Consistency versus Innovation[1]

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Introduction

The purpose for which the United Kingdom Office of the Parliamentary Counsel (the OPC) was set up in 1869 was to produce—

> "a common and consistent approach to the production of legislation".

On the other hand, there is also a strong habit of mind in the OPC of professional independence, supporting creativity and innovation. And this has been one of its traditional strengths.

Parliamentary counsel live in the middle of change and everything they do changes the context in which Bills are drafted. Everything that is drafted is necessarily new and an over formalised approach is likely to involve a failure to adapt to the changing conditions that are produced by legislation itself. Creativity and innovation are essential requirements of the job and need, within the structure of a corporate endeavour, to be encouraged and fostered. There is a tension; and, inevitably, a balance has to be struck.

Consistency

"Consistency" was a major part of our raison d'être and remains so today. What is the value of consistency for drafting legislation?

It increases clarity and reduces the labour of the reader. Any form of communication is facilitated by shared —or at least commonly understood—premises. The reader knows where the writer "is coming from". For parliamentary counsel, it produces certainty by enabling them to rely on predictable outcomes from well-established and precedented approaches. Predictability of effect is a necessary component of effectiveness and indeed of the rule of law.

But consistency can exist, and needs to operate, at different levels. I have identified three levels, which undoubtedly overlap.

High level (constitutional) consistency

At the highest level, there is a consistency in the approach to the job. Consistency at this level, although it may encompass differences of practice and degree, is essential. If parliamentary counsel cannot agree on the nature of the exercise in which they are engaged,

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[1] Paper delivered at the CALC conference held in Hong Kong in April 2009.

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then there is little hope that the courts will understand their role, or properly construe their work.

There is also an imperative for a legislative drafting office to understand what it is for. Legislative drafting offices need to be highly reliable organisations. What they do has to be right for many reasons, and it has to be right every time. That cannot happen unless the organisation has a clear idea of the difference between success and failure, and is intolerant of failure. Such organisations are rightly risk averse, but that has to be in the context, that in many situations the riskiest thing to do is to stand still. For those of us from the United Kingdom, London traffic provides a useful metaphor both for the dangers of standing still when everything else is moving, and also, at other times, for the proposition that, if you stand still, you get nowhere.

At the level of constitutional consistency the questions are of the following sort:

- What values are put, respectively, on clarity, simplicity, comprehensiveness, conciseness and accuracy? To what extent is detail delegated to executive decision-makers or to the makers of subordinate legislation? To what extent is it left to the courts to determine?
- What balance is recognised as the balance to be struck between the different audiences? Or at least what principles should govern the way the balance is struck? Is law to be written only for the courts or is the public an anticipated audience?
- To what extent does the drafting assume that reasoning proceeds deductively from principles to details or vice versa, inductively, by inferring principles from details?
- To what extent is unnecessary or redundant material regarded as inappropriate? And how does that relate to the value put on conciseness?
- What is the approach to the values of the rule of law? What are these values? Do they encompass all Lon Fuller's tests?[3]
    - Is the law general rather than personal?
    - Is it prospective rather than retrospective?
    - Is it published and accessible?
    - Is it clear?
    - Is it internally consistent, so far as concepts rather than language are concerned?
    - Is it intended to be more than of transitory duration?
    - Does it impose obligations with which it is possible to comply?
    - When it comes to application, does practice coincide with the law?

[3] Which I understand were the subject of discussion at the CALC conference held in Nairobi, Kenya in September 2007.

- What understanding do parliamentary counsel share about their role in relation to those instructing them?
- What risks between literalism and purposive construction is the parliamentary counsel expected to take? What precisely is the risk assessment that the parliamentary counsel is supposed to make? How does one deal with the dilemma that I well remember from when I was a drafting novice? On the one hand one could say "No court could get it wrong." On the other one could say "Just because a court could not get it wrong is no reason for avoiding the degree of precision needed to generate immediate certainty."
- What is the nature of the balance to be struck between the political part of the legislative process—a temporary phenomenon—and on the other the positivist austere character of law that is designed to be permanent. Razors are made to sell not to shave. For an example of an assumption of permanence on the statute see the *Calendar (New Style) Act 1750*, which fixed dates for Easter until the year 8,500—may be that is an example of assumed transience.

