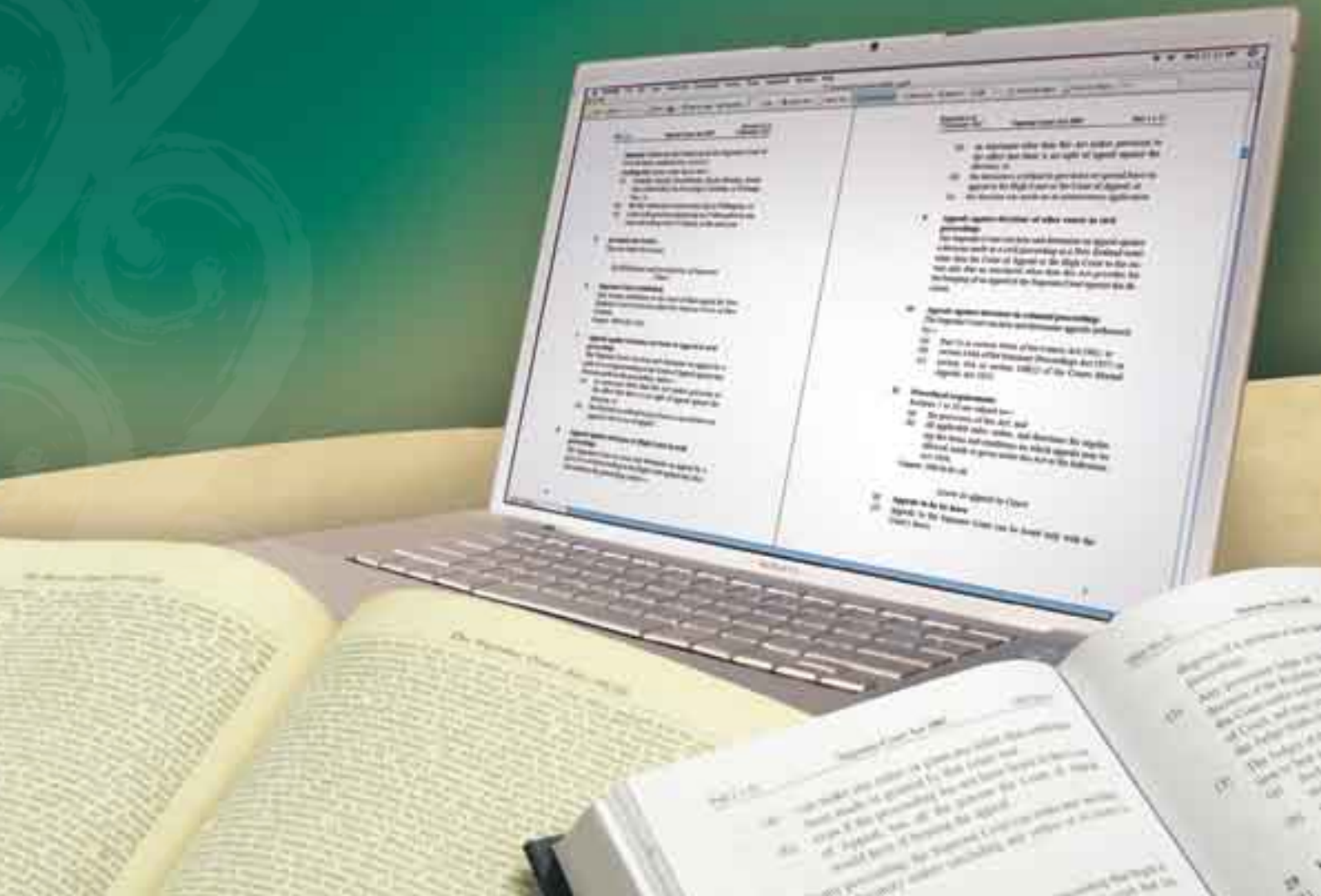




REVIEW OF THE STATUTES DRAFTING AND COMPILATION ACT 1920





REVIEW OF THE STATUTES DRAFTING AND COMPILATION ACT 1920

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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The Hon Simon Power
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

29 May 2009

Dear Minister,

NZLC R107 – REVIEW OF THE STATUTES DRAFTING AND COMPILATION
ACT 1920

I am pleased to submit to you Law Commission Report 107, Review of the Statutes
Drafting and Compilation Act 1920, which we submit under section 16 of the
Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Geoffrey Palmer', with a horizontal line underneath.

Geoffrey Palmer

President

FOREWORD

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.



Sir Geoffrey Palmer

President

ACKNOWLEDGEMENTS In the course of this review the Commission has consulted with Chief Parliamentary Counsel, Mr David Noble, and his staff, and with the Attorneys-General in both the present and previous Governments. In addition we have either met with, or received written comment from, the following:

Inland Revenue Department

Department of Prime Minister and Cabinet

Ministry of Justice

Department of Labour

State Services Commission

The Clerk of the House of Representatives

The Treasury

The Solicitor-General

Mr Walter Iles QC, former Chief Parliamentary Counsel

Mr Peter Quiggin PSM, First Parliamentary Counsel, Commonwealth of Australia

Mr Eamonn Moran QC, PSM, Law Draftsman, Hong Kong

Mr Greg Calcutt ASM, SC, Parliamentary Counsel, Western Australia

Mr Jean-Charles Bélanger, Legislative Services Branch, Department of Justice, Canada.

The Commission thanks these persons and organisations for their helpful input.

The Commissioner responsible for this reference was John Burrows, assisted by Zoë Prebble, Legal and Policy Adviser.





Review of the Statutes Drafting and Compilation Act 1920

CONTENTS

Foreword	iv
Acknowledgements.....	v
CHAPTER 1	3
Introduction	3
CHAPTER 2	4
What does the New Zealand PCO do?.....	4
The present legislation.....	4
Comment	4
The advisory functions.....	5
The interests served.....	7
Select committees	8
Conclusions	9
CHAPTER 3.....	10
Under whose control should PCO be?.....	10
CHAPTER 4.....	12
Legal status	12
CHAPTER 5.....	15
Independence	15
CHAPTER 6.....	16
Appointment	16
CHAPTER 7.....	18
Tax drafting.....	18
Arguments for separation	18
Arguments against separation.....	19
Conclusion.....	20
CHAPTER 8.....	21
Statutory functions	21
Drafting regulations.....	21
Non-government bills	22

Drafting for Committee of the Whole.....	23
Advisory functions	23
Quality of legislation.....	24
CHAPTER 9	25
Miscellaneous matters	25
The name of the office	25
Delegation.....	25
Number of departments.....	26

APPENDICES

APPENDIX A.....	28
Recommendations.....	28
APPENDIX B	30
History of the PCO.....	30
1854–1912	30
Public Service Act 1912.....	31
Statutes Drafting and Compilation Act 1920	31
McCarthy Commission, and State Services Act 1962.....	32
Parliamentary Service Act 1985	33
APPENDIX C	34
Overseas PCOs	34
Legal status of overseas PCOs	34
Under whose control are overseas PCOs?	35
Functions, duties and powers of overseas PCOs.....	36
Appointment	37

Chapter 1

Introduction

- 1.1 New Zealand has had a centralised office for the drafting of legislation since colonial times. From an early time it has been seen as an independent office, and not part of the core public service.
- 1.2 That understanding was translated into legislation in 1920, in the Statutes Drafting and Compilation Act 1920. That Act established what is now called the Parliamentary Counsel Office under the leadership of a Chief Parliamentary Counsel, and conferred on it the functions of drafting bills (and regulations when called upon) and supervising their printing, and compiling statutes and their amendments. The office was described as an “office of Parliament”, and its principal officers were to be appointed by the Governor-General.
- 1.3 Over the years there have been changes of terminology (the office was originally known as the Law Drafting Office), and the office’s functions have expanded. But there has been no fundamental review of the legislation since 1920. It now looks outdated in many respects. For example it does not recognise the publication of statutes in electronic form. It provides that all Parliamentary Counsel are to be appointed by the Governor-General. It provides that the office is to be divided into two departments, Drafting and Compilation, whereas in fact it has operated as a unified office for several decades. The Act is clearly in need of review.
- 1.4 The Law Commission was asked by the previous Government to review the Act, with a view to updating it. The review has involved us in confronting some interesting and important questions in addition to those to which we have adverted in the previous paragraph. For instance what should the office’s legal status be? Under whose control should it be? What should its statutory functions be? Is there a case for returning the drafting of tax bills, which are currently drafted in the Inland Revenue Department, to the Parliamentary Counsel Office? We even considered the question of whether the office is appropriately named.
- 1.5 In the course of the review we have consulted interested agencies and persons and received much assistance from them. We have also studied in some detail the history of the office, and the position of equivalent offices overseas. We have been informed by these studies. We set out summaries of the historical and comparative material in an appendix to this report.
- 1.6 In the course of the report we refer to Parliamentary Counsel Office as PCO.

Chapter 2

What does the New Zealand PCO do?

THE PRESENT LEGISLATION

- 2.1 It is helpful to examine the functions of PCO. As stated in the Statutes Drafting and Compilation Act 1920¹ and the Acts and Regulations Publication Act 1989² they are:
- To draft government bills and amendments to those bills at the direction of ministers.
 - To supervise the printing of such bills and amendments.
 - To draft other bills and regulations as the Prime Minister or Attorney-General may require. (In fact PCO now drafts all regulations).
 - As directed by the Prime Minister or Attorney-General to compile Acts with their amendments and in the course of so doing to make suggestions for their amendment or the alteration of the law.
 - To arrange for the printing and publication of Acts, regulations and reprints of Acts and regulations.
 - To examine all local bills (and if directed members' bills) and report on their form and effect and, if directed, to revise local bills.

COMMENT

- 2.2 Two comments may be made initially. First, it is already clear that PCO has functions which go well beyond drafting. It is concerned to ensure *access* to legislation through the functions of publishing and compiling. It also reports on certain non-Government bills.
- 2.3 Secondly, the drafting function of the office extends beyond bills. It also drafts regulations which are made by the executive government (although of course it does so under delegated authority of Parliament).
- 2.4 However there are two more substantive comments which demonstrate that the statutory definition of PCO's functions does not accurately reflect what PCO actually does, and does less than justice to its important role in our legal system.

¹ Statute Drafting and Compilation Act 1920, ss 4 and 5.

² Statutes Drafting and Compilation Act 1920, ss 4, 10, 12 and 14.

THE ADVISORY FUNCTIONS

- 2.5 First, the statutory statement of functions ignores PCO's advisory functions.
- 2.6 PCO plays a crucial role not just in the drafting of bills and regulations but in their form and content as well. Policy is ultimately the preserve of Ministers, and in the formulation of policy Ministers' principal advisers are their departmental officials and their own political advisers. However, drafters are inextricably involved in the policy process. The instructions they receive from instructing departments differ in quality and completeness. Sometimes there has been little or no involvement of lawyers in the preparation of those instructions. Parliamentary Counsel may have to draw attention to deficiencies in the policy and to practical problems that may occur with implementing it. They may need to point out that the proposed legislative scheme is flawed, and propose alternative ways of accomplishing the goals. They may sometimes even point out that the objectives can be accomplished without legislation at all.
- 2.7 The New Zealand office is not alone in this regard. Drafting offices in other parts of the world do the same. Hilary Penfold, First Parliamentary Counsel, Commonwealth of Australia, said this of her office's role in the policy process:³

Obviously, drafters rarely initiate new policy, but they have a major influence on policy in their role as what we'd call system designers. In the course of drafting legislation to give effect to new policy, drafters commonly play a major role in designing the system by which the new policy is implemented. That system will often have a substantial impact on the efficacy of the policy and that system will be influenced both by the contents of the legislation and often by the very form and structure of the language. In other words, in the course of developing legislative structures, which is a well recognised part of the drafter's role, we are influencing, if not actually determining, administrative and operational structures.

