

## **Address on the organisation of drafting offices<sup>1</sup>**

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### **Introduction**

The topic I undertook to address in this session of the Conference is not a very exciting subject. Sir Geoffrey, in his conference correspondence, indicated that we might explore the question of why drafting offices are organised in the way they are. The “why” question is a little more interesting, but always a difficult one. I propose to comment on a range of issues that impact on office organisation and leave particular matters of interest to questions afterwards.

At the outset can I make it clear that I am not an avid reader of management theories nor a regular attendee of management courses—like many heads of office, I am a drafter as well as a manager. This does not leave much time to indulge any passion for management theories.

Also at the outset can I apologise for using the NSW experience to illustrate issues. As George Tanner outlined in his introduction, this is the office I am familiar with. I have not been a travelling or nomadic drafter like Duncan Berry and others here.

### **Organisation of NSW Drafting Office**

In order to put my observations on this topic in context, I thought that I would start with a broad overview of the NSW drafting office. The NSW Office used to be part of the Attorney General’s Department, but in 1993 it became a separate department reporting to the Premier. The Department Head of the office is the Director-General of the Cabinet Office (we share a Department Head with the Cabinet Office but are not part of that office).

Some brief statistics of the NSW Office:

- The office has an annual budget of \$6.4 million Australian (that sounds a lot but—as I have found out since arriving in London—Australian dollars do not buy very many UK pounds).
- The office has 48 staff—20 drafters and 28 editorial and support staff.
- We draft the full range of legislative instruments:
  - Government and non-Government Bills and amendments in committee,
  - regulations and other statutory instruments for Government Ministers and authorities,
  - instruments that regulate land use planning for local councils and the State (environmental planning instruments).
- Overall we produce about 4,000 pages of Bills introduced into Parliament, about 4,000 pages of regulations and other statutory instruments, and about 3,000 pages of environmental planning instruments.
- We have developed and maintained a publicly accessible website of all the legislative material we produce—providing the principal instrument incorporating amendments and an increasing capacity for point-in-time searching. We have continued to supply camera ready copies of the traditional paper versions for distribution by the Government Printer.

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<sup>1</sup> Paper presented to the CALC Conference, London, September 2005.

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- We also provide various legislation information publications, a hotline service for public inquiries on the status of legislation, and a weekly email of legislative activity to several thousand subscribers.

Of course, in many jurisdictions, particularly in the large jurisdictions, the drafting office is often focussed on only drafting Government Bills and/or statutory instruments. Nick Horne had a thorough survey of the activities of the various drafting offices published in a recent edition of the CALC newsletter. If you are faced with providing a wider range of services, it has a significant impact on the organisation of the office. I will come back to this issue.

### **Drafting office—separate department, part of Premier/Prime Minister or part of Attorney General’s?**

One can begin an analysis of the organisation of a drafting office with the question of whether a drafting office should be an independent agency or part of another department (usually the Attorney General’s Department) or should report to the Prime Minister or Premier and be loosely or closely associated with The Cabinet Office. In Australia, and I suspect in other jurisdictions, there is a discernible trend. At first, drafting offices were part of the Attorney General’s Department reporting to the Attorney General, then many became separate agencies. In recent years many have moved from the Attorney General’s portfolio, reporting instead directly to the Premier/Prime Minister (and associated with the Cabinet Office).

My assessment is that this change is a response to the increasing central agency role of the drafting office (not as a mere mouthpiece, or, should I say, penpiece, for the various government agencies)—a recognition that the setting of priorities for the drafting of government legislation (and the use of the drafting office to break through an impasse caused by inter-portfolio conflict) is an important tool for the control of the Government’s legislative agenda—the things that those associated with the Premier/Prime Minister and the Cabinet Office think they should control.

There can be a significant increase in the policy development role of the drafter (especially when the Cabinet Office expects to be told when a legislative proposal that has been approved is flawed, or when the Cabinet Office requests you to start drafting a project that is stalled or undeveloped, thereby using the drafter to drive the legislative process). However, as my Director-General recently pointed out, parliamentary counsel are seen as infallible in matters of legislation and, like the Pope, when you are infallible you need to be very careful what you say.

On the downside, we need to develop strategies to maintain the confidence of the instructing departments (making it clear that we are in partnership with them in preparing the legislation). For my part I resist moves to be located in the same building as the Cabinet Office and commiserate with agency officials when the Cabinet Office turns to the “dark” side.