The answers to these questions and other similar ones constitute the culture of a legislative drafting service. And the culture needs to be common and, because it is human and therefore susceptible to change, it needs to be consistently shared. Change, not only stability, is supported by consistency. In an era of constitutional change, in particular, it is the whole culture, and not just its detailed context, that may be susceptible to change, and vulnerable to areas of uncertainty.

Also it is in the nature of the questions set out above that they do not produce the sort of certain answers parliamentary counsel prefer. On the other hand, without a degree of consensus on these issues, the process of legislation will inevitably degrade.

Montesquieu in his "Spirit of the Laws" argued for how the law of a country must match its national culture.

The culture of the legislative drafting service will also, in practice, identify the constitutional balance between the courts, on the one side, and the Executive and the Parliament on the other. (I speak here in the context of the form of parliamentary system in the United Kingdom in which legislation involves collaboration between the Executive and Parliament and in practice expresses the will of the Executive so far as it is acceptable to Parliament. This needs to be distinguished from systems with a more elaborate three way separation of powers.)

And it is this central importance of the legislative drafting function to constitutional propriety and the balance between legislators and judges that means that a legislative drafting office has to be clear, and accountable for its practice in a constitutional and democratic way. This can only be through its internal governance and the way in which through that there is accountability to political and, therefore, democratic, authority. It is definitely not something on which individual parliamentary counsel can, or should, take individualistic lines.

At the constitutional level, consistency includes consistency with whatever is needed to conform to what is constitutionally and politically appropriate within the constitutional arrangements under which legislation is enacted and construed in the jurisdiction in question.

The nature of the matters to which this category of consistency relates means that there is room for some diversity in the culture; but there must, at the very least, be a common understanding of what is required. Maybe there could, in theory, be a culture allowing for total inconsistency and an anarchic approach to drafting; but a legal system with that would not have a drafting service or a sovereign Parliament—or, arguably, the rule of law—or not for long. So it does not need to be discussed.

Intermediate (legal) level consistency

Then at the next, intermediate, level, there are elements of consistency that need to be found on questions of law, and on the effect of particular provisions.

All legislative drafting proceeds on assumptions about the existing law and on premises about what it is or is not necessary to say to produce a particular effect. Some of these are based on past decisions; some on predictions for the future.

A consistent approach to these matters by parliamentary counsel is essential, because inconsistency makes the job of other parliamentary counsel impossible. It is not possible to be certain about the effects of what you are saying if different parliamentary counsel are operating on different premises about the likely effect of provisions of the same sort. Examples from United Kingdom law of the sort of issues that are involved here include the following:

- Does pre-commencement consultation fulfil a consultation requirement if no express provision is made for it? The OPC used to differ on this but the courts have now made express provision essential (See *R (on the application of Shrewsbury & Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] EWCA 148).
- Does a power to make different provision for different cases include power to make different provision for different areas, or is the implication that it is not included unless mentioned expressly?
- What provisions trigger the rule against subdelegation? Does the exercise of a discretion on the authority of subordinate legislation necessarily involve a subdelegation.
- What assumptions are made about the possibility, under the doctrine of Parliamentary sovereignty, of derogating from the Human Rights Act 1998 (c. 42) in future legislation?

At this level, the points that arise may be different in character. There are points that can be argued one way or another, but will be resolved in a particular way if all parliamentary counsel work on the same premise. There are also points which can be argued one way or another and are less predictable. In those cases a risk analysis is required and a judgement made in order not to increase unpredictability.

Probably these are really only two different points on a scale of uncertainty. The scale potentially covers a very wide range of cases. It covers essentially every case where the practice of parliamentary counsel or their assumptions can make a difference to the construction of legislation. What may be controversial is the extent to which these matters

overlap with matters of constitutional or technical consistency.

And the points may come to be resolved in different ways: sometimes by the Law Officers, or by parliamentary committees or by the courts or by the First Parliamentary Counsel.

Technical (drafting) level consistency

Finally, there is consistency at the technical level. At this level, the objective of consistency is not to secure a common construction. It is principally to facilitate and speed up interpretation and to help understanding by the users. The objective is to avoid confusing the user, and to provide the user with something that is familiar and easy both to navigate and to understand.