- 2.8 Garth Thornton, an experienced drafter who has worked in Western Australia, Hong Kong and New Zealand, says (adapting the words of US writers Hart and Sacks):⁴

The drafter has skills and knowledge not generally possessed by policy makers. The drafter is 'an architect of social structures, an expert in the design of frameworks of collaboration for all kinds of purposes, a specialist in the high art of speaking to the future, knowing when and how to try and bind it and when not to try at all. The difference between a legal mechanic and a legal craftsman turns largely on awareness of this point.' Although not primarily responsible for policy, drafters do have important advisory responsibilities of a policy kind.

³ Speech delivered on Ms Penfold's behalf by Tom Reid, Second Parliamentary Counsel, (Conference Marking the 25th Anniversary of OPC, Canberra, 1995).

⁴ Garth Thornton *Legislative Drafting* (4 ed, Butterworths London 1996), 125.

- 2.9 Counsel must also ensure, as far as they can, that the bill or regulation as drafted achieves its purpose accurately and completely, and that it complies with legal and constitutional principle, including the Legislation Advisory Committee Guidelines. Thus for example they must do their best to ensure:
- that the draft gives effect to the intended policy;
 - that all matters which need to be provided for are provided for (including transitional provisions);
 - that the provisions of the draft are consistent with fundamental legal principles (for example that they attain the right balance between primary and delegated legislation);
 - that the draft is internally consistent;
 - that the draft is consistent with the rest of the statute book;
 - that the draft is consistent with our international obligations;
 - that the draft is clear and as simple as possible;
 - that, in the case of regulations, the provisions are *intra vires* and will withstand scrutiny by Regulations Review Committee.
- 2.10 PCO in fact performs an important constitutional role. Checks and balances are crucial in the legislative process. PCO is one of the most important of them. As we shall see later, its role in this respect is one of the reasons why it is controlled by the Attorney-General in his or her role as the Senior Law Officer of the Crown.
- 2.11 In the PCO's Annual Report for the year ending 30 June 2008, the Office thus summarised its advisory function:⁵
- Parliamentary Counsel provides advice to departments:
- in the course of the development of policy for legislation
 - in the pre-instruction phase
 - during the drafting phase
 - at other times when required.
- The subject matter of advice given by Parliamentary Counsel varies enormously. The context in which advice is sought is generally a specific piece of existing legislation or proposed legislation, but may include questions of drafting practice, the application of the LAC Guidelines, general legal principles, Cabinet procedure, parliamentary procedure, the effect of court decisions, and statutory interpretation.
- 2.12 The advisory function does not end there. As we shall see shortly, Parliamentary Counsel may also be called upon to advise select committees.
- 2.13 In the course of exercising this advisory function PCO may need to resist pressure from instructing departments. Members of departments with whom we consulted were generally most appreciative of the assistance of PCO, even though they occasionally found it frustrating to find that what they had hoped would be a

5 Parliamentary Counsel Office *Annual Report for year ended 30 June 2008*, heading "Assistance for Departments".

straightforward exercise turned out to be much more complicated. The advisory role is critically important, and it requires objectivity and independence. As Stephen Laws, First Parliamentary Counsel in the United Kingdom, has said:⁶

We are not officials of the instructing department – rather we are a central service who can stand outside the policy-making process and bring a degree of objectivity to the analysis of what is produced.

His predecessor Sir Geoffrey Bowman thus described his office’s relationship with an instructing department:⁷

We need to take a dispassionate view. It is quite a balance. We have to be friendly but at the same time we have to be firm with our propositions when we feel that the project is not viable or is not going to stand up in the court or it is not going to get through Parliament because it is shot through with logical errors. It is an interesting relationship we have.

This objectivity and independence are central to the role.

THE INTERESTS SERVED

- 2.14 The second comment is that the statutory list of duties does not reflect whose interests PCO serves.
- 2.15 In both its advisory and drafting functions PCO has responsibilities to the instructing department, but it goes much wider than this. In the proper performance of its functions PCO lessens or eliminates risk to the Government as a whole. The point was made by a number of Australian Parliamentary Counsel to whom we spoke, or who wrote to us, that *central government* is affected by bad legislation. There is considerable Crown risk if legislation is not right. There can be costly litigation. PCO’s role is thus a whole-of-government one.
- 2.16 In addition, however, *Parliament* has a very obvious interest in the quality of legislation. When a bill has passed through all its stages it becomes the product of Parliament. If there are flaws in it, it is the reputation of Parliament which suffers. When judges criticise Acts of Parliament, as they sometimes do, it is often Parliament they blame. To put it in Stephen Laws’ words, PCO must work to ensure that “there is no debasement of the currency of the means by which Parliament communicates with the courts”.⁸
- 2.17 So PCO’s functions affect government, the *instigator* of the initial product, and also Parliament, the *owner* of the final product.
- 2.18 The *judiciary* also has an interest. Para 2.16 makes the point that legislation is the language of communication between Parliament (and, in the case of subordinate legislation, the executive) and the courts. The judges are the authoritative interpreters of legislation. Once they have placed a particular interpretation on a provision a precedent is set. The *judiciary* therefore has a substantial interest in the quality and clarity of legislative drafting.

6 Stephen Laws *The Role of Legislative Counsel: Wordsmith or Counsel* (paper to the CALC Conference in Nairobi 2007) published in *The Loophole* August 2008.

7 Sir Geoffrey Bowman, Evidence to the Select Committee on Constitution (London, 23 June 2004).

8 Above, n 6.

- 2.19 Yet even that is not the whole picture. The eventual *users* of Acts of Parliament (and other legislation) have a real interest in its being accessible, understandable and constitutionally sound. The audience for legislation extends far beyond the legal profession. Individuals in a host of jobs use it in their employment; they suffer in terms of time and sometimes money if the legislative product is not good.
- 2.20 So a variety of persons and institutions have a keen interest in the work of PCO. It would of course be wrong to say that PCO owes a *legal* duty to each of these individuals and organisations. Its legal accountability is to ministers. Yet, as we have said, in the performance of its functions it affects the interests of many others. These others benefit if the resultant legislation is good, and suffer if it is not. PCO's role is critically important to the legal system as a whole. There is always a danger that officials working on a bill will see it as a separate entity, and an end in itself. PCO must see the wider picture, and ensure consistency with our statute law overall. It can be said properly that PCO is the "guardian", or "keeper", of the statute book. It protects the integrity of our statutes as a whole. As we have already said, its role is an important constitutional one.

SELECT COMMITTEES

- 2.21 Nowadays nearly all bills go to a select committee. The committee can recommend amendments to the bill, and usually does. In fact, some bills are heavily amended. These amendments are drafted by PCO. It is highly desirable from the point of view of consistency and continuity that they are, PCO having drafted the original bill.
- 2.22 Before MMP the Government usually had a majority in the House, and also therefore on the select committee. The Government could thus control the select committee process. One could say with some confidence that the amendments which were proposed at select committee and which were drafted by PCO were supported by the Government. Today, under MMP, that may no longer be so: the Government may have a majority on very few select committees. Amendments proposed by select committees are thus the select committee's own amendments; on some occasions they may depart from government policy. It is, indeed, not unknown for PCO to be asked to prepare a number of alternative drafts to assist a committee's deliberations.
- 2.23 Generally speaking, any difficulties arising from this are resolved by informal discussion, negotiation, and the exercise of diplomacy and common sense. There is seldom a problem in practice. But it does raise the issue of who PCO is drafting for when it drafts amendments at the request of a select committee. PCO's statutory duty is to draft "such amendments as may from time to time be required by ministers of the Crown." Yet the reality is that when a select committee wants an amendment drafted, PCO is drafting for the select committee. The document *Working with Select Committees* issued by the Office of the Clerk of the House captures it as follows:⁹

Once each issue is resolved in concept Parliamentary Counsel will draft amendments to the bill according to the wishes of the committee.

⁹ Office of the Clerk of the House of Representatives *Working with Select Committees: A Guide for Public Service Advisers* (Wellington, 2007) 32.

- 2.24 However, in the last analysis, if the select committee wanted PCO to draft an amendment which was clearly against government policy, the Attorney-General would have the right to withdraw their services. This appears to be recognised by the Office of the Clerk in its document *Effective Select Committee Membership: Guide to Members of Parliament*. Having noted that PCO “draft amendments requested by select committees to government bills” the document continues:¹⁰

There may be occasions where although the committee supports a bill the Attorney-General will not agree to Parliamentary Counsel assisting. If so the committee can ask the Clerk of the House to provide drafting assistance, which will be provided by an officer assigned by the Clerk.

We are not aware that this has ever happened.

- 2.25 This matter is relevant to the assessment of PCO’s functions in that it demonstrates that the proposition that PCO drafts for the executive Government is no longer entirely true without qualification. It also drafts for select committees, although, as we have seen, in an extreme and exceptional situation the Attorney-General could direct otherwise.

- 2.26 One more comment may be made on PCO’s role in relation to select committees. Parliamentary Counsel’s advice is sometimes sought by the committee. Former Chief Parliamentary Counsel George Tanner QC has said:¹¹

It is not uncommon for a select committee faced with conflicting advice from submitters on the one hand and the department on the other to seek Counsel’s view. Counsel will express a view if able to even though it may conflict with the position taken by the department.

- 2.27 Sometimes indeed PCO may be instrumental in achieving an agreed outcome as an honest broker. We heard from several quarters that the independence of Parliamentary Counsel is valued by members of select committees, and by others as well.

CONCLUSIONS

- 2.28 This assessment of the functions of PCO will inform the rest of this report. To fulfil them it must be able to give free and frank advice, to be distanced from the policy makers, and to be objective. It must be seen to be independent.

¹⁰ Office of the Clerk of the House of Representatives *Effective Select Committee Membership: Guide to Members of Parliament* (Wellington 2007) 23.

¹¹ Legislation Advisory Committee: *The Legislative Process: A Seminar for Public Servants* (Seminar, Wellington, July 2006).

Chapter 3

Under whose control should PCO be?

- 3.1 PCO is under the control of the Attorney-General.¹² If at any time there is no Minister of the Crown who is the Attorney-General, the office will for that period be under the control of the Prime Minister.¹³ The Attorney-General is also the responsible minister for the purposes of Vote: Parliamentary Counsel and the Public Finance Act 1989. Chief Parliamentary Counsel is responsible to the Attorney-General for the financial management of the office.
- 3.2 We believe that these arrangements are entirely appropriate. PCO's function of giving independent advice is, as we have indicated, a crucial one. We have described its functions as being of constitutional importance. It is for that reason that control of PCO by the Attorney-General is so important. In the role of Senior Law Officer of the Crown the Attorney-General is responsible for seeing that the Government is conducted according to law, and for upholding the rule of law. He or she is obliged in constitutional matters to act independently and free from political considerations. PCO supports, and is supported by, the Attorney-General in the performance of those functions. In the last resort, if an instructing department, or even a minister, will not accept the advice of PCO on a matter of constitutional or fundamental legal importance, PCO should be able to refer the matter to the Attorney-General. Control by the Attorney-General also ensures that PCO takes, and is supported in taking, an overarching, whole-of-Government approach.
- 3.3 This view is consistent with the position in other jurisdictions.¹⁴ In Australia, the Federal Office, and some of the state PCOs, are either responsible to the Attorney-General or are part of the Attorney-General's office; in others the PCO is responsible directly to the Premier. In the United Kingdom, PCO is a unit of the Cabinet Office, but has direct access to the Attorney-General if there are concerns about proposed legislation. In Canada most of the drafting offices are attached to the Department of Justice or the Ministry of the Attorney-General,

12 Statutes Drafting and Compilation Act 1920, s 2(2).

13 Ibid.

14 See Appendix C.

although some also have an attachment to their provincial legislature. The position in these other jurisdictions reinforces the perception that PCO has an important function in relation to central government.

