The Virtue in an Old Act [1]

David Hull [2]

Abstract: *It is more than 90 years since New Zealand's law drafting service was made an independent office of Parliament, and its functions defined, by statute. A Bill now before Parliament proposes changes. While keeping its independent statutory status, it would again become (as before 1920) an instrument of the executive government instead of a parliamentary office. Moreover, the professional staff of the office (other than the Chief Parliamentary Counsel) would, as a matter of law, cease to be "principal officers". The changes are intended to take account of modern circumstances in the New Zealand office - in particular, its growth in size.*

This article considers the contribution of the existing Act to legislative drafting in New Zealand in the 20th century, and its continuing value as a template of ideas for small jurisdictions.

A Legislation Bill that is now before the New Zealand Parliament seeks to change the character of its law drafting office. During the first part of the 20th century, the office established a reputation for excellence. The new country already had a political habit of legislative innovation, going back to the 1890s and earlier. But for its own part, under four exceptional leaders - Sir John Salmond, followed by James Christie, Dartrey Adams and eventually Denzil Ward - the office developed a strong tradition of professional independence, expertise and authority. On arriving in Christchurch on 16 July 1951 as a guest of the University of New Zealand, to visit its four constituent college law faculties, Dean Griswold of the Harvard Law School reportedly said:

---

[1] The author wishes to express his gratitude to Ross Carter, Parliamentary Counsel, Wellington, for so readily providing this and much of the other material used for this article about the history of the New Zealand Parliamentary Counsel Office. The author emphasises that the responsibility for the accuracy of the article is his alone.

[2] The author is a consultant legislative counsel, based in Jersey, Channel Islands. He was formerly a Parliamentary Counsel in New Zealand; Attorney-General of Gibraltar; and Attorney-General of Western Samoa.

> "We have always heard that New Zealand leads the world in law draftsmanship. That probably goes back to the days of Sir John Salmond, who is, I suppose, your leading legal figure. He is really a world figure, but you have built up a tradition for careful and effective draftsmanship. We at Harvard often take down your statutes from our shelves as an example."[3]

Born in the north-eastern England town of North Shields in 1862, John Salmond emigrated with his family to New Zealand when he was aged 14. Having graduated with an arts degree from the University of Otago, he won a scholarship to study law at University College, London. On his return to New Zealand, he practised for some years as a country lawyer in the small township of Temuka in the South Island. In 1897, he was appointed and distinguished himself as professor of law at the University of Adelaide in South Australia. Then, in 1906, he again returned to New Zealand, this time as the first professor of law at Victoria University College in Wellington.

The following year, he became Counsel to the New Zealand Law Drafting Office. This was a new position. It appears that until then, law drafting was being undertaken within the Crown Law Office which, under the leadership of the Solicitor-General of New Zealand as its permanent head, was responsible for the provision of legal services to the executive government. The Crown Law Office was part of the public service, though by various orders the Solicitor-General and the law drafting posts were exempted from some of the enactments that ordinarily applied to civil servants. When Salmond took over, the Law Drafting Office moved to its own premises.[4]

Four years later, Salmond was promoted to Solicitor-General. He took silk in 1912, and was knighted in 1918.

When he moved to the Crown Law Office, the Law Drafting Office was amalgamated with it. He continued to draft some Bills himself, while his eventual successor, James Christie, acted as Law Draftsman from 1916 under his guidance and direction. Christie was confirmed as Law Draftsman in 1918.

In 1920, Salmond became a judge of the Supreme Court. In the same year, New Zealand passed the *Statutes Drafting and Compilation Act*.

It has been suggested on at least one occasion that the Act was personally drafted by him. But Christie, and the Attorney General of the day (Sir Francis Bell, KC), also prepared major legislation. What does seem clear is that Salmond was one of the principal architects, and probably the leading architect, of the new Bill. Christie, in a letter to the Attorney General in 1928, said "some of the most important legislation was drafted by the then Solicitor-General (Sir John Salmond)" and that an official memorandum written by Salmond in 1916 "discussed a proposal that the Law Drafting Office should be established as an office separate from the Crown Law Office".

---

3 Dr Erwin Nathaniel Griswold (1904-1994), Dean of Harvard Law School 1946-1967, Solicitor-General of the United States of America 1967-1973.

4 See Appendix B to the Report of the New Zealand Law Commission (2009) "Review of the Statutes Drafting and Compilation Act 1920" (NZLC, R.107).

Of course, in the way of things, institutions benefit from their icons. It is not a reflection on Christie, who served with distinction as Law Draftsman and then as Counsel to the Law Drafting Office for 20 years, that the Act of 1920 is often attributed to Salmond and is seen by many as his legacy to the office he once worked in. He was a famous man, the author of seminal textbooks on jurisprudence and torts and widely regarded as one of the great common law jurists of the 20th century.