There are other benefits of an increasing association with the Cabinet and the Premier’s Office. You may end up in my position of having a Director-General who sits in Cabinet, who can tell you a definitive version of what the Government has decided to do, and who leaves the oversight of the administration of the office to an occasional meeting over coffee or a drink at a cafe or club.

### **The parliamentary counsel (drafter or manager or first among equals)**

I will only touch on another central issue for the organisation of a drafting office. Who should manage a small professional drafting office?

- Should the head of office be a professional drafter who grafts management responsibilities onto continuing professional responsibility as a drafter?
- Should a senior drafter be groomed to take on management responsibilities (for example by temporary secondments to other agencies)?
- Should a person with no drafting experience or responsibilities take charge of the office?

- Should there perhaps be a rotation of head of office responsibilities among senior drafters (something that George Tanner here wistfully mentioned to me some time ago)?

I have a strong personal preference for the traditional view that the office should be managed by a drafter who continues to draft and to advise other drafters on their drafts, but time is too short to pursue that issue.

### **Issues relating to office organisation—legislation publication**

Before dealing with some organisational issues concerning drafters, I would like to deal with the impact of the legislation publication role on a drafting office.

There are compelling arguments in favour of maintaining the traditional role of drafting offices, but many of us are in the business, or are being continually pressed to undertake the business, of securing and improving public access to legislation (particularly via the Internet which provides a big opportunity to enhance public access to legislation). The work can be regarded as the office providing drafters with improved tools to do their work and providing a spin-off benefit to the public.

Many drafting offices choose or find themselves obliged to take on wider public access responsibilities than merely producing the draft. If they are to provide efficient, cost effective and timely public access to legislation, the critical factor is for the drafting office to control the whole process through the life cycle of legislation—from birth at the hands of the drafter, its passage through Parliament and its public access until it is repealed. By controlling the process, I mean that the drafting office keeps control of the document (or electronic file) and provides a complete legislative service. This has a very significant impact on the drafting office.

In NSW, this means that we draft all Government and non-Government Bills; that we draft and supply all amendments in committee (that can be seamlessly incorporated into the Bill if passed as second or third prints for debate in the House); that we can provide an electronic version of the Bill within minutes of introduction so that it can be posted to the Parliament House website (and use that electronic file in our print shop to supply bulk printed copies to the House or supply it to others to do so); and that we can provide the vellum copy for assent purposes. But, most importantly, it means that once legislation is enacted, we can place it readily on our official legislation website and provide incorporated up-to-date versions of any amended principal Act within hours or a few days of the amendments commencing.

I realise that in the larger jurisdictions with more complicated processes and entrenched bureaucracies (in the Parliament and in the Government printing service and elsewhere) it is immensely difficult to control the document through its complete lifecycle, but without that control it is very courageous for a drafting office to assume full responsibility for public access to legislation.

### ***Consequences of controlling the process***

What are the consequences for a drafting office of controlling documents through their legislation lifecycle?

#### ***Delivering the quick Bill***

Everyone will have their own experience of producing Bills to ridiculous timetables (of drafting on the floor of the House). When you control the document you can give the appearance of normality. Let me explain with an example. Recently, in NSW, a very short legislative proposal relating to terrorism was conceived at about 10 o'clock at night; the drafter, Robyn Hodge (who is here today), and I put a draft together about 9.30 in the morning; it was circulated electronically; it was settled at about 10.30 am; a legislation committee of Cabinet was then called and met at 11.30 am (with a very short report I provided on the Bill); the Minister walked into the Lower House of Parliament at noon with the printed copies we supplied (and an electronic copy for their website); and the House passed the Bill before they rose for lunch at 1 pm. From an outside perspective, apart from expedition, it all looked very planned and professional and no different to the process for any other Bill. The problem of course is that political staff observe what can be done but do not realise it is not sustainable.

### ***Maintaining an after-hours presence***

Our editorial staff (who publish, check, and incorporate changes to documents) need to be on duty whenever Parliament is sitting. They are in constant contact with parliamentary officers, providing amendments produced by the drafters, incorporating and providing second prints etc. When the numbers are tight in the Upper House, speed is of the essence in getting an amended Bill into the next stage and we must be ready to do so to very tight timeframes.

Similarly we need to roster on senior drafters every night Parliament is sitting to draft amendments and oversee operations. As a practical measure, the drafter of a Bill becomes responsible for drafting Government as well as non-Government amendments in committee (professional drafters can maintain mental Chinese walls—we do not need to import private sector conflict of interest notions into Government service of this kind).