- 3.4 We therefore believe that the current position, whereby PCO is under the control of the Attorney-General, should remain.

Chapter 4

Legal status

- 4.1 Although most overseas PCOs have been established under the prerogative rather than by statute, we strongly believe that in New Zealand the office should continue to be constituted by statute. This enables its functions to be set out clearly, and its independence to be recognised.
- 4.2 The question is what legal status is most appropriate for PCO. The present legislation describes it as “an office of Parliament.”¹⁵
- 4.3 The separation of PCO from the public service dates back to before the 1920 Act.¹⁶ The Public Service Act 1912 contained a power by order-in-council to exempt any office or class of offices from it. In 1918 an order-in-council was made exempting the Law Draftsman, then part of the Crown Law office. In 1920 a similar order exempted the Assistant Law Draftsmen. The present Act, passed in 1920, confirmed the separation of Parliamentary Counsel Office from the public service. In moving the second reading in the Legislative Council the Attorney-General Sir Francis Bell said it was desirable that “the law drafting office should be made an office of Parliament and should be removed from the public service.”¹⁷ This had the effect that the Legislative Department (as it then was) became responsible for the payment of the salaries of the staff of PCO, and for the provision of accommodation for them. Indeed, the drafters were immediately transferred from the Old Government Building to Parliament Buildings. It is clear that PCO was to be seen as a true office of Parliament. Sir Francis Bell said that staff other than principal officers “will be appointed by the Speakers of both Houses, but upon the recommendation of the Prime Minister ... Parliament now will have its own officers, who will be in the Parliamentary Buildings. I am sure they will be efficient officers...”¹⁸
- 4.4 Today things have moved on. Although still described in the Act as an “office of Parliament” that is not really an accurate description. PCO is not included in the definition of Office of Parliament in the Public Finance Act 1989,¹⁹ nor in the Standing Orders of the House of Representatives.²⁰ There are now only three

15 Statutes Drafting and Compilation Act 1920, s 2(1).

16 See Appendix B.

17 (1920) 188 NZPD, 745.

18 Ibid 746.

19 Public Finance Act 1989, s 2(1).

20 SO 3(1).

true offices of Parliament: the Parliamentary Commissioner for the Environment, the Office of the Ombudsmen, and the Auditor-General. These offices are all appointed on the recommendation of the House of Representatives; Chief Parliamentary Counsel is not. The only Act in which PCO is now specifically referred to as an office of Parliament is the Copyright Act 1994,²¹ but there, ironically, it is only relevant for the purpose of deeming an office of Parliament to be part of the Crown.

- 4.5 It is difficult (although not impossible) to assert that PCO has the primary function of an office of Parliament today. According to the Finance and Expenditure Committee that function is to act as a check on the executive. That committee recommended “that an officer of Parliament must only be created to provide a check on the arbitrary use of power by the executive”.²² That being so, offices of Parliament should only discharge functions which the House of Representatives itself might carry out.
- 4.6 The terminology of “office of Parliament” now seems inappropriate to describe PCO. The office has features which make it more appropriately located as part of the executive. It is under the control of the Attorney-General and takes direction from ministers; it has offices outside Parliament Buildings, and since 1988 it has had its own Vote: Parliamentary Counsel. It is treated as an “instrument of the Government” and thus a department for the purposes of the Public Finance Act 1989;²³ it is also treated as a department for the purposes of the Ombudsmen Act 1975.²⁴ For the purposes of the Public Audit Act 2001²⁵ it is one of a number of “specific public entities not falling within any class”. (Others in that list include the Māori Trustee, the New Zealand Defence Force, the New Zealand Vice-Chancellors’ Committee, the Reserve Bank of New Zealand, the Parliamentary Service and the New Zealand Police.) The only application of the State Sector Act 1988 to PCO is that the State Services Commissioner may set minimum statements of integrity and conduct, and exercise powers of investigation incidental to that.²⁶ PCO is regarded by the State Services Commission as part of the “wider state sector”; it is described by the Commission as a “non-public service department” along with the New Zealand Defence Force, the New Zealand Police, the NZSIS and the Parliamentary Service.²⁷ In other jurisdictions PCO is part of the executive, although in some Canadian provinces it is also attached to Parliament.²⁸

21 Copyright Act 1994, s 2(1).

22 Finance and Expenditure Committee *Report on the Inquiry into Officers of Parliament* (1989) AJHR I.4B.

23 Public Finance Act 1989, s 2(1), definition of “Department”.

24 Ombudsmen Act 1975, sched 1.

25 Public Audit Act 2001, sched 2.

26 State Sector Act 1988, ss 57 to 57C.

27 State Services Commission *A Guide to New Zealand’s State Services* www.ssc.govt.nz/upload/downloadable_files/guide-to-nzss-1july-update.pdf (accessed 8 May 2009).

28 See Appendix C.

- 4.7 There is a view, which we heard from several organisations, that there is no reason why PCO should not be a department which is part of the core public service. The argument is that PCO's function of drafting at the direction of ministers and its control by the Attorney-General or the Prime Minister make it an instrument of the executive government and there is no compelling reason for it to be any different from any other public service department.
- 4.8 We do not agree. We think there are good reasons for keeping PCO outside the core public service. It does not formulate policies, nor does it interact directly with the public for the provision of services as most other departments do. It is not just another government department. While it certainly acts under the direction of a minister, and is responsible to a minister, the minister to whom it is responsible, the Attorney-General, has important public interest functions which other ministers do not have. PCO also performs important services for Parliament, both in drafting for select committees and in protecting Parliament from the reputational effect of bad legislation. That duality of function, and the elements of independence and objectivity which are so valued, are enhanced by a legal structure which treats PCO as a different sort of organisation. Perceptions are important, and a statute which emphasises that PCO is more than an agent of the executive government enhances the perception of independence. Otherwise it might be more difficult for it to resist pressure. We have even heard a view that if the PCO were to become part of the core public service it would no longer be appropriate for it to draft amendments for select committees. That function, according to this view, would then transfer to the Office of the Clerk. This would be most undesirable, particularly in light of the extensive amendments which are often now recommended by select committees; sometimes almost every clause of a bill is changed. We take a strong view that continuity and consistency are important. This can be achieved only if the drafting functions remain in one organisation.
- 4.9 Some might advance the point that Crown Law, which also has advisory functions and a need for perceived independence, is part of the core public service. However in our view PCO's relationship with Parliament, and the need to protect it from the consequences of bad legislation, is a clear point of distinction between the two organisations.
- 4.10 So it is the Commission's view that, while PCO is properly regarded as an instrument of the Government, it should remain outside the core public service as has been the case for close to 100 years. There is no merit in forcing institutions into predetermined boxes. There is nothing inherently wrong with the concept of a Crown organisation which does not fall within any generic class. Indeed we have already shown that the Public Audit Act specifically recognises a number of them. PCO is effectively one now, despite its name, and we are not aware that that has caused problems. We thus recommend that in the Act PCO no longer be described as an "office of Parliament". There is no need to give it any categorisation, but if that were to be thought desirable it might be described as either a "statutory office" or a "public entity". In all respects its reporting lines and relationships with other agencies should continue as now. It should continue to be required to prepare an annual report under Section 43 of the Public Finance Act 1989. Sections 57 to 57C of the State Sector Act 1988 should continue to apply to it.

Chapter 5

Independence

- 5.1 We have noted how important independence, and the perception of it, are for PCO. It is not a policy adviser; rather Parliamentary Counsel are legal experts who must be able to advise on important legal and constitutional issues without fear or favour. Indeed PCO has an important constitutional role in our system. At times Counsel must be able to resist considerable pressure. We were told of a number of cases where PCO has been obliged to insist that a proposal from an instructing department is unacceptable because it does not comply with important legal requirements. We have wondered whether this independence should be defined and protected by statute. The legislation of some other entities protects the right of independent free expression: the Education Act 1989, for example, protects the right of freedom of expression in a tertiary education institution; the statutes of Television New Zealand and Radio New Zealand protect editorial freedom against government direction. However we do not think that such a protection needs to be expressly included in PCO legislation. We shall recommend later in this report that the giving of free and frank advice should be one of PCO's statutory functions. That should be enough. The independence and autonomy of PCO are in fact recognised in a number of ways: PCO is established by its own statute; continuing control by the Attorney-General means that PCO can refer disputed matters to that Officer; and we shall also be recommending that Chief Parliamentary Counsel continues to be appointed by the Governor-General, a further indication of the special nature of the office. Moreover, Parliamentary Counsel are invariably lawyers, and owe the duties of that profession to their client, their client being the Crown: this enables, indeed requires, Parliamentary Counsel (like Crown Counsel) to provide advice and important legal and constitutional issues without fear or favour. Given those protections we feel it would be otiose to include a statutory provision expressly referring to the independence of the office. It was put to us in this way by one senior Parliamentary Counsel from Australia:²⁹

But drafting legislation is such an integral part of the Government's day to day operations that if the situation reached a point where a Parliamentary Counsel cannot speak his or her mind without fear of recrimination from the Government, then the working relationship is at an end and no amount of statutory independence will be of any use.

29 Greg Calcutt AM, SC, Parliamentary Counsel of Western Australia (correspondence with Law Commission, 25 July 2008).

Chapter 6

Appointment

- 6.1 Currently Chief Parliamentary Counsel and all “principal officers” of the PCO are appointed by the Governor-General upon the advice of the Prime Minister, and they hold office “at the pleasure of the Governor-General”.³⁰ All Parliamentary Counsel are included in the term “principal officers.”³¹ This has been so since 1920 when the present Act came into force. In those days of course the office was much smaller. The concept seems then to have been that of a small number of colleagues of equal standing, each appointed at the highest level.
- 6.2 Other officials appointed by the Governor-General include judges, some tribunal members, the Clerk of the House, Justices of the Peace, the Solicitor-General, the Commissioner of Police, and the members of independent Crown entities (which include, for example, the Privacy Commissioner, the Commerce Commission, the Law Commission, the Securities Commission, and the Human Rights Commission). All of these persons exercise roles requiring the perception of independence. Where any statute gives a power of appointment to the Governor-General it is not necessary for the Governor-General to execute a warrant or other instrument of appointment. A Gazette notice is enough.³²
- 6.3 In our view it is appropriate that the Chief Parliamentary Counsel continues to be appointed as now by the Governor-General. That is appropriate to the nature of the position, and is a recognition of the independence of which we have spoken. The Solicitor-General who is also required to tender independent advice to the Crown is so appointed. So are all Chief Parliamentary Counsel in Australia.
- 6.4 However, we see no reason why the appointment of Chief Parliamentary Counsel should continue to be “at pleasure” as it now is. No doubt any power to remove from office is limited by the requirements of procedural fairness even though it is at pleasure, but it is not clear why the appointment could not be for a fixed term. Indeed that would be preferable, in that it would provide a greater degree of independence in that the officer could not be removed at the whim of the Government. The Clerk of the House of Representatives is appointed for seven

30 Statutes Drafting and Compilation Act 1920, s 6(3).

31 Ibid s 6(1).

32 Official Appointments and Documents Act 1919, s 2. However if the office is constituted under the Letters Patent rather than by statute a sealed warrant is necessary, as is the case with the Solicitor-General.

years.³³ Some of the senior Parliamentary Counsel in Australia are appointed for terms not exceeding seven years.³⁴ We recommend that Chief Parliamentary Counsel continue to be appointed by the Governor-General but that the appointment be for a fixed term of, say, seven years. A holder of the office could be reappointed at the expiry of the term.

