### **(b) to notify other departments of legislative proposals that may affect Acts under their administration**

This can sometimes cause conflict when one department is reluctant to deal with expected objections of another department or just does not want to undertake the burden of considering consequential amendments.

**(c) to raise questions of principle**

From time to time legislative proposals offend fundamental principles of fairness - for example, proposals to make the law retroactive, certain powers of entry, search, and seizure, interference with individual rights, expropriation without compensation and so on. Quite apart from Charter of Rights issues legislative counsel have a duty to raise fundamental fairness issues at a political or other level if they cannot be satisfactorily resolved with the department concerned.

**(d) to insist that transitional problems are considered**

Often transitional provisions are left for consideration too late in the process and are seen to be "a legal problem" not of real concern to the instructing department. They are of course a vital component of the draft.

**(e) to ask questions**

Legislative counsel are responsible for preparing sound law. A sound law can be tested in many ways - one of the most valuable is by asking questions - what if . . .? While this can be taken to extremes, most departments appreciate pertinent questions, especially if they point out flaws or improve the legislative scheme.

**(f) to identify and resolve Charter and legal issues**

As the Supreme law of Canada, the Charter of Rights and Freedoms must of course be considered throughout the drafting process. References for constitutional opinions are often needed. Any Charter or legal issues that have not already been identified should be raised by legislative counsel.

If departments are aware of the need to consider constitutional issues early in the process they can often be cleared up early rather than later in the drafting process.

**(g) to refer unusual offence or penalty provisions to Crown counsel for comment****(h) to consider the "legislative package"**

Legislative proposals often involve a mix of new law, amendments to existing law, and the repeal of law. One provision may depend on another. The form of the legislative package must be carefully thought through in collaboration with the instructing officer.

**(i) to spot financial and other practical implications**

When legislative counsel see significant financial implications for a Bill they must refer it to Treasury. Knowing of this, departments are more likely to discuss with Treasury the economic impact of their proposals ahead of time. Similarly, if the Bill is likely to have a significant impact on the court system, or the cost of administering a new law by another department, the appropriate departmental official should be alerted.

**(j) to draw to cabinet's attention any policy changes made to its instructions**

(k) to decide on the last word

The words chosen for a draft are the responsibility of legislative counsel. But departments should be encouraged to comment on issues of precision, comprehension and clarity.

**(l) to communicate clearly**

Legislative counsel should have a sense of their purpose. The creation of sound law in accordance with Government policy is the traditional view legislative counsel have of their function. An explicit commitment to communicate the law with clarity should be an intrinsic element of their functions.

Not all Legislative Counsel Offices have all the listed responsibilities but all have responsibility for some of them. If the roles and responsibilities of legislative counsel are known and understood in advance of a drafting project it is more likely that the project will proceed smoothly.

**What are instructions?**

**(5) Legislative drafting instructions**

What are "instructions"? Dr. Elmer Driedger commented that a drafter must

be brought to the point where he is qualified to deal with the subject matter from a legislative point of view

Garth Thornton describes drafting instructions as "an essay in communication" whose sole aim is to communicate information to the drafter. He says

it is easy for a draftsman to overlook the difficulties of preparing adequate drafting instructions; some advice ... on their suggested form is invariably useful and often welcome.

Thornton outlines the basic elements of good drafting instructions in his book on Legislative Drafting. The following is an edited version of what he says.



**(a) background**

Instructions should contain sufficient background information to enable the drafter to see in perspective and in context, the facts and problems which the legislative proposal is intended to meet.

Proposed legislation often has a history which contributes to the solution proposed by the instructing department. The drafter needs to know of this so that it can be kept in mind during the drafting process.

Reference should be made to reading material that would be helpful or reference sources.

The instructions should distinguish between background information and the actual proposal being made.

**(b) principal objects**

The principal objects of the legislation should be clearly and fully stated. It is helpful for the drafter to know the purpose of the legislation. Designing a statement of purpose is helpful both for the drafting, the instructing department to think its precise purpose through, and for the drafter to properly understand what it is the legislation is intended to achieve.

