

# The future of legislative drafting: a strategic approach

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This article reflects my personal views only, and not those of my employer.

## Introduction

When I was asked to give a paper on the future of legislative drafting, I immediately thought of all the predictions I could make, and how many of them would turn out to be wrong. Making predictions is a risky business. So in this paper, I'll try to avoid predictions about the future. But how then can one talk about the *future* of legislative drafting?

The approach that I will take is about *strategy*, rather than *prediction*. But what is strategy? Strategy is looking at a *range of future outcomes*, taking into account *current trends*, and exploring how our decisions today would sit with that range of future outcomes. By and large, we cannot control what those outcomes will be. However, by developing strategic concepts now, we are better prepared to *pivot* towards whichever possible outcome becomes reality. This is the approach I propose to take in looking at the future of legislative drafting. The question becomes: what are the possible ways in which legislative drafting will develop, and how can we develop a strategic concept now to deal with such outcomes?

In developing a strategic approach, one first needs to identify a range of possible outcomes. I have taken a structured approach to this kind of analysis, based on a famous paper by Richard Susskind about the development of legal industries generally, combined with my own observations on practical issues facing drafting offices. The 1<sup>st</sup> part of this paper will examine Susskind's trends in some detail. The 2<sup>nd</sup> part of this paper will examine these trends in the context of practical issues facing drafting offices today. These issues include the nature of the drafting job, office structures, office financing, recruitment of staff, training and salaries. Each of these issues is affected by Susskind's broad trends and increasing demands for more legislation. Looking at these issues in a systematic way should give us some insight into the range of possible future developments in legislative drafting.

Before launching into this discussion, I would like to stress again that this paper is not about *prediction*, it is about *strategy*. For the most part, the paper deals with *possible* outcomes, not the *likelihood* of such outcomes. A strategic approach must contemplate multiple scenarios - and recognise that the development of these scenarios is not within our control. The essence of the strategic approach is to weigh and balance competing themes in these scenarios. This allows us to develop approaches that can adapt rapidly – that is, to pivot – to changing situations.

## Basic trends affecting the legal profession

In a famous article published ten years ago, Richard Susskind identified 4 existing trends affecting the legal profession.<sup>2</sup> These are as follows:

1. internationalisation
2. pressure on costs
3. information technology
4. disaggregation, that is the increasing specialisation of the legal profession

In considering the role of legislative counsel, one should also add a fifth, and perhaps the most important trend, that is:

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<sup>2</sup> Susskind, R., *Provocations and Perspectives*, A working paper submitted to the UK CLE Research Consortium (Legal Education and Training Review), 2012, <http://letr.org.uk/wp-content/uploads/Susskind-LETR-final-Oct-2012.pdf> , visited 14 May 2020.

## 5. increasing volume and complexity of legislation

Let us now look at all of these trends in some detail.

### Disaggregation

Disaggregation is the separation of legal work into component services, and the performance of those services by different providers. Complex services will be performed by highly skilled specialists, while simple services will be supplied as a bulk commodity by others. It is obvious where most lawyers would like to position themselves in this respect.

I have written about this topic at length in a 2020 article in *The Loophole*, and much of the following discussion is based on that article.<sup>3</sup>

My own view is that legislative counsel are somewhat insulated from disaggregation, but we will not escape it completely. One can already see this trend in the increasing bulk of rules drafted “out of house”, whether by instructing departments, regulators, or even non-governmental actors such as accounting bodies. Furthermore, instructing departments have often developed instructing branches with specialised legal expertise. This may simplify the job of legislative counsel, but also remove some of their advisory responsibility. Instructing departments may go even further by outsourcing the legal analysis of proposed policy to a Crown Solicitor or the private sector. In each case, the advisory role of specialised legislative counsel may be disaggregated and diminished. I should add that such disaggregation tends to happen in larger jurisdictions. In smaller jurisdictions, the legislative counsel is often the first lawyer to have contact with emerging policy.

Disaggregation raises the question of which specialist skills legislative counsel should be promoting. It is not an easy question. If you ask 10 experienced legislative counsel to list the skills that are most important for doing their job you will get 10 different answers. And by a miraculous coincidence each one will list the skills that are their own personal strengths.