There is also at this level a reputational issue for a legislative drafting service that goes beyond just making things easy for the user. If (as in the case of OPC), a legislative drafting office is set up to achieve consistency and a common approach, then there is a potential risk to its reputation if it tolerates a degree of inconsistency at the relatively trivial technical level. Its reputation for quality and for consistency at the more important constitutional or legal level may be questioned if it is shown to be unable to achieve consistency at the technical level, even where that inconsistency causes no practical damage, at least not directly. In this context reputation is not about looking good. Rather it is about building trust with clients and the users of the statute book. Parliamentary counsel, to be effective, need to be thought of as being reliable.

But how much consistency is needed for these "reputational" purposes? The difficulty is that it is often inconsistency at the technical, albeit relatively trivial, level that is more obvious, superficially at least, than it is at the higher levels, where, in fact, it can do more damage.

So achieving technical consistency involves judgements both about how knowledgeable the assumed reader is expected to be about the conventions of the statute book; and it is also about the inferences about constitutional and legal consistency that the assumed reader can be expected to draw from inconsistency at the technical level.

Technical consistency, however, has different manifestations. It may include signals that identify and endorse the values and culture of the legislative drafting service. To that extent it overlaps with consistency at the constitutional level. So it may for example involve acceptance of a political influence on e.g. the arrangement of clauses. The United Kingdom practice of locating definitions near the end reflects the practical need to deal with that aspect of the Bill in Parliament after it has been debated.

In this way too, technical consistency may reflect an element of the culture underpinning constitutional consistency, which takes a view on how important technical consistency is to the achievement of legal inconsistency. I think this has the potential to be regarded as an area of considerable controversy, particularly in the United Kingdom. Parliamentary counsel in the United Kingdom are constantly confronted with the question of to what extent doing something in a different way in a new context will impact on other provisions. The way in which the OPC approaches the assessment of that risk is, or at least should be, a vital element of its collective culture. An example of the development of our culture in this respect has been how the OPC is now much more relaxed than it used to be about assuming that a textual amendment needs to match the "linguistic register" of the amended provision. Nowadays the

OPC leans in favour of adopting the more modern style in the amendment unless it can be demonstrated that that definitely could give rise to problems.

Structure is also part of technical consistency. If all Acts follow the basic pattern, the user will know where to find provisions (such as finding the definitions at the end of an Act).

So too is the use of words for common form provisions, such as the short title clause, the words used to provide for extent, or for the parliamentary control of legislation.

Finally, there is the use of language, "house style", practices on the use of particular words, practices with punctuation or numbering or paragraphing.

One of the problems with this form of consistency is answering the question of to what extent it is necessary or not. How much of this does in practice make a difference to the user? And, more particularly, how much do individual practices have a significant effect on parliamentary counsel. There is a temptation for parliamentary counsel to seek to work this out from first principles, or from anecdotal evidence. And let's be frank, there is a temptation for some parliamentary counsel to want to impose their own rules for internal consistency on others, just because they want an even neater system. None of this is intrinsically a bad thing, at least not so long as it flows from and reflects the culture of the legislative drafting office that secures constitutional consistency.

But it is even better to answer these questions on the basis of real evidence. And we in the OPC have been seeking the evidence in our client surveys, without, it has to be said, any clear-cut results so far.

Innovation

I have spoken at length about consistency. I shall now speak briefly about innovation. Every legislative drafting office depends crucially on the individual expertise and professionalism of its staff. In jurisdictions where there is an ongoing process of legal and constitutional change (which is probably most of them) it is essential for parliamentary counsel to adapt, and to keep up to date with the risks that legislation faces when read by users in general and, more particularly, when construed in the courts.

What is clear though is that, while a legislative drafting office may depend on innovation and creativity from its individuals, those processes need to be visible and explained to the whole organisation. The purpose of change in a legislative drafting office is to adapt and to improve, not the individual's output, but the output from the whole system. If innovation is to fulfil that purpose it needs to be communicated, explained and accepted by parliamentary counsel collectively.