### ***Staff flexibility***

In order to undertake a wider range of work efficiently, the organisational structure of a small drafting office needs to be flexible, and in particular emphasise multi-skilling. Since I do not have a power presentation or a slide show, I will have to ask you to imagine the organisational structure in NSW with drafters on one side and then several separate units—an editorial group that checks and publishes documents, an administrative support group that provides secretarial/corporate services, a database group that incorporates and maintains the database of legislation posted to our website, an IT support group, and a remnant group of one preparing paper reprint publications using the versions on our database. Staff at various times in their career move between these groups.

Bill checking, incorporating amendments on the database at peak periods, and the taking charge of, or assisting at, the editorial desk while Parliament is sitting, are undertaken by all the staff (even the second IT officer who has a background in editing is often called on to do this sort of work). Without that flexibility, the size of the non-legal staff would be likely to double.

### ***IT implications***

On the office IT side, control of the document (and its style) means you are able to produce systems for drafters and editors (complicated though they may be) that complement each other and can be delivered to a reasonable budget. The IT issues will be dealt with later in this conference—suffice it to say that we see the imperatives as securing the longevity of the legislative data; coping with the rich structure of legislation (we have opted for sgml/xml rather than a proprietary format); maintaining a small specialist IT branch within the organisation (and not being captive to the IT outsource market); and dealing with the inevitable consequences of the drafter shouldering a lot more responsibility for producing text that also has the necessary publishing attributes. In NSW we have a combined drafting and publishing tool—this is not a problem for the new young guns, but it is a challenge for the old hands like myself.

There is also a valuable role for a drafter to play in facilitating IT development and public access. This may not seem “real” drafting work to some, but drafting offices are very fortunate to find the drafter who is willing to become immersed in this work and who can bring the traditional methodology and expertise of the drafter to the development of relevant IT and other systems and at the same time make them responsive to drafters’ needs because of their unique position and knowledge.

### ***The continuing need for a career structure***

These demands put pressure on maintaining an office career structure. There is no doubt that drafting legislation and legislation publication is a very specialist task. Everyone tells us that the x and y generations no longer have any loyalty to an organisation—they move on regularly. To maintain the necessary flexibility and expertise of staff, there is nothing like that old public service career process. Start as the office boy and work your way through the organisation. We have our successes and failures. Our quality assurance manager (Ming Wong) started as a copy typist—for a drafter having

his Bill “Minged” is a guarantee that it contains no editorial errors. A senior member of the IT Group started as an executive secretary and was supported in obtaining an IT degree. My personal secretaries tend not to be mother figures. I have recently lost one who studied law while with us and secured first class honours. She has moved elsewhere to pursue her legal career—there is the upstairs downstairs mentality preventing non-legal staff moving on to become drafters.<sup>3</sup>

### *With control comes responsibility*

When you do control the process there is also the responsibility for delivering the product in the end. This can have interesting consequences sometimes. I have told people this story before, but it illustrates the point. Recently, as part of a trade union protest against proposed changes to workers compensation legislation in NSW, union members blockaded Parliament (and withdrew staff services in the Parliament) in an attempt to prevent the passage of the Bill. Cabinet Ministers broke the picket line in a dramatic march of Ministers down the street from the Government offices to Parliament House. The only thing they forgot to do was to take a copy of the Bill with them. It became the responsibility of the drafting office to realise that a copy of the Bill needed to be provided and to get the Bill into Parliament. All electronic means of transmitting the Bill were unavailable. In order get the Bill into Parliament, it took a secret rendezvous within the Parliament House precinct between my office manager and the Minister's staffer (described to my officer manager as a tall lady in a blue dress). The offending Bill was passed in an unobtrusive envelope through the iron fence to the lady in question in the midst of the angry protestors.

## **Issues relating to office organisation—drafters**

### ***Supervision—Bill review***

I might now deal with the purely drafting side of the office. There is something about drafting that attracts highly individualistic (dare I say sometimes eccentric) characters.

The traditional organisational arrangement is similar to chambers at the private bar with drafters acting relatively independently once the head of office has allocated a particular drafting project. With junior officers, there is a pairing with a senior officer until they have sufficient experience to operate on their own.