**(c) how the objects are to be achieved**

The instructions should provide a picture of how the legislation will actually work in practice. The machinery envisaged and the necessary powers and duties should be described in detail.

The drafter should not only be aware of important issues of policy but also of major administrative detail. For example, if a power to make regulations is envisaged, the instructions should identify the kinds of things that are intended to be dealt with by the regulation. It does not matter that the instructions include matters that will be handled administratively - it is more important for the drafter to have a thorough knowledge of the practicalities of the proposal.

The department should not be afraid of pointing to gaps in its proposal or particular areas where advice is being sought or is required. Far better for legislative counsel to know of the uncertainties than for the department to bluff it out.

**(d) implications of the proposal**

The instructions should refer to all known implications and difficulties whether legal, social or administrative.

Alterations required to existing law should be specified and provisions of other Acts and regulations that will be consequentially affected noted. Legislative counsel may be able to help with a search of the statutes and regulations if this has not already been done to aid the department in identifying necessary amendments to other legislation.

The proposal should indicate how contraventions of the legislation are intended to be dealt with.<sup>(11)</sup>

To summarize Mr. Thornton's suggestions - legislative counsel need to know these things:

- (a) what is,
- (b) what will be, and
- (c) why.

The "what will be" and "why" are both important elements of instructions. In writing them down, in thinking them through, and in discussions about them, the "what will be" and "why" help to show up the issues from different points of view and often help create new ideas for a better legislative solution.

For additional ideas about what instructions should contain Appendix 1 is an excellent summary of what New Zealand Parliamentary Counsel expect from instructions. Appendix 2 contains an extract from the Australian Legislation Handbook, published by the Australian Government Publish Service. The Handbook is referred to in Mr. Thornton's book.

**(6) What form should instructions take?**

In 1948 the UK Treasury issued some notes on the Preparation of Bills.<sup>(12)</sup> Writing of the kind of memoranda that should be submitted to cabinet or cabinet committee for review and approval as drafting instructions, the note states

Those who are concerned with the preparation of memoranda of this kind should be careful to avoid casting them in a form which bears the slightest resemblance to a draft Bill. Nothing is more hampering to the [legislative] counsel, when the drafting stage is reached, than to be obliged to build what is usually a complex structure around "sacred phrases", or forms of words that have become sacrosanct by reason of their having been agreed upon in Cabinet or in one of its committees.

And later the memoranda reiterates "it is above all things necessary to avoid anything in the nature of a 'rough draft Bill'". Garth Thornton summarizes the view of most

legislative counsel - that instructions in the form of draft legislation are not desirable - a straightforward prose account is preferred.

Dr. Driedger is emphatic<sup>(13)</sup>

A draftsman does not like to receive his instructions in the form of a draft Bill; he prefers them in the form of a plain statement of what is intended, supplemented by oral discussion . . .

I challenge these views. They do not consider the department's needs or the quality of the information provided as instructions. The aim of instructions is not solely to communicate to the drafter. Instructions have, or should have, a dual purpose

- to communicate to the drafter, and
- to help the department think out its policy and administrative details in a coherent way.

Putting the point another way,

. . . language is something more than the tool of thought. It is part of the process of thinking.<sup>(14)</sup>

To discourage departments from preparing drafts of legislation deprives them of an important working tool - the very tool by which their policy will be implemented. Without forcing departments into drafting if they find it easier to describe what they want in prose I suggest that a departmental draft can be useful for both legislative counsel and the department writing it.

The problem is not departmental drafting; the problem is that particular drafts or forms of words can become sacrosanct - that problem can arise in whatever form instructions are prepared.

Instructions in the form of an annotated draft, supplemented by comments and meetings can be extremely helpful if the department understands that

- the draft Bill is legislative counsel's responsibility, and
- legislative counsel is not bound to follow the organization or the language of a departmental draft.