Even when individual solutions are found for new or even unique problems, the information needs to be shared because it contributes to the collective wisdom. And it should draw on collective experience too. There is very little room in the sphere of legislative drafting for "trial and error". So whether a trial results in an error or in a success is something that everyone in a legislative drafting office should know about as soon as possible—in order to reduce the risk of unnecessary trials and certainly to prevent repeated errors. For the same reasons, everyone should also, if possible, have been made aware of the trial in advance.

Furthermore, the most important aspect of innovation is not in finding new, improved ways to

do things that have been done before. There is scope for that; but the more common and essential purpose of innovation is the purpose of responding sensitively to changes in the system.

So the desirability of innovation and creativity is not an excuse for a self-indulgent freedom to assert your personality on the statute book. A diversity that recognises that different people may look at the same issue in different ways is healthy. A competitive attempt to create a drafting identity that is separate from that of other members of one's profession most definitely is not. To personalise what the rule of law requires to be universal is, under the United Kingdom's constitutional arrangements at least, unacceptable. The problem, as usual, is to know where to find the line between what is acceptable and what is not.

The balance

What is needed in a legislative drafting office, so far as guidance on all forms of consistency is concerned, is to strike the right balance between innovation and consistency.

In my view the ideal—and this I think is the premise on which the OPC has long operated—is to find a consensus at the highest level, the constitutional level. And that is not just a domestic office matter. At that level, it must contain elements for which parliamentary counsel are politically accountable. The premise is, however, that if consensus is achieved at the high level, much of what is required at the lower levels will flow automatically. Unfortunately, though, we do not live in a perfect world. So it is necessary to consider how much of what should flow from the consensus needs in a particular case to be separately managed into the system.

At this point, I want to suggest that there are many factors that can contribute to the mechanisms that a legislative drafting office needs in order to produce the necessary level of consistency, and to achieve the right balance with innovation.

Common to all circumstances, however, is the need for three things—

- a common acceptance that the rationale of a legislative drafting office is to take advantage of its collective strength to produce better work than could be produced by its individual members working separately;
- strong internal communications that are used for sharing practices and experiences;
- a culture that is open-minded to new approaches and determined to maintain a high quality product.

Different factors affect the measures a legislative drafting office will need to implement, in order to maintain the necessary level of consistency and to promote constructive innovation and creativity.

The size and staff "gearing" of a legislative drafting office[4] are factors that contribute to the determination of what is needed. It is relatively easy to maintain a coherent idea of what the office approach to things is in a relatively small office with a stable establishment. Once an office grows, it is more difficult. The OPC has grown from 30 to 60 in a relatively short time

[4] "Gearing" is a concept I explain below.

and this has meant a need to adjust and to establish new systems. Not only do the communications become more difficult as you grow larger; but growth also creates the potential for more divergence of practice, and that multiplies the risks such divergence brings.

In addition, the rapid expansion of the OPC had a radical effect on staff gearing: first in one direction and now, it seems, in the other.

By gearing, I mean the proportion of staff with different levels of experience. A rapid expansion followed by a period of consolidation at a fixed strength, which is what has occurred in the OPC, means an immediate influx of junior staff (producing what I shall call high gearing) followed by a period in which the proportion of senior to junior staff increases (low gearing) as the junior staff become more senior but the senior staff do not retire at the rate needed to maintain the same ratio of senior to junior staff.

Some of you may be familiar with David Maister's analysis of this phenomenon in the legal professional firm.[5] He analyses the gearing problem for the professional service firm in terms of three levels of experience of staff and the projects and tasks they can carry out, although, in that context too, he accepts that he is really talking about 3 points on a spectrum.

So his three projects are "brains" projects; "grey-haired" projects and "procedural" projects.

- Brains projects are those difficult projects that require innovative techniques. They are for the power house of the firm: the highly skilled and highly paid practitioners working hands on.
- Grey haired projects are those which are not necessarily new work but where judgement and experience are the crucial factors. The firm has built its specialism and relies on its specialist expertise to establish trust and to negotiate. Those are projects for the senior partners.
- Procedural projects are those that can be systemised and carried out using more junior staff.

