

## The Role of Legislative Counsel: Wordsmith or Counsel? [1]

*David Hull<sup>1</sup>*



In small jurisdictions we have a particular interest in ensuring that ministers, civil servants and other public lawyers, and we ourselves, understand the nature of the function of legislative counsel. Our own resources are severely limited. Recruitment is a problem. The number of lawyers who seek a career in public law is small. Of those who do, still fewer are eager to write laws. These things are as true in small developing countries as they are in prosperous offshore finance centres where the attractions of private practice are so obvious.

There are corresponding constraints within our client departments. In many larger countries, it may be possible to insist that proposals for primary legislation are dealt with only by senior civil servants who have the ability to conceive, to explain and develop them fluently and comprehensively, and to comment critically on drafts. Technical expertise on the substance of a proposal will be readily available. Characteristically, those resources are not available to us to the same extent either. These things affect the passage and quality of our legislation. In seeking to counter their effects, we resort to expedients.

In the topic for this session, I take “wordsmith” to be used (provocatively, to stimulate discussion) in the sense of a scribe or penman – a person who simply writes at the dictation of another. Very occasionally, we do encounter departmental officers who begin by making that assumption. The reason is always the officer’s inexperience in the preparation of legislation.

But that is uncommon, and it isn’t a real problem. It merely wastes some time in getting the job done. Many years ago, a rather controversial Prime Minister in my own country remarked that a Cabinet minister who could not score a political point off a parliamentary question was not up to his job. The same thing might be said of a trial judge who cannot steer a jury in the direction of an appropriate verdict. I think there is something of an analogy there for legislative counsel. Of course we are not

---

<sup>1</sup> Legislative Counsel, Jersey, Channel Islands; formerly Chief Justice of Swaziland and Attorney General of Gibraltar.

---

wordsmiths in any pejorative sense. So far as I know, it has never been suggested that this should be called the Commonwealth Association of Legislative Wordsmiths. In professing our discipline, it lies with us in our dealings with client departments to demonstrate that there is more to it. This may require patience, tact and persuasiveness – and if necessary assertion, though it rarely comes to that. If a civil servant is up to the task of handling legislation, what happens in practice – particularly if a bill is of any length – is that as work progresses, he or she gradually comes to appreciate the interaction that the law drafting process involves.

Much more frequently, the instructing officer approaches his or her task from the other end. Far from regarding legislative counsel as a mere penman, he relies on what he takes to be the other's expertise not only in composition and law but also in the substance of the legislative proposal. In short, he looks to legislative counsel to play the mandarin manqué, and sometimes even the technician too. The case with which all of us are probably most familiar is where the instructor cites an overseas statute with a bare request "to adapt it" for the country concerned.

It seems to me that these two scenarios have a common feature. In the first, the instructing officer is all too obviously unversed in the preparation of legislation. His very literal interpretation of the expression "drafting instructions" betrays him. He is unaware of the art in it. He probably lacks any real grasp of the legal context of a bill. In any case, it is apparent that he does not understand the professional services that legislative counsel provide.

In the other situation, the instructing officer does appreciate that counsel isn't a wordsmith. He knows that the preparation of a bill involves legal issues. He may be conscious as well of what he sees as his own limitations in working up a policy proposal in that setting. Even so, does he himself have a sufficient understanding of the nature of our professional services?

No one here, I imagine, will disagree that composition – the ability to write well – is an essential skill in the discipline of law drafting. What constitutes good writing may be another matter, but presumably we all accept that it is a prerequisite. And because we deal routinely with common legislative techniques – for example, appeals, licensing schemes, the definition of criminal offences and statutory defences, and the bringing of legislative schemes into force – I suppose it can also be said that we have a contribution to make to the "practicability" of legislation. I say "suppose": I know that there is a weighty body of professional opinion in the discipline that it is part of the law drafting function to query whether a bill is practical. Nevertheless, it does seem to me that it is important to be clear as to what we profess in that respect – by reason of being legislative counsel, anyway – and that it is just as important not to overstate it.

The art in law drafting was to my mind put very succinctly in an advertisement in the Times some years ago for Parliamentary Counsel in London. It is to analyse, clarify and express legislative propositions. That is certainly business for counsel. By itself, and properly understood, it is surely in very ample measure business of counsel. It requires intellectual ability, creativity, knowledge of the law, critical appraisal and judgment. There is no need to go further to seek to justify our professional function.