On the other hand, legislative counsel should be ready to explain why they have chosen a different organization or different language than the department.

Most Canadian jurisdictions accept instructions in the form of a draft, as does the New Zealand Parliamentary Counsel Office, (although no jurisdiction encourage drafts).

Australia says that someone else's draft is not an adequate substitute for "proper instructions".

#### **(7) Responsibilities of instructing department**

There are few more challenging or complex matters that a Government department undertakes than to prepare legislative drafting instructions and to shepherd a proposed Bill through the legislative process.

Significant legislative proposals should have resource persons assigned to the project full-time. Without dedicated resources a project will suffer. Resource persons should have authority to make decisions on issues or be able to get decisions quickly. Dedicated resources will allow early consultation with other departments and a properly organized public consultation process, if required.

The departmental contact person with legislative counsel needs special qualities - not only to prepare instructions and answer questions - but to view drafts with a critical eye to see that they do what is wanted.

Sound legislation is the product of a good drafter and intelligent officials working collaboratively. The departmental official must have a "feel" or a "head" for reading drafts and seeing what is right and wrong with them. Although expert in their area, some officials are reluctant to make critical commentary on drafts in the mistaken belief that "the legal text" is up to legislative counsel, and not of primary concern to them. Other officials have a genuine difficulty seeing the effects of a draft - they see the words but don't see their deficiencies or ramifications.

Legislative counsel must spot these reactions and work through the difficulties by

- actively encouraging criticism
- asking questions about their own drafts and their effect
- encouraging the official to seek the comments of others to ensure that the draft does its job.

Legislative counsel should make efforts to gain the confidence of officials so that a free exchange of ideas and comments can take place. The groundwork for this should be done early in the process so that it is clear that constructive criticism is welcomed and that collaboration produces the best product.

#### **(8) Timeliness**

If there is one overriding common problem in legislative drafting it is lack of time. One reason for lack of time is political pressure - but there are others. Many people unfamiliar with the legislative process have no idea of the time things take and what can take up time.

Deadlines, internal and external consultation, departmental and political decisions, public involvement, the time it takes to produce a draft, to meet to discuss it, to redraft and meet again, the inevitability of the drafting process throwing up new policy and other issues, all these things should be noted as affecting time frames.

Of course it is impossible to say with precision how long a drafting project will take, but it is helpful to make it clear that everything is likely to take longer than anticipated, and to plan accordingly!

A strategic plan is essential for most major drafting projects and is imperative if wide public consultation is anticipated. Of course a plan is a guarantee of nothing, but it will point up how a delay will impact other key dates and activities outlined in the plan.

Of course the flip side to lack of time is too much time. This can be a problem if long gaps occur between instructions when a keen sense of the draft can be lost, especially when the drafter has other important ongoing projects.

### Legal context

#### (9) The legal regime - what is, what is to be

It is important for legislative counsel to have a good grasp of the law that is proposed to be changed. With the time constraints usually imposed on them it is rare for legislative counsel to know as much as they would like. There are rare exceptions - when a law reform commission recommendations are being implemented or a matter has been thoroughly researched by the department proposing the measure. But these are exceptions, not the rule.

A legal brief of the existing and proposed law should become accepted as a normal part of drafting instructions. The requirement should be waived only in exceptional circumstances. If this requirement can be endorsed by the Attorney General or by a cabinet legislative review committee, and waived only by them, so much the better.

A legal brief for legislation is a specialised form of research and writing. The work should probably be performed in association with the Legislative Counsel Office, or by research staff assigned to that office.

The benefits are twofold. Legislative counsel benefit by knowing the law they need to do the drafting work and the department benefits by having a legal review early in the process.

#### Research counsel

The problem of having a properly researched legal background raises a broader question of whether Legislative Counsel Offices should have, as part of their staff, research counsel. A good case can be made for lawyers dedicated to legal research for legislation. A ratio of 3 legislative counsel to one research counsel might be a good balance.