- 6.5 However, the position of all other Parliamentary Counsel is very different. Their being appointed by the Governor-General is anomalous. There is doubt as to the employment status of Parliamentary Counsel under the system. Since 1988, Chief Parliamentary Counsel fixes the remuneration of Parliamentary Counsel, but the legislation is silent as to the other terms of their engagement. They are probably employees for the purposes of the Employment Relations Act 2000, but even that is far from clear, and there has been debate about it. There is a further difficulty with the present system in that IRD employs its own drafters. Since they are not appointed by the Governor-General they are unable to transfer to PCO. (We return later to the relationship between these two offices.)³⁵
- 6.6 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 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. We recommend that the legislation should provide that Chief Parliamentary Counsel is the Chief Executive of the office, and that he or she appoints all other staff, including Parliamentary Counsel, fixes their remuneration, and is the employer of all such staff. There should be express provision that staff are subject to the Employment Relations Act 2000. In this respect the Clerk of the House of Representatives Act 1988 is a useful model.
- 6.7 There will need to be carefully formulated transitional provisions to protect Parliamentary Counsel appointed before the new legislation comes into force. The terms and conditions of their engagement should be no less favourable than they are currently.

33 Clerk of the House of Representatives Act 1988, s 10.

34 For instance, First and Second Parliamentary Counsel (Cwlth) (Parliamentary Counsel Act 1970, s 5) and Parliamentary Counsel of Queensland (Legislative Standards Act 1992, s 14(3)).

35 See paras 7.1–7.14.

Chapter 7

Tax drafting

7.1 The IRD has its own drafting unit, which drafts all tax bills. This was authorised by a 1995 amendment to the Statutes Drafting and Compilation Act 1920.³⁶ The IRD is the only department to do its own bill drafting; all other bills are drafted by PCO. The main reasons for this separation were that in the 1990's PCO was severely under-resourced, and there were concerns about drafting style. There was a desire for a re-draft of the Income Tax Act in plain language, and it was believed that better progress could be made if IRD took on the work itself.³⁷ In the early stages of the project of redrafting PCO provided assistance, but the later stages were carried out by the IRD drafters alone. The project was completed in 2007 with the passage of the Income Tax Act of that year. It is a very substantial Act, spanning 4 volumes of the statutes. The IRD drafting unit continues to draft amendments to that legislation.

ARGUMENTS FOR SEPARATION

7.2 Given all that has now happened, there are some arguments for keeping tax drafting separate. IRD has evolved its own drafting style which is different from that of PCO; it uses alphanumeric numbering of sections, different forms of expression and different section placement (for example the definition section is at the end rather than the beginning). This has already happened, and would take time to reverse.

7.3 The culture of drafting is different too. Tax policy is devised by large groups of officials who meet to debate and refine the issues; the drafters are part of that team. This is known as the Generic Tax Policy Process (GTPP). The process is very different from that used in other departments which devise policy and then instruct PCO. It was put to us that if tax drafting was returned to PCO the IRD drafting styles and modus operandi would have to be unpicked, and that this would require substantial adjustment.

7.4 Nor can there be any suggestion that the Income Tax Act 2007 is unsatisfactory. By general agreement the work of redrafting has been a success.

³⁶ Statutes Drafting and Compilation Act 1920, s 8A, added in 1995.

³⁷ *Organisational Review of the Inland Revenue Department (the Richardson Review)* (1994) recommendation 22, para 12.10.

ARGUMENTS
AGAINST
SEPARATION

- 7.5 Moreover, there is no doubt that tax is one of the most specialised forms of law (although others, such as resource management and securities law, are arguably no less so). If PCO were to resume tax drafting, it would have to acquire specialisation in the area. One way of doing so would be to take over the drafters currently with IRD.
- 7.6 Currently relationships between PCO and IRD are good. The software of the New Zealand Legislation System is made available to IRD by PCO.
- 7.7 However, there are strong arguments for there being only one office for the drafting of all legislation. The current separation does create problems.
- 7.8 First, we have already shown the real importance of having drafting completely separated from policy making, and have noted the critical independent advisory role which resides in PCO in the case of all other kinds of bills.³⁸ The point of having a separate drafting office is that it can take a dispassionate, objective whole-of-law approach more easily than drafters who are members of the same department which formulated the policy. While there is no doubt that drafters who are members of the policy department have many opportunities for interaction with the policy makers, distance promotes better checks and balances. We are uncomfortable with a position whereby the same agency can recommend policy, draft the legislation implementing it, and then apply and enforce it.
- 7.9 Secondly, the division of work between the two agencies leads to certain illogicalities. For example, while the IRD drafts tax bills, PCO drafts tax regulations. Moreover, there are some topics which cross subject-matter boundaries and where there has to be a decision as to how the work should be divided between the two organisations: the ACC legislation is an example. On other occasions PCO drafts the whole Act even though it may contain a significant tax component: the legislation about student loans, child support and KiwiSaver for example.
- 7.10 Thirdly, while specialisation has its advantages there is merit in diversity as well. Experience in drafting a wide range of legislation exposes drafters to a greater range of problem situations and thus develops their skills. Moreover, they gain a greater knowledge of the whole statute book into which each new Act will be placed. Earlier in this paper we described PCO as the “guardian of the statute book”.³⁹ It is not possible to fulfil that role if one is only concerned with one aspect of it.
- 7.11 Fourthly, there is merit in consistency of style throughout the statute book. Users should not be required to familiarise themselves with more than one style, format or structure. As we have said, inconsistency in these matters has already developed. The Income Tax Act 2007 has many stylistic points of difference from other Acts. Not only does this affect users, it has technical implications for

38 Above, paras 2.5–2.13.

39 Above, para 2.20.

the legislation website as well. As far as the Income Tax Act is concerned, even if the offices were to amalgamate it would probably not be sensible to revise it immediately, but that could be a goal in the longer term.

- 7.12 Fifthly, efficiency argues against having two drafting agencies. The available pool of drafters is small, and it is unfortunate that they are split between two agencies. Bringing them together would avoid duplication of training and professional development programmes, and of support services such as proofreading and peer review.
- 7.13 Sixthly, one of the great benefits of working in a large drafting office is the opportunity to discuss issues with colleagues and learn from the experiences of others.
- 7.14 In other jurisdictions the single drafting office is the norm. However Canada has an arrangement whereby a group of drafters from the Department of Justice (called Tax Counsel Division) are resident in, and work closely with, the Department of Finance in preparing tax legislation.

CONCLUSION

- 7.15 In our view the arguments for having all drafting done in a single office are strong. In 1999, the Finance and Expenditure Committee considered the issue of tax drafting as part of its enquiry into the operations of the Inland Revenue Department. The committee reported:

We consider that the arguments for moving the responsibility for tax drafting back to Parliamentary Counsel Office have merit and are worthy of further consideration. We recommend that the Government consider moving the responsibility for drafting tax legislation back to the Parliamentary Counsel Office.

We agree with this, and now that the redraft of the Income Tax Act is complete we think it is appropriate that the matter be considered again.

Chapter 8

Statutory functions

8.1 The Statutes Drafting and Compilation Act 1920, or any new Legislation Act into which it is consolidated, should desirably list the functions of PCO. That is common form in modern statutes which set up agencies. The Law Commission Act 1985, the Clerk of the House of Representatives Act 1988 and the Privacy Act 1993 are but a few instances. The functions listed in the current legislation should obviously continue – in particular to draft government bills; to arrange for the printing of such bills; to arrange for the printing and publication of Acts and regulations; to compile (or reprint) acts. In its 2008 report *Presentation of New Zealand Statute Law*⁴⁰ the Law Commission recommends the addition of two further functions – to publish Acts and regulations electronically as well as in hard copy, and to carry out a programme of revision of Acts. These should be added to the statutory list. We now consider what further functions should appear in the Act.

DRAFTING REGULATIONS

8.2 Currently PCO in fact drafts all regulations, but the current Act requires it only “to undertake such other duties relating to the drafting and preparation of regulations as the Prime Minister or the Attorney-General may from time to time require”.⁴¹ In some overseas jurisdictions PCO drafts only bills, not regulations. We think PCO should do both. Regulations can affect citizens as much as Acts of Parliament. There are more of them. It is just as important that they be properly drafted and important also that there be consistency between bills and regulations. We would thus recommend that it be another express function of PCO to draft all regulations which are required to be published in the SR series, and such amendments to them as may be required.

8.3 There is also a vast amount of tertiary legislation in New Zealand: rules, codes, standards and other subsidiary legislation which is made under the authority of an Act of Parliament, but is not made by order-in-council and is not drafted by PCO. The desirability of this kind of legislation itself raises major questions. Leaving that aside, however, the drafting of much tertiary legislation leaves much to be desired. In an ideal world PCO should draft all delegated legislation. That way its quality would be assured. However given the volume of tertiary legislation and the limited resources of PCO, this would be unrealistic, and we make no recommendation about it. There are other ways of improving the quality of tertiary legislation: the preparation of drafting templates, for

40 Law Commission *Presentation of New Zealand Statute Law* (NZLC R104, Wellington, 2008).

41 Statutes Drafting and Compilation Act 1920, s 4(1)(e).

example, and guidelines for drafters prepared by PCO. Indeed PCO already provides training sessions, and publishes part of its drafting manual on its website. We recommend that there be added to PCO's list of statutory functions the provision of advice to departments and agencies on the drafting of tertiary legislation.