The route to profitability for the professional legal firm is to have high gearing (more junior staff), and to find ways of systemising the carrying out of projects that are charged as brains or grey haired projects so that they can be carried out more cheaply using more junior staff. Gearing has to suit the business. Because professionals spend longer as seniors than juniors, there is a tendency for gearing to become lower. A firm must expand business to justify the growth required to maintain a particular level of gearing without losing staff that are becoming more senior. Or they must either change their business to justify a lower gearing or lose junior staff before they lower the gearing and replace them with more junior staff. This explains the need for the high turnover of junior staff in big stable legal firms, and their often rigid "up or out" hiring and firing practices. Those firms cannot afford to have lower gearing without changing the business and there is a limit on constant expansion.

This does not have an exact parallel with legislative drafting offices, whose hiring and firing practices and capacity to change their business are generally more circumscribed. But the analysis does have some implications for the OPC[6] that are worth considering.

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5 See *Managing the Professional Service Firm*. D. Maister (1993).

6 And possibly for legislative drafting offices generally.

Firstly, it is worth pointing out that many legislative drafting projects, certainly at the level of primary legislation, are either brains or grey-haired projects or a combination of both (i.e. somewhere on the spectrum that joins the two). This may justify a slightly lower gearing (more senior to junior staff) in a legislative drafting office than in the average professional firm.

On the other hand, perhaps subordinate legislation drafting is more readily susceptible to systemisation and thus to being carried out as procedural projects by junior staff, than primary legislation. Primary legislation projects often involve more political, "grey-haired" questions. If that is right, then a legislative drafting office with a large subordinate legislation practice, or perhaps one that drafts for a relatively docile legislature[7], might need a different gearing from one where the bulk of the work is primary legislation[8]—and there is a high political content to the process.

More significantly though, the analysis may also tell us something about the different practices in different offices so far as the achievement of consistency is concerned, and about the balance with innovation and the extent of drafting guidance required.

In the OPC, as first our workload grew beyond manageable proportions, we expanded as an office, initially with a large influx of juniors. I think it would be true to say that we responded by becoming more procedurally focused. With an excessive workload, the OPC had to delegate more responsibility to junior staff and then, as their numbers increased, it became necessary to take advantage of them by quickly bringing them on stream.

I would suggest that you can trace a similar approach in legislative drafting offices that rely on itinerant parliamentary counsel or where parliamentary counsel move in and out of the rest of the government's legal service or there is a reliance on outside contractors. High gearing requires projects to be treated more as procedural projects.

In those circumstances, what is necessary is to impose consistency at the technical level so as to systemise the process in a way that emulates, and hopefully generates, consistency at the constitutional and legal level. Standards are imposed in a procedural way on the bottom from the top. Similarly, where proofing has been systemised by delegation to specialist proof readers (a way of increasing gearing), that too requires a detailed prescription of house style. A similar practice may be needed too where bilingualism is involved and the gearing is affected by the use, for example, of jurist linguists.

In the case of the OPC, as the juniors came on stream quickly, they became aware of an increasing divergence of practice partly resulting from increasing numbers, and they needed guidance at the basic level to do the day-to-day job and to make the choices between different approaches before they had acquired the experience to make them on their own judgement. This was all in the context in which rapid expansion itself created a risk for cohesion and, therefore, to the relatively informal mechanisms for maintaining the consensus on consistency at constitutional level. And, as it happened, it also coincided with a period of rapid and significant constitutional change (involving, in particular, devolution, the *Human Rights Act 1998* and a hardening of a doctrine of the separation of powers). And those changes were

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[7] If there were such a thing!

[8] As is the case in the OPC.

such that they required at least a reconsideration (and arguably a revision) of the pre-existing consensus.

In this context, a need was seen for a legislative drafting techniques group to make recommendations on the way to progress. These recommendations concentrated in the first instance principally on practical solutions to commonly occurring problems. The sort of thing that is needed for inexperienced staff required to acclimatise to new areas of work quickly. So what was produced was a number of quick and relatively simple, yet workable, solutions to problems that occur frequently.

The OPC also set up a know-how group that sought to systemise its knowledge, thus enabling it to achieve consistency at the legal level.

But we are now entering a new phase. The OPC is no longer expanding and my thesis is that, as the OPC is now maturing as an organisation, it needs to develop an approach to consistency that allows room for innovation and creativity by more experienced parliamentary counsel, but which is nevertheless more conducive to achieving consistency at the constitutional and legal levels. The OPC still has the problem of size and needs to ensure that it has systems that promote consistency and the sharing of information.