But we do have an objective yardstick here. The important skills are the ones that governments value. Governments face complex problems that will require ever more sophisticated legislative solutions. This means that they will reward lawyers who understand the reality of these problems – and who can be relied upon to provide sophisticated solutions. They are less likely to reward those who perform bulk, simple tasks. The skills that will be highly valued will be skills in dealing with complexity. Performing bulk, simple tasks is the road to commodity production – a dangerous thing in a world of disaggregation, as it is begging to be managed for greater output and lower costs.

The issue of disaggregation is linked closely to the trend towards increasing complexity and volume of legislation.

### Increasing complexity and volume of legislation

Drafting offices have dealt with this trend in various ways. Firstly, and most noticeably, the size of drafting offices has increased exponentially. According to Francis Bennion, the United Kingdom drafting office only had 4 permanent members in 1930, but had grown to 23 in the 1980s.<sup>4</sup> It now counts about 50 members.<sup>5</sup> Most larger drafting offices around the world can tell the same growth story. Secondly,

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<sup>3</sup> Lovric, D, ‘Legislative Counsel – Future Roles and Innovation’, *The Loophole*, June 2020 (2020.2), p 3.

<sup>4</sup> Bennion, F., *Statute Law*, (Oyez Publishing: London, 1980) at. 17.

<sup>5</sup> Spitz, R., “150 years of the Office of the Parliamentary Counsel”; <https://civilservice.blog.gov.uk/2019/03/28/150-years-of-the-office-of-the-parliamentary-counsel/> (visited 29 August 2022).

this growth in size has been accompanied by an increasing emphasis on management. This manifests itself in an increasing managerial focus of the head of office, and in the adoption of increasingly sophisticated work tracking systems, often based on new information technologies. Thirdly, drafting offices have embraced standardisation and quality control, in order better to manage the risk of errors in large workflows.

These approaches are necessary, and have been mostly successful in dealing with increasing volume of legislation. They proved their worth in the current pandemic, where very large volumes of legislation needed to be produced at a very rapid pace.<sup>6</sup> Having existing systems in place to quality control and manage a great number of urgent drafting projects was crucial to the successful role of legislative drafting in such emergency situations.

However, such systems do not necessarily deal with increasing complexity of legislation. Indeed, as more and more attention is placed on getting a large bulk of legislation drafted, less time is available for analysing its complexities. The risk here is obvious – if legislative counsel do not focus on the complexities of legislation, they may in time be seen to be producers of a commodity, which, as I mentioned earlier, is a dangerous thing in a time of disaggregation.

I will return to this theme later in discussing future developments in the nature of a legislative counsel's job.

I turned to the 3<sup>rd</sup> broad trend, that is, information technology.

### Information technology and drafting

In discussing the future direction of information technology, the main challenges in making one's observations ambiguous enough so that they will not seem ridiculous in 10 years time. Most people, including myself, have only a vague idea of where information technology is taking us. Only a few things are certain: information technology will have an increasing role in our work lives, and the pace at which it will do so is accelerating.

I can think of 4 broad areas in which developing information technology will influence legislative drafting. These are: production technology, knowledge management, data management and computer aided drafting. As we will see, it is the last of these areas that offers the most interesting possibilities for legislative counsel.

But to start off, let us have a look at the more prosaic area of *production technology*. Computers have already revolutionised the way in which legislative drafts are produced, printed and published – and have helped legislative counsel enormously. The doyen of Australian drafters, John Ewens, ended his career just as word processors started to enter the drafting world. He is said to have seen a personal computer, and sighed, realising what he could have achieved if he had had such a tool available to him in his own career.<sup>7</sup>

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<sup>6</sup> Logie, A., and Bucknall, J, "Reflections on Innovations and the Role of Legislative Counsel in Drafting Quarantine Act Emergency Orders during COVID-19" *The Loophole*, June 2022 (2022.1) at 3.

<sup>7</sup> Kirby, M., "Obituary: JQ Ewens" (1992) 66 ALJ 870, at 871:

John Ewens was the authentic Australian Federal lawyer. He worked closely with all of the Australian Prime Ministers [and] remained open-minded, creative and blunt-speaking to the last. When, in the Law Reform Commission, his eyes first fell upon the word processor, his joy was endless. For the drafting and redrafting of statutes, the new invention was nothing short of a miracle. "What I could have done with this!", he exclaimed.