Section 2 of the new Act declared—

> "(1) There shall be an office of Parliament to be called the Law Drafting Office.
>
> (2) The Law Drafting Office shall be under the control of the Attorney-General. If during any period there shall be no Minister of the Crown who is Attorney-General, the office shall during such period be under the control of the Prime Minister."

The office was to consist of a "Bill Drafting Department" and a "Compilation Department". The Act gave statutory recognition to its professional members. The chief officer of the Bill drafting division was to be called the Law Draftsman. There were also to be one or more Assistant Law Draftsmen. The other division was to have, as its chief officer, a Compiler of Statutes. All were constituted "principal officers" of the Law Drafting Office. They were to be appointed by the Governor-General on the advice of the Prime Minister and to hold office at pleasure.

Section 4(1) stipulated that the duties of the officers in the Bill Drafting Department were –

> "(a) to draft such Government Bills as the Ministers of the Crown may direct to be prepared for the consideration of Parliament, and such amendments of such drafts as may from time to time be required by Ministers of the Crown during the passage of such Bills in Parliament……".

The section also required the Bill drafting officers to supervise the printing of bills, to examine and report on local Bills, to report on private Bills if required to do so, and to undertake other duties in respect of statutes and subordinate regulations if so required.

So the new Act, prosaically named though it was, had the following distinctive features:

(a) The Law Drafting Office was given a separate, statutory identity.

(b) Unlike the Crown Law Office, it was made a parliamentary office.

(c) Its functions were defined by statute.

(d) Each of its professional members was given statutory status as a principal officer.

(e) The Office was to be controlled directly by a Minister of the Crown.

(f) The first of the Bill Drafting Department's functions was to prepare Government Bills.

(g) It was to do so at the direction of Ministers of the Crown.

(h) It was to do so for the consideration of Parliament.

The Act was a template for a law drafting service in at least three pivotal ways. It recognised that the preparation of legislation is by its nature politically important, and that an executive government must have direct control of law drafting facilities to enable it to secure its policies; that in a Westminster system, the executive branch is responsible to the legislature; and that, on a mature understanding of the process, preparing a Bill – big or small - is always business for senior officials.

This template provided a statutory foundation for a coherent and authoritative doctrine of legislative drafting as a specialized legal discipline.

The Act reinforced—indeed by implication it required—a professional philosophy that legislative counsel owe a duty to the legislature and its members. It did not do so by requiring or permitting counsel to explain or justify executive policy. Nor did it contradict a Minister's right to have a Bill worded in a way that might be the most advantageous to him politically. But, for example, if asked in a Select Committee as to the intended effect of the wording of a Bill, counsel could and would consider himself duty-bound to give a candid answer to any Member of Parliament, regardless of party. In this respect, as in others, an office doctrine could sustain bipartisan confidence in the integrity of its function, while avoiding tensions that might otherwise develop between the Office and the Ministers for whom it prepared draft legislation.

Combined with the requirement to draft to the direction of Ministers, the constituting of all of the legislative counsel as principal officers enhanced the professional independence and authority of the Office. It was, and remained at least until the early nineteen-seventies, organized on the lines of English chambers. The Law Draftsman was nominally first among equals, and the ambience of the office reflected this. After an initial period of supervision for newcomers, each of the legislative counsel was responsible for his own Bills. Instructions for legislation were always delivered by senior civil servants and on occasion, by very senior civil servants. Legislative counsel nevertheless spoke with authority on standards of expression and presentation of Bills and on law drafting practice. They could insist that points of legal principle were properly addressed, and confidently invite instructing officers to consider the practicability of their proposals. If necessary, they could assert a right of audience with the minister promoting a Bill – and, if it involved legal principle, a right to take the matter to the Attorney General. It was in practice rarely necessary to do so: the real virtue of the Act was that it set out a framework in which the participants—all senior officials—understood their respective functions and could work together accordingly.

Despite something of a shift in emphasis so far as reference to ministers is concerned, the guidance notes for the assistance of persons working with the office today (since 1973 called the Parliamentary Counsel Office) continue to reflect that doctrine.[5] Paragraph 3.1 says—

> "3.1.1 Responsibility

[5] "Working with the PCO" (Edition 3.3.1, updated October 2010): see www.pco.parliament.govt.nz

The apparent shift in emphasis seems no more than that: the Law Commission's view appears to imply is that parliamentary counsel does have direct access to the minister promoting a Bill: see paragraphs 2.20, 3.2, 4.8 and 5.1 of its Report.