## PART 3 USING THE COMPUTER TO GET BETTER INSTRUCTIONS

### Checklists

Certain kinds of legislative provisions recur time and time again in statutes. Without specific instructions, legislative counsel tend to turn to their own favourite precedent in a former Act, cut and paste it into a draft, do a bit of editing, and ship it off to the department.

Precedent banks of standard clauses are not favoured by legislative counsel. They see in "precedents" all that is wrong with other forms of legal drafting. Precedents lead, in Jim Ryan's words, to procrustean legislative drafting. On the other hand, legislative counsel (especially those new to the Office) need some guidance and reminders about what to ask and to think through in the projects to which they are assigned.

Even if a precedent bank is not a great idea (particularly if it is never reviewed) a checklist of questions for typical legislative provisions is very useful. And a checklist can be created and computerized.<sup>(15)</sup>

The design of a checklist can also help improve the quality of the subsequent legislation. It can put questions in an appropriate order which then helps resolve technical points of detail. To take a simple example:

Assume an Act is to create a right of appeal to a Tribunal. Learning of this, a typical approach (in the absence of explicit instructions) is for legislative counsel to make a decision for the first draft that the appeal

- be within a "reasonable" period of time
- be within a time that the Tribunal considers to be reasonable
- be within 30 days (or some other specific time) of an identifiable date
- be within 30 days of an identifiable date unless the Tribunal permits the appeal to be filed later (and there may be some guidance to the Tribunal about when it should exercise its discretion)

Not infrequently this level of detail is relegated to "technical detail" - its "just a drafting issue". Important policy questions may not be raised at higher levels - for example, what degree of court supervision, if any, should the Tribunal be subject to?

If that important policy was settled first - subsequent drafting questions would fall more neatly into place. If, for example, the decision was that the Tribunal should be supervised by the court then this would be reflected in the detail.

If "big" policy questions are not dealt with first, they are decided through the "back door" - with decisions evolving more by accident than design. This is not to say that the detail will not from time to time be an exception to the policy (or change it completely) - it will, but at least it is then done within the context of decided policy - not on an ad hoc basis. Here is one approach to developing a policy development and drafting questionnaire and "computerizing" it.

**(a) drafting the law**

Not only must legislation be legally sound but possible alternative approaches, solutions or options to a given problem or issue need to be considered. The traditional precedent only gives a standard form answer - it does not exercise the mind. If the drafter does not think of an alternative a precedent will not help.

**(b) knowledge of the facts**

Knowledge of the facts is based on the instructions received and on asking the right questions. Again the traditional precedent does not help - it gives answers without necessarily knowing all the relevant facts.

**(c) integrating the law and the facts**

The aim of drafting legislation is to achieve a department's purpose in the best way without unforeseen consequences. Computer software programs are now available to help with the task. Computer programs can be developed to help draft the simplest to the most complicated legislation - but the program would take some time to develop.

**(d) the program**

The program builds on what legislative counsel already have in a written questionnaire form (standard questions to ask) or what they have learned to ask instructing officers through years of experience. Typically asked questions are redesigned and loaded into the computer program. The questions can be put in an order that will provide the general context and gradually focus on the detail.

Any particular answer to a question will initiate a whole new series of questions. All the variations, options and alternatives legislative counsel would normally ask an instructing officer are put into the program. Each counsel in the office would be asked to participate in the questions, variations, options and alternatives. The result is a very comprehensive program containing the collective knowledge and experience of the Office. It can, of course, be modified from time to time as necessary.

Because the questionnaire is computerized it can be structured in the form of a logic tree. This means the answers to certain questions automatically cause the system to move into specifically selected lines of other questions - questions that might not have been raised without the help of the computer. Alternatively, the computer will automatically eliminate other questions which are not relevant (a bit like the typical passport form which allows you to skip several questions if, for example, you are not married or have no children).