NON- GOVERNMENT BILLS

- 8.4 The Statutes Drafting and Compilation Act 1920 requires PCO to examine all *local bills* and to report on their form and effect. If desired, PCO must revise such *local bills*. PCO is also required to report on the form and effect of *members' bills* when so directed.⁴² Nothing is said about *private bills*.
- 8.5 The Crown needs advice on the extent to which non-government bills affect the rights of the Crown and the extent to which they impinge on other legislation. There are two questions. The first is whether PCO is the right body to give such advice, or whether it better falls within the province of another organisation such as, for instance, the Crown Law Office, or the Office of the Clerk of the House of Representatives. We understand that currently the Office of the Clerk often does give such advice. If as we shall suggest PCO is to contribute to the final form of the drafts of such bills it is in our view appropriate that the legal duty should remain with PCO as under the current legislation.
- 8.6 The second question is the person or entity to whom the advice should be given. Currently, according to the 1920 Act, it is the Prime Minister or the Attorney-General. It has been suggested to us that the advice should be given to the relevant select committee which is examining the bill. Given that it is the select committee which makes amendments to the bill, and given that the select committee is advised by officials of the relevant department, we see merit in the suggestion. However the proper line of report should be to the Attorney-General (or Prime Minister), in the knowledge that the report would be likely to be passed on to the select committee.
- 8.7 We believe that the duty to report should also relate to private bills. They seem to raise the same issues. We therefore recommend that PCO should examine all local and private bills, and such members' bills as may be directed, and report to the Attorney-General (or Prime Minister) on their effect, in particular on whether they affect the rights of the Crown, and on their relationship to other legislation.
- 8.8 There is also a question as to who drafts these bills. Currently it is only government bills which have to be drafted by PCO. Yet, if local bills, private bills and members' bills become law they are no less Acts of Parliament than other Acts. Some affect all the public; others affect substantial sectors of it. The drafting of these bills should also be of high standard. It would seem to us sensible for PCO to be involved in the drafting of *local bills* and *private bills*. Yet, we hesitated over this. It would mean that PCO would be acting for a non-government "client". In the last analysis, the promoter of a local or private bill can place before Parliament any bill they wish. Yet PCO, in its function as the "guardian of the statute book", should be involved in providing drafting assistance and advice. If PCO had concerns about the promoter's wishes it might be obliged to give advice to a select committee of Parliament which was at variance with what

⁴² *Ibid* s 4(1)(c)(d) and (2).

that “client” wanted. There are analogies with a lawyer’s obligations to his or her client, and the overriding obligation to the Court. We have decided to recommend that PCO be responsible for providing assistance and advice in the drafting of private and local bills. It would not impose a significant new burden: these days there are seldom more than one or two of each type a year. Counsel already sometimes assist in the drafting of them. Consideration might be given to questions of cost recovery.⁴³

- 8.9 *Members’ bills* are different. The numbers introduced each year are variable but can be quite high. In 2006, for example, there were 32. Many more may be drafted for a ballot, but not proceed further. A very small minority of members’ bills pass into law: perhaps two or three a year. To require PCO to draft even all members’ bills which are drawn in the ballot could impose greater demands on its resources than are justifiable, and have detrimental consequences for the Government’s legislation programme. There is a further argument that it would be a constraint on the democratic process: members, particularly those in opposition, should be able to engage anyone they wish to draft bills. However, current practice is that, if it becomes likely that a member’s bill will attract the numbers to pass, PCO will be requested to make necessary drafting changes to it. Although ultimately a decision in each case for the relevant select committee and the Attorney-General, we can see no reason why this practice should not be recognised in the Act. It could take the form of a direction-making power in the Attorney-General.

DRAFTING FOR COMMITTEE OF THE WHOLE

- 8.10 A further difficulty at the moment is that at Committee of the Whole many amendments may be proposed. They often have to be drafted with great speed. Sometimes amendments are moved which have not been drafted by PCO. Sometimes, indeed, they are moved from the floor of the House and a few of them may even have been hastily composed on the spot. Sometimes they become law, and in the recent past a number have given rise to considerable legal difficulty down the track. There would be much benefit in requiring all amendments to bills to be drafted by PCO, and for there to be a requirement that at least 24 hours’ notice must be given of them so that they can be drafted with due care and deliberation. That would be the ideal solution. However drafting all amendments, including opposition amendments, would impose a very large burden on PCO; moreover members may not always wish to disclose their intentions to the Government’s drafters. An alternative solution might be to require that all amendments passed at Committee of the Whole stage be subject to PCO scrutiny during the following 24 hours. If serious problems were discovered in that period, the bill would be recommitted. Since this is more a matter for standing orders than legislation we make no formal recommendation about it, but commend it to the attention of the Standing Orders Committee.

ADVISORY FUNCTIONS

- 8.11 There is a further question of whether one should capture in the legislation the wider advisory function of PCO which we described at the beginning of this report. We emphasised the critical importance of this advisory function. Some may argue that it is well understood and implicit in the drafting function,

⁴³ We note that promoters of private and local bills currently pay a fee to the Speaker of the House and the Clerk of the House (Standing Orders, September 2008, Appendix C, cl 13). This may provide a model.

so need not be spelt out. However, we think there is merit in including it expressly in the legislation. It is of fundamental importance, and to leave it out while listing all PCO's other functions is to tell only part of the story. Some might otherwise draw the unfortunate inference that it was deliberately omitted, and that the other functions listed are exhaustive; the office might then be seen as performing little more than a mechanical function.

8.12 There is ample precedent in the legislation setting up other agencies for the prescription of full lists of functions including sometimes the tendering of advice.⁴⁴ There is precedent in Australia for this kind of provision. The Queensland Legislative Standards Act 1992 includes among the functions of the Queensland PCO that of providing advice to Ministers, government entities and members on

- (i) alternative ways of achieving policy objectives, and
- (ii) the application of fundamental legislative principles

in performing PCO's other functions.⁴⁵ During the process of consultation in the course of the preparation of this report some members of the New Zealand PCO indicated their belief that the statute should prescribe it as a duty of Parliamentary Counsel "to give free and frank advice to the Legislature, and the Executive Government of New Zealand". Such a provision would provide support to Counsel in cases where an instructing department was trying to insist that its instructions, however wayward, should be carried out to the letter. We recommend that the function of giving free and frank advice be spelled out in the legislation.

QUALITY OF LEGISLATION

8.13 There is a final question of whether it is necessary or desirable to provide in legislation that it is a function of PCO to ensure that legislation is of high quality. The Queensland Act previously referred to does so. It provides that the function of the office is to "ensure the Queensland statute book is of the highest standard".⁴⁶ We are reluctant to prescribe this as an express function because of the possible consequences of doing so. No bill could ever provide for every contingency which may arise in the world of fact. Human foresight and the resources of the English language do not extend so far. All legislation, however well drafted, can occasionally produce a result which no one foresaw. We do not wish to offer unsuccessful litigants a vehicle for visiting their disappointment on the drafters of the relevant legislation. On the other hand the very purpose of having a drafting office is to ensure a quality product, and there may be merit in including a purpose section in the Act which emphasises this. We recommend that the purpose section of the new Statutes Drafting and Compilation Act state that one of its purposes is to facilitate legislation of high quality.

⁴⁴ See for example the functions of the Privacy Commissioner listed in the Privacy Act 1993, s 13.

⁴⁵ Legislative Standards Act 1992 (Queensland), s 7(g) and (h).

⁴⁶ *Ibid* s 7(j).

Chapter 9

Miscellaneous matters

THE NAME OF THE OFFICE

- 9.1 It has been suggested to us that Parliamentary Counsel Office is not the most appropriate name for the office. It is said that it does not adequately convey to the uninitiated what the office does, and that it is frequently misunderstood. An alternative might be Legislative Counsel, the name in common currency in Canada and the United States of America. However, it is not obvious to us that that name would be any better understood. Another suggestion is to change to a name which encompasses all the office's functions: the Law Drafting, Publication and Revision Office, for example. That might be thought to be a little cumbersome. As at present advised we see no reason to change the name Parliamentary Counsel Office. It is the name uniformly used in the United Kingdom and Australia. The New Zealand PCO has close collegial links with its Australian counterparts; there is an Australasian Parliamentary Counsel's Committee. Moreover, the name is not inappropriate. The adjective "parliamentary" indicates that the office's role has links with Parliament as well as government; and the word "counsel" emphasises the advisory function which we have said is so important. So while we believe that the matter merits discussion, we do not presently recommend any change in the name.

DELEGATION

- 9.2 The current Act does not expressly confer on Chief Parliamentary Counsel any power to delegate his or her functions. We think that it should. In practice there is no problem with financial delegations since Chief Parliamentary Counsel has authority delegated by Cabinet which includes an authority to sub-delegate.⁴⁷ But Chief Parliamentary Counsel should have an express statutory power of delegation which mirrors those available to public service chief executives under the State Sector Act 1988,⁴⁸ and which is present in the statutes of many other agencies. The lack of an express power to delegate has hindered the implementation of good administrative practice in PCO in the past. As we have noted the office has a number of different functions, and a power of delegation would enable these to be managed in a sensible, efficient and flexible manner.
- 9.3 A related question is whether the Act should provide for the appointment of deputies. There is an argument for this, but the power of delegation we propose would seem to render it unnecessary. There are de facto deputies now.

⁴⁷ Cabinet circular CO(99)7.

⁴⁸ State Sector Act 1988, s 41.

NUMBER OF DEPARTMENTS

9.4 The Statutes Drafting and Compilation Act 1920 provides for the division of PCO into two departments, each with its own head: a drafting department and a compilation department.⁴⁹ This division originated, it would seem, because it was thought in 1920 that unless a compilation department was created with separate functions and separate resourcing most of the office's time would be spent on drafting and not enough on compilation (or reprinting as we now call it). In his second reading speech in the Legislative Council Sir Francis Bell said:⁵⁰

I should like the Council to understand that we have been very short-handed in bill-drafting The duties, as honourable gentlemen will see, are carefully distinguished by Department, so that the officers of one Department shall not be performing the duties of the other. The real reform that I have been trying to effect is that the compilation officers will not be taken off their own work.

9.5 That separation should not continue. It is *de facto* obsolete in any event. Since 1952 when Mr A E Currie retired there has been no separate appointment to the position of Compiler of Statutes. The last four holders of the position of Chief Parliamentary Counsel (Mr Iles, Mr Tanner, Mr Jamieson and Mr Noble) have been appointed as both Chief Parliamentary Counsel and Compiler of Statutes. Both offices vest in the same person.

9.6 We believe that the legislation should not continue to provide for two departments. This is so for a number of reasons. First, to retain two departments could be a recipe for disharmony. That indeed appears to have been the situation in the early 1950s. Secondly, the division is an artificial one. Drafting, publication and reprinting are part of a unified set of responsibilities. The new Legislation System and Website spans all of them. Thirdly, division into two departments leads to an inflexibility which could hinder development. For instance the Law Commission is proposing a new function of revision which lies somewhere between the two.⁵¹

9.7 The only reason for separating the functions into separate departments would be if it could lead to a conflict of interest to have them reside in the same person. There is no suggestion that that would be the case.

9.8 We believe therefore that the best resolution is for the statute to confer functions on Parliamentary Counsel Office, and leave Chief Parliamentary Counsel, as the head of the office, to organise those functions and to structure the office as he or she thinks fit. The power of delegation which we propose should facilitate that. There should no longer be two departments, and the title "Compiler of Statutes" should no longer be used of Chief Parliamentary Counsel.

49 Statutes Drafting and Compilation Act 1920, s 3.


50 (1920) 188 NZPD, 745–746.

51 Law Commission *Presentation of New Zealand Statute Law* (NZLC R104, Wellington, 2008) Ch 7.

Appendix A

Recommendations

- R1 That PCO should continue to be under the control of the Attorney-General.
- R2 That PCO should no longer be described in the legislation as an office of Parliament.
- R3 That PCO should continue to be outside the core public service.
- R4 That Chief Parliamentary Counsel should continue to be appointed by the Governor-General, but for a fixed term; other Parliamentary Counsel should no longer be appointed in that way.
- R5 That the legislation should provide that Chief Parliamentary Counsel is the Chief Executive of PCO, that he or she appoints all staff including Parliamentary Counsel, and is the employer of all such staff. All Parliamentary Counsel should have a legal qualification.
- R6 That the legislation should contain express provision that all staff, including Parliamentary Counsel, are subject to the Employment Relations Act 2000 or its equivalent.
- R7 That transitional provisions should specify that Parliamentary Counsel appointed before the new regime takes effect continue on terms no less favourable than previously.
- R8 That the Government should consider moving the responsibility for drafting tax legislation back to PCO.
- R9 That the legislation should list the functions of PCO. In summary, those functions should be as follows:
- 9.1 To draft Government bills and amendments as directed by Ministers.
 - 9.2 To draft regulations which are to be published in the SR series, and amendments to them.
 - 9.3 To arrange for the printing of bills and amendments.
 - 9.4 To arrange for the printing and publication of Acts, regulations and reprints of Acts and regulations, including in electronic format.
 - 9.5 To undertake reprints of Acts with their amendments.
 - 9.6 To revise Acts in accordance with a triennial programme of revision.