> In broad terms, the drafter is responsible for the way that legislation is expressed and presented, while responsibility for policy lies with the department. In practice, policy and drafting are not mutually exclusive but form a continuum.
>
> 3.1.2 Independence
>
> Drafters also have a wider responsibility. They are counsel to the Government and Parliament in their legislative capacity. This can occasionally lead a drafter to take a different view on the implementation of policy decisions from that of your department. If necessary, the drafter may ask for an assurance from you that the instructions reflect the Government's or Minister's intentions.
>
> If the drafter believes there is a serious conflict with good drafting practice or general legal principle, which discussion between you and the drafter has not resolved, the drafter may submit a memorandum to the Attorney-General setting out the drafter's concerns.
>
> The PCO's independence can be useful if differences arise between departments. The drafter can help to resolve the conflict in an impartial and unbiased way."

And paragraph 4.2, describing legislative counsel's position at a parliamentary Select Committee, states:

> "The drafter's role remains as outlined in section 3.1, both in terms of drafting and in providing independent advice on the legal implications of provisions."[6]

If passed in its present form, the Legislation Bill will repeal the Act so closely associated with Salmond. It will replace it with one Part – the last in a Bill consisting in all of four – that deals with the constitution and functions of the PCO.

As explained at the outset (in clause 3(g) in Part 1), the Bill's purpose in this respect is to replace the 1920 Act with "modern" legislation that "facilitates" the drafting of "high-quality" legislation.

Part 4 provides for the continuance of the Parliamentary Counsel Office. It begins –

> **57 Parliamentary Counsel Office continues as separate statutory office**
>
> (1) The Parliamentary Counsel Office continues as an instrument of the Crown and a separate statutory office under the Attorney-General's control.
>
> (2) During any period when there is no Minister of the Crown who is Attorney-General, the Parliamentary Counsel Office is under the Prime Minister's control."

After nearly a century, the PCO would thus cease to be a parliamentary office, and become again an instrument of the Executive Government. The new Bill also describes what is in practice the main work of the parliamentary counsel— the drafting of Government Bills—more shortly than its predecessor: the references to their preparation "at the direction of Ministers of the Crown" and for "the consideration of Parliament" are removed. Clause 58 simply begins—

---

[6] It is also apparent from the Law Commission's Report (see, e.g. paragraph 4.8) that this is current PCO doctrine.

"(1) The functions of the PCO are—

(a) to draft government Bills and amendments to them;".

The responsibility of the office for the performance of its functions is dealt with in a new clause 63, which begins—

"(1) The Chief Parliamentary Counsel is the chief executive of the PCO and is responsible to the Attorney-General for—

(a) carrying out the functions, responsibilities, and duties of the PCO; and

(b) the general conduct of the PCO; and

(c) managing the activities of the PCO efficiently, effectively, and economically."

The Chief Parliamentary Counsel (as the Law Draftsman of New Zealand has been styled since 1973) would continue to be appointed by the Governor-General (on the "recommendation" of the Prime Minister).

The other parliamentary counsel would no longer be, in law, "principal officers". They would also cease to be appointed by the Governor General. The Bill provides, in clause 64—

"(1) The Chief Parliamentary Counsel may appoint such people to be parliamentary counsel as he or she thinks necessary for the efficient exercise of the functions, responsibilities, duties, and powers of the Chief Parliamentary Counsel and the PCO.

and

(3) A parliamentary counsel is an employee for the purposes of the Employment Relations Act 2000."

These changes apart, the new Bill retains several of its predecessor's features. New Zealand's law drafting service would continue to have a statutory identity. It would remain under direct ministerial control, outside the core public service.

The proposed changes reflect recommendations made by the New Zealand Law Commission in its 2009 Report "Review of the *Statutes Drafting and Compilation Act 1920*" (NZLC, R.107).

Despite the recommendations, this was not at all a critical report. If anything, like Dean Griswold's earlier comments, it might well have provoked a blush or two in the office: in the foreword, the President of the Commission (the Right Honourable Sir Geoffrey Palmer, himself a former parliamentarian and Prime Minister) had this to say:

> "Those who are familiar with the processes of drafting laws in Westminster style Parliaments have long valued the role of Parliamentary Counsel. The professional expertise of Parliamentary Counsel is the essential quality control that is required in the production of statute law.

> There is nothing quite like the institution of Parliamentary Counsel in other systems, even in common law systems such as the United States. We have managed to get the essential elements of law drafting right in New Zealand. There is no need to change in any fundamental way at all.
>
> But because the existing New Zealand statute governing these matters is old it needs to be brought up to date, with a few tweaks here and there.
>
> This is a conservative report. There is no case that can be made, in the view of the Law Commission, that big changes are required. This report aims only to make what is already an excellent institution within the New Zealand Government better."