By this sophisticated branching system legislative counsel is lead through all the questions necessary to get a detailed description of the law to be created. For many questions the computer provides a suggested answer - if the answer is accepted the return key is tapped - variations to the answer are also given if requested and problems highlighted.

The system can be seen as the collective wisdom of the Office in asking the questions to get the facts which can then be turned into draft clauses, reflecting the Office drafting style.<sup>(16)</sup>

The advantages of this kind of program to lawyers in private practice are obvious. Even the most junior of lawyers has the benefit of the program when asking questions and thinking of the kinds of questions to ask and legal issues to be dealt with. A similarly structured program to develop legislation seems to be equally advantageous. Without it the drafter is often left to his or her own devices with all the inherent dangers of the drafter not asking the right questions, or of not thinking of all the options. With programs designed to ask the right questions in the right sequence, the drafter has a helpful support system.

Over time it should be comparatively easy for the Legislative Counsel Office to pool its collective knowledge about the questions that should be commonly asked and the things that should be considered when designing particular pieces of legislation or elements of them. This information could in turn be made available to departments and used by them to develop drafting instructions.

#### **(e) drafting precedents**

Obviously computer programs that develop questions can also propose precedent clauses. Whether for law firms or Legislative Counsel Office, standard clauses<sup>(17)</sup> can provide consistent style and quality. If a drafter proposes a variation to the standard clause, justification for the change could be required, or approval from a senior member of the Office. The precedent clauses here could still be procrustean but if they are, at least they should stem from asking the right questions - not by assuming answers for which questions are never asked.

There is a considerable opportunity to improve substance, style and consistency of legislation with this kind of project.<sup>(18)</sup> To give just one example, "Crown agency" provisions in an Act for a Crown corporation.

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### Conclusion

In the first words of this paper I commented that I did not propose to deal with the quality of legislation itself. In fact, getting better drafting instructions will improve the quality of most legislation. For those wishing to read something on the quality of legislation try New Zealand's Legislation Advisory Committee: Legislative Change, Report No. 6, December, 1991 (A revised version of its 1987 Report 1)<sup>(19)</sup> or Twining and Miers: How To Do Things With Rules, Weidenfeld and Nicolson, (3d) 1991.

The nature of Government and the way it does business is changing. Legislative Counsel Offices must be ready to meet that change. Although this paper has focused on the narrow question of getting better instructions for legislative drafting in a traditional sense, there is already a demand for legislative counsel to take instructions in different ways - in particular through attendance at committee meetings where policy issues are thrashed out and legislative counsel are then asked to "write it up"

With new ways of governing will come new ways of receiving instructions. Legislative counsel should be active participants in creating innovative processes to receive and obtain instructions, indeed of helping Governments design more disciplined ways of handling legislative development projects as a whole.

But the fundamental elements of a good legislative product remains: a collaborative effort - with good teamwork between instructing officers and the drafter.

### Thanks

To Claire Reilly, legislative counsel, British Columbia and Glen Acorn, Q.C. for commenting on an earlier version of this paper.

Special thanks to Ian Turnbull, Q.C., First Parliamentary Counsel of the Australia Commonwealth for sending me the Australian Legislation Handbook and to Janet MacLean, University of Auckland, Faculty of Law, for sending me the most recent version of New Zealand's Legislation Advisory Committee Report on Legislative Change.

1. Former Chief Legislative Counsel of British Columbia, quoting from a letter from Mr. Justice Lambert of the B.C. Court of Appeal. (The Advocate, (1981) p397.)
2. The Law Society: Reform of the Legislative Process, Submission to the Hansard Society, March 1992, para. 3.1. Admittedly a rough gauge of legislative activity, but the message is clear.

In these kinds of statistics rarely is a breakdown given of the kind of issues before the court. Is it the application of a statute (like a *Highway Traffic Act* or the *Criminal Code*) or the uncertain interpretation of a statute? Either way the courts deal with a lot of legislation.