An alternative arrangement is a more corporate approach—where the work of individual drafters is reviewed and exposed to scrutiny by the widest possible range of people within the office (legal and non-legal) so as to produce a draft that represents the corporate view of the office. This involves all but the most senior drafters being supervised by and reporting to a senior officer, drafting being subject to peer review by a group of the most senior officers, drafts being checked by clerical officers to office editorial standards and a junior legal officer making a final check. The downside is the significant drafting resources required to fully implement the system. The most effective system of peer review is where the senior officers meet as a group to discuss the draft with the drafter. This brings a lot of experience to bear on a draft. The process of discussion leads to issues being exposed that were not readily apparent on a reading of the draft. The conduct of meetings for peer review, which had been a regular feature in the NSW Office, is now only rarely undertaken. Instead all relevant papers are copied and circulated to the peer review group and written comments on the draft are provided. The reason for the change is that it took up too much time of the senior officers. Peer review on the papers is still an effective tool. As a result, senior officers can still provide input and can become familiar with developments across the statute book (which assists in other matters including amendments in committee on the Bill when they are the duty officer during Parliamentary sittings). And, of course, for me as Chief Parliamentary Counsel, I am in a position to sound as if I have some idea of what I am talking about when drafted Bills are considered by the Legislation Committee of Cabinet for approval for introduction.

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<sup>3</sup> Since this paper was delivered, there has been movement in this area. The personal secretary has returned to the office as a drafter and 2 other personal assistants have completed their law degrees and been appointed to newly created paralegal positions that straddle legal and editorial work.

If you have the resources to implement a more thorough process of peer review, you still need to foster individual responsibility of the allocated drafter. The drafter has to think about the appropriateness and consequences of any changes suggested or required by the supervisor or a peer review. The drafter has to worry about the possibility that an instrument will not receive thorough review.

### ***Drafting offices in a federal structure***

Like Australia, many of you have to draft in a federal system where no one government has a monopoly of legislative power and there is a need for co-operation. Even the UK seems to be moving in that direction. It will come as no surprise that in a federal system there is constant pressure for the drafting of uniform legislation on various topics. Unless the States in a federal system co-operate we will be faced with increasing consolidation of legislative power at the federal level. In Australia the drafting offices have responded by establishing an organisation, the Parliamentary Counsels Committee, comprising the heads of the all the drafting offices in Australia and also New Zealand. When one of the many Federal and State Ministerial Councils decide on some uniform legislation, it is formally referred to our Committee. We find a volunteer from among our members to be the lead drafting office. We circulate drafts for comment and meet regularly to settle the drafts. We also meet to discuss matters of general interest to drafting. The Committee needs significant secretarial support, which was originally provided by Victoria and is currently provided by NSW. I can commend the system.

### ***Allocation of drafting work***

All heads of office need to put in arrangements to ensure that drafting work is properly allocated among drafters. One of the tools that I am hoping will assist in improving work allocation in NSW is our current IT development for a job tracking and data management system, which currently goes by the rather unimaginative title of the Legislation Lifecycle and Job Management System (a part of the Process Automation System). I am offering a bottle of good wine to anyone in the office who can come up with a snappy name for it.<sup>4</sup> The new system should enable me (or any other supervisor) to get a very quick report of all the work with a particular drafter and the stage it has reached (and all other relevant information about it), arranged in different categories. I have seen some very good and less complex systems demonstrated at the Commonwealth level and in Western Australia.

We need to worry about whether drafters are allocated the range of work that best suits their expertise. It used to be thought that only senior officers should draft Bills, leaving other drafters to work on regulations or planning instruments, or as an assistant to a senior officer on a Bill. The reality now is that significant matters of policy are to be found in regulations, and there are many insignificant government or non-government Bills. Of course, senior drafters must still draft the major Bills. I must concede, however, I find it difficult to enthuse drafters about the latest planning instrument of the council from the back of Bourke (which we are called upon to draft in NSW).

An interesting arrangement in some offices is the division of work among groups of drafters allocated to particular portfolios. We have never done this in NSW. It is done in Queensland and other Australian jurisdictions and I understand has the advantage of building up good working relationships with government agencies.

### ***Organisation arrangements to keep drafters***

Drafting offices rely heavily on career drafters. This is under threat. At the same time there is an increasing need for drafters to appreciate the context in which they work or to obtain other relevant policy expertise. One needs to fight the natural reaction of not wanting to allow drafters to go off and pursue drafting or policy or other work in another organisation for fear that a good drafter whom you have spent years in training to their level of expertise will simply be lost and you will need to start again. We also need to accept the reality that when a drafter leaves temporarily on other pursuits it is the drafters left behind that have to shoulder the extra work—but as they say what goes around comes

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<sup>4</sup> The prize has been won since this paper was delivered—the new system is known as LEGIS.

around. Subject always to the demands on the office, we should encourage drafters to undertake secondments (for a few years or a few months) as policy officers, or on exchange in a jurisdiction that needs to develop its drafting capacity. We should be prepared to give people a couple of months or years on leave without pay to draft overseas or take career breaks.