More recently, we have seen videoconferencing becoming a standard tool for holding meetings, and voice recognition is on the threshold of becoming a standard tool in drafting, I use it regularly in creating my own drafts, and I have found it extremely useful and timesaving. Yet I don't think that it will replace the keyboard, or even pen and paper. In my own practice, I tend to use pen and paper for developing the structural and conceptual aspects of a first draft, followed by a full first draft created through voice recognition, with the keyboard being reserved for corrections and minor polishing. My experience is that each of these methods encourages a different kind of thinking – for example, pen and paper is much better than voice recognition for structural or high-level conceptual work, while voice recognition is better a keyboard for mid-level conceptual work. The keyboard is best for maintaining a focus on micro-details. Future drafters will work out the balance of methods that best suits them.

A little further down the track, we will probably see the use of augmented reality in meetings and in research. Imagine holding a meeting with instructors in a virtual room where pulldown menus operated by your eye movements access existing laws and other documents, and draft laws appear on a virtual wall immediately after you have dictated them. But I think I'm getting ahead of myself.

In the area of *knowledge management*, we will probably see the development of increasingly sophisticated databases of legislation, case law, government policy, office procedure and drafting technique. In my own office, we have an extensive digital library dealing with these issues, which is available to every drafter and is fully text-searchable. I suspect that every drafting office in the world is developing its own version of such a system. Indeed, the sheer variety of such systems, and the platforms on which they are based, could itself become a challenge for legislative drafting. Such a variety is a stimulus to innovation and improvement, but has obvious costs to efficiency. If one jurisdiction were to develop a clearly superior knowledge management system or drafting platform, there would be clear incentives for other jurisdictions to adopt it.<sup>8</sup> It is a feature of information technology that disruptive innovations are scalable at low cost. Drafting offices are not immune to this aspect of technological innovation.

If one moves from knowledge management to *data management*, current systems are at a comparatively early stage of their development. Drafting offices generate enormous amounts of data, all of which could be harvested, analysed and applied in management. At its most simple, this may be a matter of monitoring the work of individual drafters, or of monitoring the progress in real time of the government legislative program. A more sophisticated version would involve sharing data with other agencies, such as a Prime Minister's Department, an instructing Department or parliament itself, which would promote more efficiencies in the interactions of various areas of government. I am sure that a data analysis professional could think of many more uses for shared or harvested data from drafting offices. The real challenge may be in setting meaningful limits on the use of such data. I can only hope that data management will not lead to micro-management of drafters' activities,<sup>9</sup> or to over-zealous harvesting of personal information.

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<sup>8</sup> The recent creation of a common drafting platform in the United Kingdom covering several of its jurisdictions may be an indication of the benefits from such standardisation: Lynch, M., "Lawmaker, the new legislative drafting service for the UK and Scotland", paper for Commonwealth Association of Legislative Counsel conference 18-19 July 2022, <https://www.calc.ngo/members> (accessed 29 August 2022, requires password).

<sup>9</sup> Apparently a general trend in white-collar professions: Jody Kantor and Ayra Sundaram, "The Rise of the Worker Productivity Score", *New York Times*, 14 August 2022, <https://www.nytimes.com/interactive/2022/08/14/business/worker-productivity-tracking.html> (visited 17 August 2022).

I now turn to what is probably the most intriguing future application of information technology, namely, the overlap between legislation and programming code. There are 2 broad streams of this phenomenon: legislation as code on the one hand, and AI assisted drafting on the other hand.

Matthew Waddington has written extensively about the issue of legislation as code.<sup>10</sup> This is an approach that encourages legislative counsel to structure legislation according to the logic of programming code. If legislation is structured in this way, there would be minimal costs in expressing it in the form of a computer program, or indeed, having the computer program as the legislation itself. This may be particularly useful in the case of legislation based on black letter or mathematical rules, which bear some similarity to computer code. It may be less useful in the case of legislation based on principles, which by its nature is hard to reduce to the formality of code.

Legislation as code has occasionally attracted attention at the highest political levels, and thus demands serious attention from legislative counsel. If it becomes an established practice, legislative counsel may need to develop at least a basic understanding of coding, which has obvious implications for office training programs.

AI assisted drafting also offers intriguing possibilities for legislative counsel. Unlike legislation as code, it would not require drafters to have some understanding of coding. Rather, it would require computers to have some understanding of legislation. This may sound like science fiction, but current technology - while not yet having reached this point - is making such machine learning conceivable.