The Commissioners considered that, as one of the most important checks and balances in the legislative process, the PCO performed what amounted to a constitutional role. It provided a wide range of advice to departments in the development of policy, the pre-instruction stage and the drafting phase, as well as at other times if required. The advisory role was critically important. It required objectivity and independence. The PCO's functions affected both the executive government "as instigator of the initial product" and Parliament "as the owner of the final product". Counsel had to be able to give free and frank advice, distinct from that of the policy makers.[7] The office's functions should be set out clearly and it should be seen to be independent. For those purposes, the PCO should continue to be constituted by statute.

Nevertheless, the Commissioners thought it no longer necessary to make it an office of Parliament - and no longer appropriate that the professional staff other than the Chief Parliamentary Counsel should be principal officers.

On the first point, they noted that in moving the second reading of the 1920 Act in the upper chamber of the day, the Attorney General had said that it was desirable that the law drafting office should be made an office of Parliament and removed from the public service. But while endorsing the view that the PCO should remain outside the public service, they thought that today "things have moved on", that the description as an office of Parliament "is not really an accurate description" and that it is "difficult (though not impossible)" to assert that the PCO now has the primary function of an office of Parliament.

Their view as to the appropriate status of parliamentary counsel was expressed more unequivocally. They noted that the office was much smaller in 1920, and "that the concept then seems to have been that of a small number of colleagues of equal standing, each appointed at the highest level". They considered that for his part the Chief Parliamentary Counsel should continue to be appointed by the Governor-General—in the same way as judges, the Clerk of the House of Representatives, the Solicitor-General, the Commissioner of Police and some others. But they went on to say—

> "However, the position of all other Parliamentary Counsel is very different.
>
> A modern organisation needs to be effectively managed. Chief Parliamentary Counsel should be able to determine who is appointed and on what terms. The only constraint, we

[7] Although the Law Commission recommended that this should be a specific statutory provision (see paragraph 8.12 of its Report), the Bill does not include it.

> believe, is that a person appointed as Parliamentary Counsel should be a lawyer, or have a legal qualification. Appointments by Governor-General should not continue."

As recently as the early 1970s, the PCO was in fact effectively organized as legal chambers. The core of senior members certainly regarded and treated each other as professional equals. No doubt looking to the future, the office had begun to recruit a new generation, and the younger members were (as indicated above) accorded a similar courtesy. The absence of hierarchy, civil service fashion, was a very significant factor in morale.[8] But it is not the point of this article to argue against the merits of the Report or the Bill that has followed it. Since 1920, the PCO has grown substantially in size. Circumstances do change; and as the Commission had readily acknowledged, the authority and reputation of the PCO are firmly established.

In a small jurisdiction, there is also a strong case—a very strong case—for clearly defining the identity, function and status of the law drafting service and its legislative counsel. Whether as a statute to be copied or a handbook of ideas, the 1920 Act remains a valuable model.

The preparation of legislation puts strains on policy resources that are at least as great as those on the law drafting service. Few small administrative cadres have any real depth of experience in the process of making law. In practice, instructing officers more often than not look to legislative counsel to play the leading role. This is not to confuse policy and drafting, but it is important that the service not only has the necessary expertise but is also seen and acknowledged as authoritative.

Another aspect of it is that many small societies practise consensus politics. This approach usually reflects strongly held cultural views about the way in which public business should be conducted. It is therefore also desirable that the law drafting service should have and be seen to have obligations to the legislature.

In the end, it may be too optimistic for a very small legislative drafting office to expect that, as a matter of course—rather than from time to time in particular instances—it will retain experienced legislative counsel in post. A more realistic policy may be to create a service in which members feel professionally fulfilled while they do remain. Identity, independence, the ambience of chambers, and consciousness of expertise and authority in the provision of a professional service all engender high morale—even, ideally, a positive sense of élan.

But law drafting is also, if a public lawyer wishes it to be so, a mobile discipline. It is one of a combination of skills that equips him or her for a successful and rounded career in public law. Arguably it is the most relevant. Experience in legislative drafting will not displace a need for the experience in the practicalities of applied law that must be acquired in advocacy, advisory and criminal work. But none of the other disciplines provides quite the same bridge between the particularity of case lawyers and the creative generality of public administration, policy-making and the affairs of politics. Salmond himself is of course a stellar example of this: several years' experience at the outset in rural private practice, complemented by several more years in the reflectiveness of academic work, and eventually by legislative drafting—all leading on to high office as the principal permanent legal adviser to his government.

---

[8] As a former New Zealand Assistant Law Draftsman, I can vouch for this [Ed.]