Despite the predictions about the lack of commitment from the x and y generations, my experience of those who have the aptitude for drafting is that they appreciate and become committed to the wider public service they perform. Although they could readily make more money in the private sector, they will stay committed to drafting and hopefully to one of our drafting organisations. We also need to keep drafters at work after they retire. For my predecessor, Dennis Murphy, who many of you will know as a previous President of CALC, I have created the title of “Counsel to the Parliamentary Counsel”. He is still drafting on a part-time contract basis, and, as he mentioned to me recently, he has turned 65 but does not feel at all decrepit.

### **Dealing with public service dross**

A significant issue for a drafting office is dealing with public service dross. The NSW office like many drafting offices is a separate government agency. With that welcome independence comes the public service administrative overheads. Every agency, no matter how big or small, must have the same suite of plans (the corporate plan, the disability action plan, the IT strategic plan, the asset disposal plan and on and on). Every conceivable matter needs to be reported on; one is reviewed by internal auditors, the Auditor General, the Ombudsman, Treasury budget officers, and many others. Since we are a very small office, I see this continuous flow of paper as it passes through my in-tray. There are a number of ways people respond to this problem:

1. There is what I fondly call the Mary Gaudron solution. Mary Gaudron was the first female High Court Judge in Australia and has recently retired. When Mary was the NSW Solicitor General in the eighties and had a small independent office within the Attorney General’s Department, she disposed of all the dross by hurling it into the bin with an appropriate expletive. This is something she could get away with because she was Mary Gaudron and she was part of a bigger department—but it is unlikely to be an available option for many of us.
2. The other option which one observes from time to time is the office that becomes immersed in and mesmerised by the dross. I worry about this constantly and try to resist it as best I can.
3. For a professional office that needs to focus on producing the professional product in a timely manner, there is no substitute for an astute non-drafting office manager, who can extract the matters that need your attention from the among the dross, and play the public sector management game for you with the rest.

### **Conclusion**

In preparing this address I had some difficulty in finding some appropriate thoughts with which to conclude. You will need to forgive me if I conclude with an observation I made at the recent Australian drafting conference when discussing the drafting of criminal offences.

I mentioned that I had recently dashed off another draft Bill related to terrorism. I thought I had made a succinct and clear statement of there being “reasonable grounds for believing that there is an imminent threat of a terrorist act”. In response there was Crown Law advice that it was ambiguous and needed to be changed because it could be construed as referring to either an imminent threat or an imminent terrorist act. In one of those rash decisions one makes from time to time—I sent off a memorandum to the following effect:

One wonders whether there is a real problem. The words used in the phrase “an imminent threat of a terrorist act” can be technically fragmented, but this may not assist the ordinary comprehension of the phrase. In the tragedy, *King Richard III*, Shakespeare begins with Richard’s soliloquy:

“Now is the winter of our discontent  
Made glorious summer by this son of York”

*Address on the organisation of drafting offices*

We need not ask whether the winter or the discontent has turned into glorious summer. I write this memorandum over a beer at the end of another working day. For parliamentary counsel, in June, in the last busy days of a parliamentary session, it is the winter of our discontent. I recall the words of the leading Italian/Australian poet, Luigi Strano (in one of his shortest poems):<sup>5</sup>

“Oh com’è amara la birra,  
dopo un giorno  
completamente perduto”.

Roughly translated: Oh how bitter beer tastes, after a day that is completely lost.

For those of you who need to deal with issues of office organisation and management, I hope that after your day’s labour the beer does not taste that bitter.

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<sup>5</sup> I might interpose here, following the revelations made by George Tanner in the introduction, that Don Luigi Strano is in fact my uncle and the eldest son of my grandfather, Don Mimi Strano, whose colourful Italian connections George has referred to. Don Luigi did not follow his father into the family business—at 94 he is still writing and publishing poetry. I also did not follow my grandfather into the family business even though he would, when I was a boy, take me with him to his office on a Saturday morning—I ended up in the business of writing legislation. But to get back to my memorandum and the poem....