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- 9.7 To provide advice to departments and agencies on the drafting of tertiary legislation.
- 9.8 To examine all local and private bills, and such members' bills as may be directed, and report to the Attorney-General or Prime Minister on their effect, in particular on whether they affect the rights of the Crown, and their relationship to other legislation.
- 9.9 To provide assistance and advice in the drafting of all local bills and private bills, and to draft such members' bills as the Attorney-General may direct.
- 9.10 To provide, in the course of performing its functions, free and frank advice to the executive government, and, when required, to the legislature and its committees.
- R10 That the purpose provision of the legislation should state that one of its purposes is to facilitate legislation of high quality.
- R11 That the name of the office should continue to be Parliamentary Counsel Office.
- R12 That the legislation should confer on Chief Parliamentary Counsel express power to delegate his or her functions.
- R13 That Parliamentary Counsel Office should no longer be divided into two departments.

Appendix B

History of the PCO⁵²

In the years before the enactment of the Statutes Drafting and Compilation Act 1920, the role of Law Draftsman was housed within several different offices. The legislative drafting role was generally held by an official on top of their primary public service position. When the drafter took up a new primary position, the drafting function often followed him to his new position.

1854–1912

In New Zealand's early days as a colony, the Attorneys-General performed the role of draftsmen. In 1873, the Judicial Branch of the Colonial Secretary's Office divided into two new and independent departments: the Department of Justice and the Crown Law Office. Following that, the drafting function came to be housed within the Crown Law Office. In 1877 John Curnin was appointed as "Law Draftsman in the Crown Law Office".⁵³ Later, in 1895, Dr Frederick Fitchett was appointed as both the Assistant Law Officer and Law Draftsman. When Fitchett became Solicitor-General in 1900, William Joliffe succeeded him as Law Draftsman.⁵⁴ Until 1907, much of the legislative drafting was done either by the Solicitor-General himself, or by Law Officers under his supervision.

In 1907 the new post of "Counsel to the Law Drafting Office" was created. Professor JW Salmond⁵⁵ was appointed to this office and drafting work was taken over by him and his staff.⁵⁶ The Law Drafting Office then acquired its own premises in the Government Buildings as an office of the Civil Service, but not as an office of Parliament.⁵⁷

In 1910, Salmond was appointed Solicitor-General, and the Crown Law Office was reorganised. He took with him to the Crown Law Office the function of legislative drafting. The amalgamation of the Law Drafting Office with the

52 This section on the history of the PCO owes a great deal to the currently unpublished and excellent research of Mr Ross Carter of the Parliamentary Counsel Office. We are very grateful for his generosity in allowing us access to his research.

53 *New Zealand Gazette* (1877) No 78 (Sept 13 1877) 933.

54 Peter Cornford [1964] NZLJ 423, 425.

55 Later Sir John Salmond.

56 EJ Haughey *Crown Law Practice in New Zealand* (1961), 22.

57 Peter Cornford [1964] NZLJ 423, 425.

Crown Law Office was part of a policy of reducing the number of separate offices in order to make administration more efficient and economical.⁵⁸ As at 1911, the Crown Law Office was classified as a Department of the Public Service.⁵⁹

In the years prior to 1912, the Law Draftsman was exempted from certain requirements that applied generally to the civil service.⁶⁰ These exemptions signalled the independence of the position of Law Draftsman, and that it was somewhat removed from the rest of the civil service.

PUBLIC SERVICE ACT 1912

Public service reform was a major policy plank of the Reform Party Government that came to power in 1912.⁶¹ The Public Service Act 1912 effected this reform, providing for and regulating the public service. Commissioners were appointed under the new Act to implement its provisions.⁶²

The 1912 Act expressly exempted a number of officials from its operation.⁶³ In addition, Orders in Council were made under section 4 of the Act also exempting the Solicitor-General,⁶⁴ the Law Draftsman,⁶⁵ and Assistant Law Draftsman,⁶⁶ all of whom were officers in the Crown Law Office. In effect, this meant that these officers were not part of the public service for the purposes of the Public Service Act.

STATUTES DRAFTING AND COMPILATION ACT 1920

In 1920, when Sir Francis Bell was Attorney-General, the Law Drafting Office was established as a separate office of Parliament by statute.⁶⁷ The reason given for this was that it was thought desirable to remove the Office from the Public Service and to make its staff permanent Parliamentary officers.⁶⁸

- 58 Ward NZPD Vol 149 (1910), 689, quoted in Alex Frame *Salmond: Southern Jurist* (VUP 1995), 96–97.
- 59 This was according to a provisional classification of the public service as at 30 September 1911 under the Public Service Classification and Superannuation Act 1908. The Law Draftsman and Solicitor-General were among the office’s seven staff.
- 60 In 1895, the Law Draftsman was exempted from a fidelity fund insurance scheme for officers of the civil service. It was exempted from the scheme, established by regulations under the Civil Service Officers’ Guarantee Act, 1893: *New Zealand Gazette* (1895) No 18 (March 7) p 439. The Law Draftsman was also exempted from “Guarantee Board” regulations under the Civil Service Act 1908, which dealt, among other things, with appointments, discipline, and an officers’ guarantee fund. See regulation 22, Guarantee Board Regulations *New Zealand Gazette* (1912) No 28 (March 28), p 1,138.
- 61 Following the 1911 election.
- 62 These included provisions regarding inspection of departments, divisions (administrative, professional, clerical, general), appointments, grading, salaries, and dismissals.
- 63 Section 4 of the Act exempted “any officer of either House of Parliament” as well as “persons employed in either of the Departments of the Legislature under the separate control of the Speaker of either House or under their joint control”.
- 64 *New Zealand Gazette* (1913) (April 2), p 1,011 (order made on 31 March 1913, just before the commencement on 1 April 1913 of the 1912 Act).
- 65 *New Zealand Gazette* (1918) Vol III, p 3,580 (order made on 15 October 1918).
- 66 *New Zealand Gazette* (1920) No 61 (June 24) p 2,022 (order made on 15 June 1920).
- 67 Statutes Drafting and Compilation Act 1920, s 2.
- 68 Hon Sir Francis Bell, Attorney-General, moving in the Legislative Chamber for the second reading of the Bill that became the Act, (1920) 188 NZPD 745–746, cited in Denzil Ward’s *Statement to the Royal Commission on the New Zealand State Services* (the McCarthy Commission) on 19 July 1961.

Under the 1920 Act, the Office's principal officers (the Law Draftsman, Compiler of Statutes, and one or more Assistant Law Draftsmen) were appointed by the Governor-General on the recommendation of the Prime Minister.⁶⁹ Any other staff were appointed by the Speakers of both Houses upon the recommendation of the Prime Minister.⁷⁰

The 1920 Act did not amend the Public Service Act 1912, but by Order in Council in 1925⁷¹ the office of Compiler of Statutes was exempted from the government superannuation provisions that applied generally to the public service.⁷² Section 7 of the 1920 Act required the salary of each principal officer and member of staff of the Law Drafting Office to be separately appropriated in the Annual Estimates of Expenditure. This was done from 1921 to 1952. In 1953, section 7 was repealed,⁷³ and Law Drafting Office salaries were now determined according to the same general rules that applied to the rest of the public service.⁷⁴

MCCARTHY COMMISSION, AND STATE SERVICES ACT 1962

In 1951, the Legislative Council was abolished.⁷⁵

The historical development of the New Zealand State Services saw a group of entities, including the Law Drafting Office, develop as autonomous Departments outside the Public Service proper and outside the jurisdiction of the old 1912 Act Public Service Commission. These autonomous Departments were in practice co-ordinated with the Public Service in terms of conditions of service, salary scales and similar matters. The Royal Commission on the New Zealand State Services (McCarthy Commission) was established in 1961, its warrant to review the state services in New Zealand.

The McCarthy Commission recommended that autonomous Departments such as the Law Drafting Office be brought within the ambit of the new State Services Commission. However, claims for the continuation of autonomy were favourably considered by the Government.⁷⁶ The McCarthy Commission excluded the Law Drafting Office from a unified career public service, in which officers could make a career in the service as a whole rather than only in one department, on the grounds that particular circumstances applied to the Office that would make this undesirable.⁷⁷

69 Subject to section 6(5) of the 1920 Act, which ensured that the officers holding the positions of Law Draftsman and Assistant Law Draftsman at the time the Act came into force would continue as the first principal officers under the Act.

70 This arrangement for appointing staff other than the principal officers essentially remained until 1985. See below p 33.

71 *New Zealand Gazette* (1925) No 46 (June 11) p 1,877.

72 The superannuation provisions from which the office was exempted were contained in Part II of the Public Service Classification and Superannuation Act 1908.

73 Finance Act 1953, s 5.

74 Explanatory Note to the Bill which was enacted as the Finance Act 1953.

75 By the Legislative Council Abolition Act 1950.

76 Though it did introduce new powers to inspect and review the Office's operations at the request of the responsible Minister: JF Robertson "Efficiency and Economy in the New Zealand Public Service" (1965) 28(1) NZJPA 81, 95.

77 *State Services in New Zealand: Report of the Royal Commission of Inquiry* (Wellington, Government Printer, 1962) 253–254.

A series of Acts in the 1960s and 1970s saw salary levels of the Law Draftsman and other staff of the Law Drafting Office being determined variously by an Advisory Committee on Higher Salaries in the State Services;⁷⁸ the Attorney-General, and Parliament (for salaries exceeding \$7,300);⁷⁹ the Chairman of the State Services Commission (in respect only of employees of the LDO, not “higher salaries”);⁸⁰ the Higher Salaries Commission (in respect of principal officers);⁸¹ and the Chief Parliamentary Counsel in consultation with the State Services Commission.⁸²

In 1973, the Law Drafting Office was renamed the Parliamentary Counsel Office.⁸³ The principal officers of the Office were also renamed: the Law Draftsman became the Chief Parliamentary Counsel and Assistant Law Draftsmen were renamed as Parliamentary Counsel. Aside from these name changes, the substance of the appointment provisions remained the same under the amended Act: principal officers were appointed by the Governor-General on the recommendation of the Prime Minister.⁸⁴ This appointment method for principal officers remains today.

PARLIAMENTARY SERVICE ACT 1985

In 1985 the Fourth Labour Government reformed the public service via the Parliamentary Service Act 1985. It abolished the Legislative Department and replaced it with a Parliamentary Service and Parliamentary Service Commission. It also ensured that staff of the PCO, aside from principal officers, were appointed by the Chief Parliamentary Counsel, within maximum numbers set by the Attorney-General.⁸⁵ The 1985 Act was repealed and replaced by the Parliamentary Service Act 2000, the provision relating to the Clerk’s Office having been moved to a separate Act in 1988.

The Parliamentary Service and its predecessors have for many years provided administrative and support services for the LDO and PCO.

78 State Services Act 1962.

79 Described in the *Report of the Royal Commission of Inquiry into Salary and Wage Fixing Procedures in the State Services* (Chairman, the Hon Sir T McCarthy, AR Shearer, Government Printer, August 1968). The principles and machinery for State pay fixing recommended by the 1968 Royal Commission were substantially embodied in the State Services Remuneration and Conditions of Employment Act 1969.