In contrast, I think it is a moot point whether by reason of practising as legislative counsel, or even as lawyers, we have any special insight into the practicability of proposals for legislation, beyond those arising from our familiarity with the kinds of machinery provisions I have mentioned.

For example, the political mood in a country may for the time being favour “deregulation”, such as reducing or avoiding the statutory prescription of forms. As long as that mood prevails, legislative counsel will be aware of it, and is likely to invite a client department to consider proceeding accordingly. That isn’t taking an initiative on the practicability of legislation, though. It may for the time being be seen politically as a better approach to public administration, but counsel is doing no more than to draw attention to the received wisdom of the moment. Likewise, by explaining to an instructing officer that a licensing regime or an appeal system is often set up in a certain way, counsel is not alerting the client department to practicalities, only to precedent. In most cases, I think that the truth of the matter is that counsel probably has little or no experience of the way in which such a scheme actually works on the ground. If a particular person happens to be informed, for instance, about the costs involved in a particular licensing arrangement, that is coincidental rather than anything that flows from his professional expertise. Again, all counsel is doing is to direct the department’s attention to the way or ways in which, for better or worse, other legislation has been enacted.

We often compromise on our drafting instructions, for what we regard as constructive motives. We accept inadequate instructions and proceed on them, taking it upon ourselves to assume to a greater or lesser extent the functions of an instructing officer. We do so, despite our own lack of competence, in circumstances in which the instructing officer has failed to demonstrate that he himself knows the reasons for a legislative proposal and its objectives.

The likelihood of a result that is less than satisfactory must be fairly high. There is no legislative “audit trail”, so identifying the objects that a bill is intended to achieve and the reasons for going about it in the way that is proposed is bound to be to some extent a chance affair. In seeking to do so, counsel will inevitably be distracted to a greater or lesser degree from his or her professional functions of analysis, clarification and composition. And the lack of any real engagement between the instructing officer and counsel deprives the exercise of one of the most important steps in the process of preparing and polishing legislation – the vigorous, ongoing dialogue that should take place between them, by which each scrutinizes and comments critically on the instructions or the drafts of the other as they stand for the time being.

Pragmatic drafters may say “That’s all very well in theory, but law drafting is an applied discipline, not an abstract one. If we don’t take an initiative, how will the job get done?” It is a point of view that few legislative counsel at work in small countries will disparage. Legislation, as we all know, is usually a matter of political priority. Delays cause chain reactions of tension within an administration. Ministers feel frustrated and departmental officers may become defensive. Most people tend, for understandable reasons, to regard “law drafting” as coextensive with the preparation of legislation. Everyone looks

towards legislative counsel for assistance, and for a result. In such an environment, he or she may be constitutionally inclined to get on with it.

Yet is there not a need for a better approach? A bill is one detail of a greater project. Ordinarily, it will be an essential feature of it and may have taken up considerable time and work along the way. Its conception, planning, passage and subsequent implementation – and the bigger project of which it is one part – will nevertheless involve many other matters of administrative decision-making and judgment, and skills, that no one would seriously suggest as falling within our competence. In practice, legislative counsel is seldom involved in the early stages of policy-making. We never participate in the aftermath of the approval and enactment of a bill – the staff planning and training, the logistical arrangements, and the ongoing administration of the Act we have drafted. When legislative counsel attempts the work of an instructing officer one part of the larger project is being dealt with, eccentrically, in isolation. Quite apart from issues of general administrative experience and expertise, it seems to me that this raises a question of adequate coordination.

We are not wordsmiths. But nor are we administrators. We are specialist legal counsel. The problem is not one of law. It is a matter of administrative resources, and it needs to be addressed accordingly. I don't believe it is insurmountable. As law drafting offices, we have a part to play in dealing with it. However, the solution requires something more than our issuing handbooks or procuring government standing orders as to the steps to be followed in preparing legislation. They may have their place procedurally, but they do not get to the nub of the problem. So far as they may attempt to prescribe how drafting instructions are to be prepared, I think they are inappropriate and may be counterproductive. The way forward, I suggest, lies instead in engaging in dialogue with senior politicians and senior officials. We need to explain to them the elements involved in the preparation of legislation. We might perhaps advert dispassionately to the fact that the delivery of the legislation programme is generally considered as a matter of political importance. The aim should be to convince them - ministers, and senior officials at the highest level - of the need to complement the resources that they have committed to law drafting with corresponding administrative resources.

---