In this context, the roles of the OPC's legislative drafting techniques group and of its know-how group are evolving so as to become less authoritative and to provide a source of information that can inform a consistent approach within a shared view at the constitutional level of what consistency requires at every level.

Nevertheless, I must emphasise that the precondition for such systems is that there must be a common understanding of what constitutional consistency requires. We cannot take this for granted. For this, we need to have a cohesion and structure that supports the development and maintenance of that understanding. And "maintenance" is an important element of this, because in a changing system there has to be a common response to changes to the system.

As I have indicated, quite apart from the size and gearing of the legislative drafting office concerned, the constitutional and legal stability of a system will also determine how much consideration needs to be given over time to constitutional consistency. However, we need to exercise caution about this. From my point of view, most constitutional systems assume the existence of more continuity than does in fact exist in practice. United Kingdom constitutional arrangements have changed enormously over the time I have been with the OPC. I have mentioned already some of the more recent changes, but over my time in the OPC there have been other major changes, including the role of European Union law and some very major developments in the scope and application of administrative law.

All this has two effects. Firstly, it provides a temptation to the neophiles to change unnecessarily to adapt to constitutional developments. Secondly, it provides a temptation to the conservatives to deny the need for change. In these circumstances, a legislative drafting office needs a forum and culture that not only allow these issues to be debated and collectively assessed, but also enable a common approach to be settled.

In the United Kingdom, we have responded to this by ensuring that we have established a number of groups within the OPC to discuss and to consider matters of general interest and application. These comprise not only the legislative drafting techniques group and the know-how group, but also many others, including those providing for a more collective form of

governance. One of their purposes is to expose more members of the OPC to the strategic issues with which the OPC is confronted. It is only in the light of those issues that a common approach can be settled.

The OPC has also held an office forum on the principles that should govern its drafting. Furthermore, the OPC has been researching methods of measurement, including primarily a survey of our departmental clients,[9] so that it can collectively identify what works for them and what does not. Among the things that the OPC has sought from its clients are views about its practice so far as consistency is concerned.

All of this has the objective of building cohesion and a degree of consistency at the constitutional level, in the expectation that the combination of that, coupled with the professionalism of the staff recruited and trained by the OPC, will reduce the need to have more prescriptive rules at the technical or legal level.

For me the essence of professionalism is the acceptance of a common set of values and standards and the exercise of independent judgement within that.

Our analysis has also identified the need to define the matters on which legal consistency is required and to ensure that they are dealt with collectively. Where issues arise that require a view to be taken on what is required to achieve legal consistency, it has to be an OPC view and ultimately, if possible after the consultation within the OPC, a decision for its head.

Conclusions

So, what do we need to achieve the correct balance for consistency and innovation?

We need systems that establish the context in which a common understanding of what the job involves can be established and can develop as circumstances change. Out of a more strategic approach, we can develop our approach at the legal and technical level. At the technical level, the OPC has identified what makes it desirable , for itself at least. This includes helping users navigate and understand the work of the OPC, preserving its reputation for consistency at the more important level and achieving efficiency when it wishes to systemise tasks, or is forced to by pressure of work or the demands of its gearing or demography.

And the other things the OPC needs are the best possible communications and a culture of openness that will allow everyone in the OPC to know and understand the judgements within that culture that their colleagues are making. A culture that says “If anyone wants to learn from me, they can read the Acts I have drafted” is not enough. More proactive sharing of practice is the only way to ensure that the development of the culture and adherence to it is self adjusting. Consistency and innovation are things that both need to contribute to the corporate purpose of having a legislative drafting office. They can only contribute in that way if information about their practice is shared.

I set out to describe how a legislative drafting office can balance the need for consistency with the need for innovation. I have produced a conceptual analysis of what I think is necessary to produce a healthy culture of openness and professionalism in a maturing office. I have also, I hope, identified why different situations in different offices may require different solutions or different balances in the solutions they offer.

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[9] Many other legislative drafting offices do the same.

The question for you is, perhaps, to ask yourselves what the culture is in the legislative drafting office to which you belong. Why is it the way it is? Is it able to adapt to change, whether affecting itself or to the context in which it operates? How does it adapt?