80 State Services Remuneration and Conditions of Employment Act 1969, s 6.

81 Wage Adjustment Regulations 1974 (SR 1974/143).

82 Statutes Drafting and Compilation Act 1920, s 6A (inserted on 1 April 1988 by section 2 of the 1988 amendment).

83 Statutes Drafting and Compilation Amendment Act 1973.

84 The method of appointing other staff, discussed above at p 32, remained until 1985. See below.

85 The Parliamentary Service Act 1985, s 64, substituted the new s 6(4).

Appendix C

Overseas PCOs

LEGAL STATUS OF OVERSEAS PCOS

Overseas PCOs are established either by statute or prerogative. In Australia, two PCOs are established by their own statutes: the Federal Office of Parliamentary Counsel,⁸⁶ and Queensland Office of Parliamentary Counsel.⁸⁷ A third, the Victorian Office of the Chief Parliamentary Counsel, does not have its own statute, but is established under Part 3 of the Public Sector Management Act 1992 (Victoria).⁸⁸ However, most overseas PCOs have been established under the prerogative rather than by statute. The other Australian state PCOs, most Canadian drafting offices,⁸⁹ and United Kingdom OPC were established in this way.

In a number of overseas jurisdictions, the PCO is part of the executive, although some are attached to Parliament. Australian drafting offices are attached to departments such as the Department of Premier and Cabinet,⁹⁰ the Attorney-General,⁹¹ Justice,⁹² and the Chief Minister.⁹³ The United Kingdom Office of Parliamentary Counsel is part of the Cabinet Office.⁹⁴ The majority of Canadian

86 Parliamentary Counsel Act 1970 (Commonwealth), s 2(1). OPC does not draft regulations or statutory instruments. These are mainly drafted by the Office of Legislative Drafting and Publishing, which is part of the Attorney-General's Department and not established by statute.

87 Legislative Standards Act 1992 (Queensland), s 5.

88 Schedule 1 lists the Office of Chief Parliamentary Counsel as an administrative office of the public sector.

89 An exception is the Newfoundland and Labrador Legislative Council Office, which is a division of the Department of Justice. It was established by the Statutes and Subordinate Legislation Act, RSNL1990 CH S-27, s 17.

90 The New South Wales Parliamentary Counsel's Office is a separate office within the Department of Premier and Cabinet. The Tasmanian Office of Parliamentary Counsel is a Division of the Department of Premier and Cabinet. The Victorian Office of the Chief Parliamentary Counsel is an administrative office attached to the Department of Premier and Cabinet.

91 The South Australian Office of Parliamentary Counsel is a division of the Attorney-General's Department. The Western Australian Parliamentary Counsel Office is part of the Department of the Attorney-General.

92 The Australian Capital Territory's Parliamentary Counsel's Office is part of the ACT Department of Justice and Community Safety.

93 The Northern Territory Office of the Parliamentary Counsel is part of the Department of the Chief Minister.

94 The Office was established in 1869 as part of HM Treasury, then moved to the Civil Service Department in 1969. When the Civil Service Department was disbanded in 1980, the OPC became part of the Cabinet Office.

drafting offices are attached either to the Department of Justice⁹⁵ or the Ministry or Office of the Attorney-General⁹⁶ as the case may be, though some are attached to the legislature,⁹⁷ or even to a combination of the above.⁹⁸

UNDER WHOSE CONTROL ARE OVERSEAS PCOS?

The question of where the drafting office is located (that is, within the executive or attached to the legislature) is closely linked to the question of to whom the office reports. A number of Canadian drafting offices report directly to the Attorney-General⁹⁹ or Deputy Attorney-General,¹⁰⁰ or the Minister¹⁰¹ or Deputy Minister¹⁰² of Justice, because the drafting offices are located in those Ministers' departments. In the case of drafting offices that are attached to Parliament as well as to the executive, there is sometimes a dual reporting relationship to Ministers and parliamentary officers such as the Speaker.¹⁰³

- 95 At the federal level, there are three drafting offices. The first, the Federal Drafting Services Group, is located in the Legislative Services Branch of the Federal Department of Justice. The other two are attached to the federal Parliament, see n 97 below. Quebec has two drafting services, Ministerial Research and Legislation Directorate (Direction de la recherche et de la législation ministérielle); and Government Legislation Directorate (Direction de la législation gouvernementale), both of which are housed within the Department of Justice. The Newfoundland and Labrador Office of Legislative Counsel is a division of the Department of Justice. In Nunavut, drafting is done by the Legislation Division of the Department of Justice.
- 96 Alberta's Legislative Counsel Office is part of the Justice and Attorney-General's Department. Ontario's Office of Legislative Counsel is part of the Ministry of the Attorney-General. British Columbia's Legislative Counsel Office is in the Legislative Services Branch of the Ministry of Attorney-General.
- 97 The federal Office of the Law Clerk and Parliamentary Counsel of the Senate, and the Legislative Counsel Office (within the Office of the Law Clerk and Parliamentary Counsel) of the House of Commons are attached to the federal Parliament. In Nova Scotia, the drafting office is attached to the provincial legislature.
- 98 The Manitoba drafting office is attached to both the Department of Justice and the provincial legislature. The same relationship applies in Ontario, Prince Edward Island and the Yukon, where the office is considered to be a government drafting office that, concurrently, has an independent function as the law clerk of the provincial or, in the case of the Yukon, territorial legislative assembly.
- 99 The Ontario Office of Legislative Counsel reports to the Attorney-General.
- 100 In New Brunswick, the Director of Legislative Services and Chief Legislative Counsel report to the Deputy Attorney-General.
- 101 In Newfoundland and Labrador, the Senior Legislative Counsel of the Legislative Counsel Office reports directly to the Minister of Justice.
- 102 The Chief Legislative Counsel of the Albertan Legislative Counsel Office reports directly to the Assistant Deputy Minister (Legal Services) of Justice. In British Columbia, the Chief Legislative Counsel reports to the Assistant Deputy Attorney-General (Legal Services Branch) administratively, and to the Deputy Attorney-General on the legislative program. In the Northwest Territories, the Director of the Legislative Division reports directly to the Deputy Minister of Justice. In Nunavut, the Director of the Legislation Division of the Department of Justice reports directly to the Deputy Minister of Justice. In Quebec, the Government Legislation Directorate reports to the Associate Deputy Minister of Juridical and Legislative Affairs (Justice). In Saskatchewan, the Chief Legislative Counsel in the Legislative Counsel Office reports directly to the Deputy Minister of Justice. In the Yukon Parliamentary and Legislative Counsel Office, the Chief Legislative Counsel reports to the Assistant Deputy Minister, Legal Services, who in turn reports to the Deputy Minister of Justice.
- 103 In Manitoba, the Legislative Counsel reports to the Deputy Minister of Justice with respect to government work and to the Speaker of the Legislative Assembly with respect to private members' bills and general advice provided to the Assembly. In Nova Scotia, administratively, the Chief Legislative Counsel reports only to the Speaker of the House of Assembly. But the Chief Legislative Counsel also reports to the Cabinet Committee on Legislation, the Government House Leader and the Minister of Justice (the latter as Chair of the Law Amendments Committee) on government legislation.

FUNCTIONS, DUTIES AND POWERS OF OVERSEAS PCOS

Overseas PCOs have a range of functions, duties and powers. These are the easiest to identify for PCOs that were established via legislation. Certain basic functions are likely to be common to all PCOs: to draft legislation and amendments; and to carry out incidental functions.¹⁰⁴ However, some Acts go further, listing a more detailed set of functions. The Queensland Act includes functions such as drafting private members' bills¹⁰⁵ and amendments for members (that is, non-Ministers)¹⁰⁶ on request; drafting subordinate legislation¹⁰⁷ and other instruments;¹⁰⁸ providing advice to Ministers and government agencies on alternative ways of achieving policy objectives,¹⁰⁹ and on the application of fundamental legislative principles.¹¹⁰ There is also a function to prepare, print, publish, and make electronically available legislation,¹¹¹ information about legislation, and reprints of legislation.¹¹²

Even PCOs that were not set up by legislation generally have a defined set of functions and obligations. For instance, although the South Australian Office of Parliamentary Counsel is not established by statute, its website lists its responsibilities. These include drafting primary and subordinate legislation, providing advice on legislative matters to the government and private members, printing and publication in hard copy and electronic form, and publishing an index of statutes and maintaining a legislation website.¹¹³

In jurisdictions where there is a programme of revision or consolidation, this is usually carried out by the PCO or another revision body (which is often headed by the Chief Legislative Counsel, essentially constituting a division of the PCO). The revision body is accorded statutory powers in order to carry out the revision task. All the Canadian provinces and territories except one have a history of conducting periodic revisions of their Acts of Parliament.¹¹⁴ This is also the case at the federal level. Each has enabling legislation that authorises the revision process.¹¹⁵ Responsibility for conducting revisions of Acts of Parliament generally

104 These are the functions listed in the Parliamentary Counsel Act 1970 (Commonwealth) s 3.

105 Legislative Standards Act 1992 (Queensland), s 7(b).

106 Legislative Standards Act 1992 (Queensland), s 7(d).

107 Legislative Standards Act 1992 (Queensland), s 7(e).

108 Legislative Standards Act 1992 (Queensland), s 7(f).

109 Legislative Standards Act 1992 (Queensland), s 7(g)(i).

110 Legislative Standards Act 1992 (Queensland), s 7(g)(ii).

111 Legislative Standards Act 1992 (Queensland), s 7(l). Similarly, there is an obligation in California to publish legislation electronically as well as in hard copy: California Government Code, s 10248. In New South Wales, section 45C of the Interpretation Act 1987 provides for, but does not require, the publication of legislation on the NSW legislation website.

112 Legislative Standards Act 1992 (Queensland), s 7(k) – (m).

113 See www.legislation.sa.gov.au/Web/Parliamentary%20Counsel%20guidelines/About%20Parliamentary%20Counsel/AboutParliamentaryCounsel.aspx (accessed 8 May 2009). The publication functions stem from the Legislation Revision and Publication Act 2002.

114 The province of Saskatchewan does not have such a history.

115 For instance, Statute Revision Act, RSA 2000, ch S-19 (Alberta); Statute Revision Act, RSBC 1996, ch 440 (British Columbia); Department of Justice Act, CCSM, ch J35 (Manitoba); Statute Revision Act, SNB 2003, ch S-14.05 (New Brunswick); Statute Revision Act, SNWT 1996 (Northwest Territories; Nunavut); Statute Revision Act, RS 1989, ch 443 (Nova Scotia); Statutes and Subordinate Legislation Act, RSNL, ch S-27 (Newfoundland and Labrador); Statute and Regulation Revision Act 1998, SO 1998, Ch 18, sch c (Ontario); An Act Respecting the Consolidation of Statutes and Regulations, RSQ, ch R-3 (Quebec); Statute Revision Act, RSC 1985, ch S-20 (Federal).

is vested either with Legislative Counsel,¹¹⁶ or with another body,¹¹⁷ usually a Commissioner or Commission.¹¹⁸ The enabling legislation grants a range of revision powers. For instance, the Revising Officer in Manitoba has powers to: revise and alter the language of statutes; break up and reorder statutes and provisions; and omit redundant or repealed provisions.¹¹⁹

Legislative Counsel in Australia have powers for the preparation of reprints.¹²⁰ A number of these powers in Queensland, South Australia and Tasmania are wider than those currently available in New Zealand, and some are close to the boundaries of revision. The United Kingdom Consolidation of Enactments (Procedure) Act 1949 authorises the Lord Chancellor to prepare a bill consolidating enactments relating to any subject, and in doing so, to make corrections or minor improvements.¹²¹ The revision powers are not as broad as those in many of the Canadian jurisdictions. The Lord Chancellor has no powers to renumber or reorder provisions for instance.