3. Quoted from a press release announcing the formation of the Statute Law Trust. The Trust was set up by Francis Bennion with the principal object to procure the establishment in Oxford University of a professorship in statute law studies linked to Balliol College. The secondary object is to further statute law studies.



4. Naturally enough most lawyers concern themselves only with the statutes they deal with on a day to day basis. This tends to give them a narrow and somewhat skewed view of the statute book as a whole.
5. I wrote this before "the legal text" of the proposed Constitutional amendments became an issue in the Constitutional debate. Perhaps we are seeing the birth of interest in what the law actually says...?
6. Professionalizing Legislative Drafting: The Federal Experience, edited by Reed Dickerson, American Bar Association, 1973.
7. Sir Noël Hutton, former First Parliamentary Counsel in the U.K. described the establishment of the Parliamentary Counsel Office as "nationalization" because virtually all Government legislative proposals had to be channeled through one office.
8. Ilbert says that in the middle of the last century the situation was this:

The cost was great... There was no security for uniformity of language, style or arrangement in laws... There was no security for uniformity of principle in measures for which the Government was collectively responsible. Different Departments introduced inconsistent bills, and there was no adequate means by which the prime minister, or the cabinet as a whole, could exercise effective control over measures fathered by individual Ministers. And lastly, there was no check on the financial consequences of legislation. There was nothing to prevent any Minister from introducing a Bill which would impose a heavy charge on the Treasury, and upset the chancellor of the exchequer's budget calculations for the year.

There were the defects that impressed the acute and frugal mind of Robert Lowe... when he was chancellor of the exchequer in 1869. The remedy which he devised was the establishment of an Office which should be responsible for the preparation of all government Bills, and which should be subordinate to the Treasury, and thus brought into immediate relation, not only with the Chancellor of the Exchequer... but also with the First Lord of the Treasury, who was usually Prime Minister. This is how the present office of parliamentary counsel to the Treasury was started.

Sir Courtney Ilbert: *The Mechanics of Law Making* p63.

9. Similarly, in Australia, Thornton comments about Australian drafters:

Most draftsmen find the inadequacy of drafting instructions a recurring problem and their most common inadequacy is a lack of depth and comprehensiveness.

G.C. Thornton: *Legislative Drafting*, Butterworths (3d), p113.

10. Contrast this with the Legislation Handbook issued by the Australian Department of the Prime Minister and Cabinet (see Appendix 2 for extract).
11. This is a much neglected topic. It is too often relegated to the end of a drafting project with all contraventions being relegated to offences.
12. Notes on Government Organization No. 3: The Preparation of Bills, Treasury, March 1948, p8.
13. E.A. Driedger: The Composition of Legislation, Supply and Services Canada, preface xix.
14. Arthur Littleton: The Importance of Effective Legal Writing in Law Practice, 9 Student Lawyer 6 (1963) - a quotation which introduces Dickerson's Fundamentals of Legal Drafting.
15. The authors admit neither of them have done this (??)
16. This description is based on a 11 November 1985 National Law Journal article called Help in drafting complex documents. The article described a program called "Workform" available at that time in the United States.

There are other programs similar to this on the market and some word processing systems say that this form of program can be developed. (See the Lawyer's PC, 1 October 1987 issued describing Wordperfect as a legal system engine.) I do not know of any legislative drafting office that has experimented with this program. It is being used in some private law firms as are various other "expert" systems.

17. The great fear of precedent clauses is that once a precedent is established it stagnates. Legislative counsel can avoid this by periodic review. Driedger suggested (with caution) some standard forms in his Composition of Legislation, Legislative forms and Precedents.
18. A project of this nature could be national, or even Commonwealth in scope - perhaps in one sense picking up on the suggestion made by Francis Bennion in Statute Law (p24):

Standardization is an area where cooperation between Commonwealth countries would be fruitful. Model clauses on topics like strict liability or powers of entry could be drawn up in uniform terms applicable to any common law country.

19. Available from P.O. Box 2590, Wellington, New Zealand.