In one jurisdiction there is a statutory function or obligation to ensure that statutes are well drafted, or that the statute book as a whole is of the highest standard.¹²² Plain English is the official drafting policy of the PCOs in a number of Australian states and at Federal level.¹²³ It is also a priority in Canada.¹²⁴

Commonly, the Chief Parliamentary Counsel has the ability to delegate his or her powers to another person in the office or public service.¹²⁵ There is also sometimes provision for the appointment of an Acting Chief Parliamentary Counsel while the Chief Parliamentary Counsel is absent or otherwise unable to perform the duties of the office.¹²⁶

APPOINTMENT

The appointment processes for Chief Parliamentary Counsel and other PCO staff vary, often according to the legal status and structure of the office itself. In most Australian jurisdictions, the First Parliamentary Counsel is appointed

116 In Newfoundland and Labrador, Ontario and Yukon, the respective Legislative Counsel Offices are responsible for revision. In Alberta, Nova Scotia, and British Columbia, responsibility rests specifically with the Chief Legislative Counsel. In New Brunswick, revision is carried out by a Statute Revision Steering Committee, comprising the Director and two other employees of the Legislative Services Branch of the Office of the Attorney-General.

117 In Quebec, revisions are conducted by the Statute Revision Branch of the Department of Justice. In Manitoba, the Minister of Justice is responsible for revision, and may appoint a Special Committee on Law Revision, of which the Minister shall be a member.

118 The most recent revision of the federal public Acts was conducted by the Statute Revision Commission of the Legislative Services Branch. Responsibility for revision in the Northwest Territories and in Nunavut rests with a Statute Revision Commissioner for each of those territories, appointed by the Ministers of Justice of the respective territories.

119 Department of Justice Act, CCSM, ch J35, s 5(2).

120 For instance, the Australian Capital Territory's Legislation Act 2001, ss 114–116;

121 Consolidation of Enactments (Procedure) Act 1949, s 1(1) (UK).

122 For instance, Queensland: Legislative Standards Act 1992 (Queensland), s 7(j).

123 Victoria, Queensland and ACT.

124 In 1991, the Canadian government published a manual on plain writing, drawn from the work of 14 federal government departments. In the same year, Saskatchewan became the first province to adopt a government-wide Clear Language Program.

125 Legislative Standards Act 1992 (Queensland), s 20.

126 Parliamentary Counsel Act 1970 (Commonwealth), s 15. Legislative Standards Act 1992 (Queensland), s 21.

by the Governor-General¹²⁷ or Governor in Council.¹²⁸ The Chief Parliamentary Counsel is generally appointed for a period of up to seven years, with the opportunity for re-appointment following the initial seven years.¹²⁹ Other staff members are appointed under a Public Service Act.¹³⁰

The appointment process in Newfoundland and Labrador in Canada has similarities to New Zealand's. The Lieutenant-Governor in Council appoints the Chief Legislative Counsel,¹³¹ and one or more Legislative Counsel.¹³² The Chief Legislative Counsel is not appointed for a fixed term as is common in Australia, instead holding the position "at the Minister's pleasure".¹³³ In jurisdictions where the PCO is part of the public service, the Chief Parliamentary Counsel and other staff tend to be appointed according to a Public Service Act or similar.

127 In the federal Office of Parliamentary Counsel, the First Parliamentary Counsel and Second Parliamentary Counsel are appointed by the Governor-General: Parliamentary Counsel Act 1970 (Commonwealth), s 4(1).

128 The Queensland Parliamentary Counsel is appointed by the Governor in Council: Legislative Standards Act 1992 (Queensland), s 14(1).

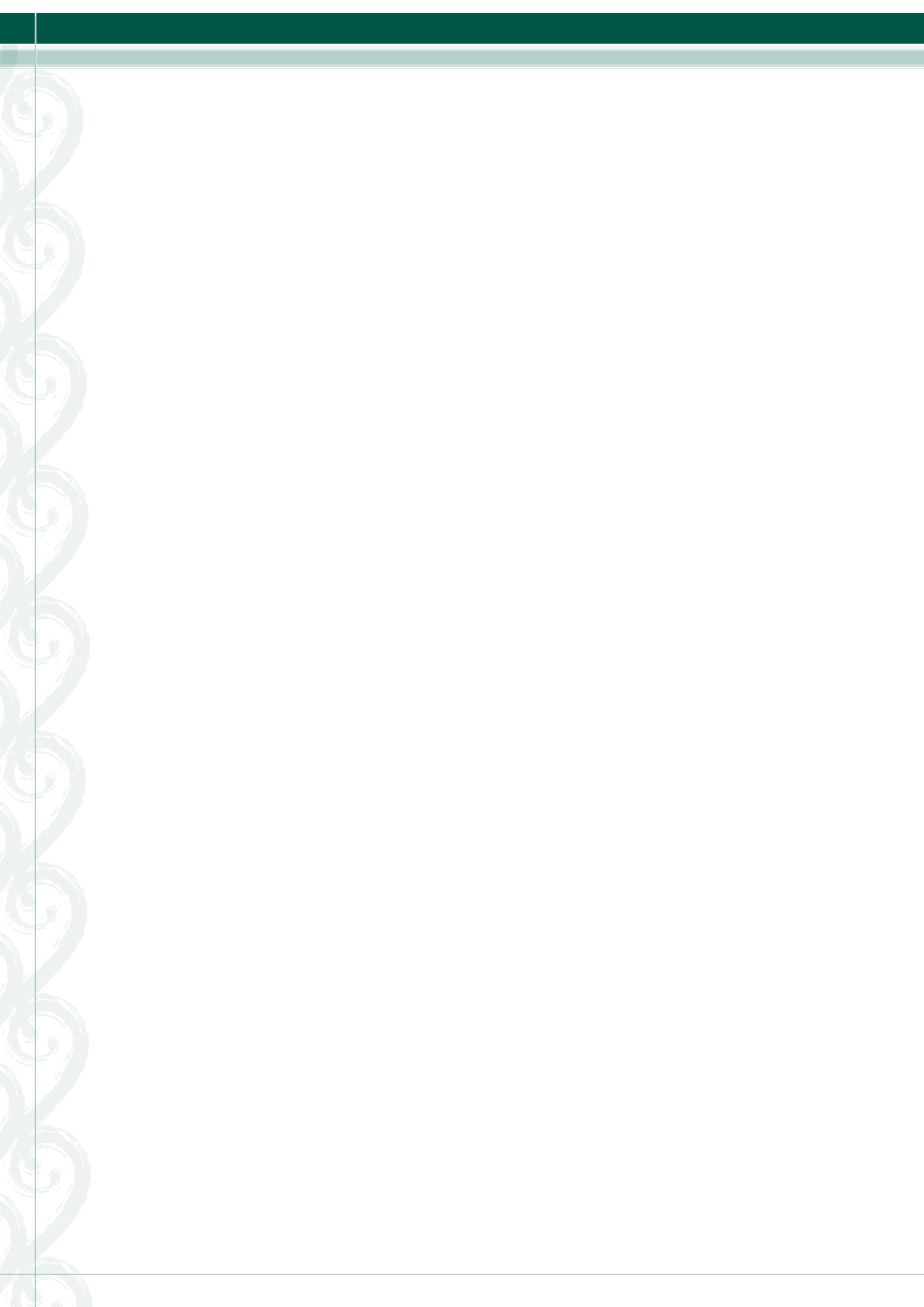
129 Parliamentary Counsel Act 1970 (Commonwealth), s 5. Legislative Standards Act 1992 (Queensland), s 14(3).

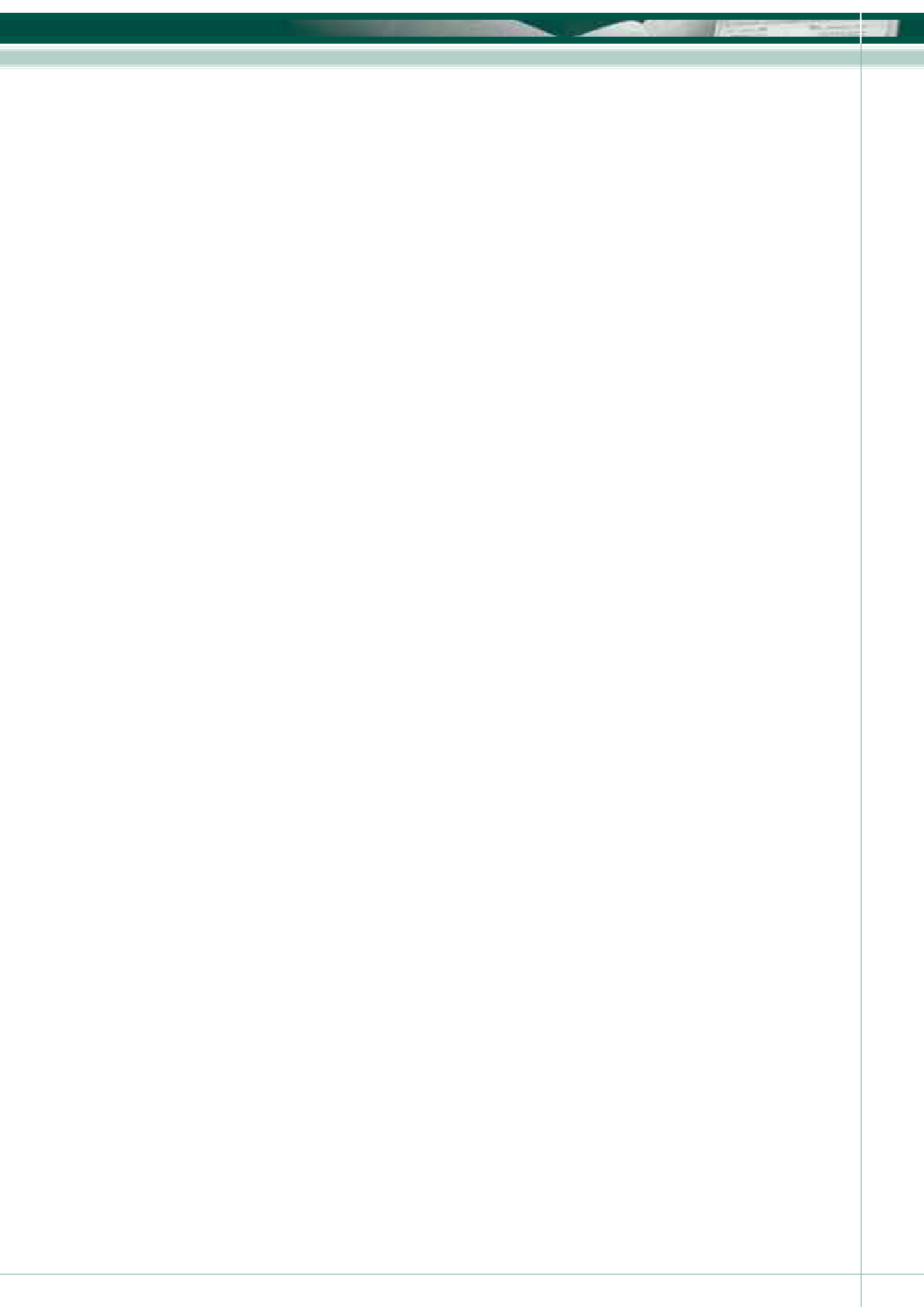
130 Parliamentary Counsel Act 1970 (Commonwealth), s 16. Legislative Standards Act 1992 (Queensland), s 11.

131 Statutes and Subordinate Legislation Act RSNL 1990 Ch S-27, s 19.

132 Statutes and Subordinate Legislation Act RSNL 1990 Ch S-27, s 22.

133 Statutes and Subordinate Legislation Act RSNL 1990 Ch S-27, s 19.





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