I was long sceptical of the potential for AI in legislative drafting, but having read of progress in the past couple of years, my scepticism has started to wane. Current machine learning technology is capable of digesting and processing an enormous database of text, and using that database to predict the completion of sentences, or indeed narratives.<sup>11</sup> AI perceives and predicts patterns, including linguistic patterns, and much legislation is built on such patterns. It is no longer fanciful to imagine a computer program that, when asked to draft, for example, a licensing system for dogs, would ask a series of structured questions, and then could produce a rough but credible first legislative draft. The machine learning system would simply have learned the patterns for drafting a licensing scheme, and applied it to the case at hand.

However, I don't think that this would lead to the job of legislative counsel becoming redundant. The kind of drafts that an AI system could produce would likely be very rough and contain fundamental flaws. An expert human drafter would be needed to correct and polish such a draft. Nevertheless, such a system may assist a human drafter in some circumstances, and lead to considerable efficiencies. The real danger would be in overestimating the ability of such a system to produce completed drafts. There is a danger that non-professionals will assume that an AI produced draft will only require some legal scrubbing from a legislative counsel – or that policy departments will produce drafting instructions on the basis of AI generated drafts. I suspect that AI is still a long way

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<sup>10</sup> Waddington, M, "Machine-consumable legislation: A legislative drafter's perspective – human v artificial intelligence", *The Loophole*, June 2019 (2019.2) at 21; Waddington, M, "Parsing drafts for if-then structures Jersey's Rules as Code project", paper for Commonwealth Association of Legislative Counsel conference 18-19 July 2022, <https://www.calc.ngo/members> (accessed 17 August 2022, requires password). Other papers on this subject are also available on from the same conference.

<sup>11</sup> Metz, C., "Meet GPT-3. It Has Learned to Code (and Blog and Argue)", *New York Times*, 24 November 2020, <https://www.nytimes.com/2020/11/24/science/artificial-intelligence-ai-gpt3.html> (visited 29 August 2022).

off from meeting such expectations. After all, the main job of legislative counsel is not simply to record policy, but to help work out which policy instructors really want.

Nevertheless, there is a very credible case for increasing use of AI as an aid to drafting legislation. Indeed, we have been using computer assisted drafting at a very basic level for a long time. For example, in my own office we have computer programs built into our drafting platform that prompt consideration of certain drafting issues and offer standard precedent solutions. The real question may be about how much resources we want to invest in developing such systems further.

Before moving on from technology, it is worth considering some words from the 19<sup>th</sup> century, from the ever-quotable Henry Thring. He warned young drafters against the temptation of dictating to shorthand transcribers,<sup>12</sup> and emphasised the role of a good memory in composing legal text.<sup>13</sup> He had a good point – newfangled technology can become a timewasting distraction from the real job of actually thinking about issues and synthesising approaches to dealing with them.

### Internationalisation

A feature of the modern legal world that Henry Thring never had to face was internationalisation. Increasingly, legal issues have a transnational aspect, legal education involve study of foreign legal systems, and legal careers across borders. It is an intriguing question as to how internationalisation could affect the work of legislative counsel.

In my 2020 CALC article, I suggested that “internationalisation will not affect legislative counsel in the medium term, apart from offering us more chances to meet and connect as we do at CALC meetings”.<sup>14</sup> I would count this as a prediction that went slightly awry. The pandemic led to a widespread adoption of distance working, which in turn opened up the possibility of working across international borders. I understand that some drafting offices have recently employed legislative counsel who are physically present in another jurisdiction.

Of course, there is nothing fundamentally new about international mobility for legislative drafters. For several decades, there has been a group of (mostly retired) mobile legislative counsel who are employed in various jurisdictions across the world on a contract basis. Furthermore, there have been many examples of drafters who have started their career in one country, and then further their career successfully in another country.

Nevertheless, I still think that internationalisation has limited scope for affecting the work of drafting offices in the medium term. There are numerous barriers to the free movement of drafting services, including the need for specialist constitutional knowledge of a particular jurisdiction and nationality requirements for working in public service. Furthermore, experienced legislative counsel will generally be attracted to the convenience of working in their home jurisdiction. For this reason,

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<sup>12</sup> Thring, H., *Practical Legislation*, 3<sup>rd</sup> ed. (Luath Press: Edinburgh, 2015) at 8:

As a detail it may be well to warn the inexperienced draftsman against an intellectual danger incident to the employment of shorthand writers. The essence of business composition is to think before you write, whilst the effect of employing shorthand writers too soon is to induce the novice to write before he thinks.

<sup>13</sup> Thring, above n. 11, at 11:

Whatever the subject, the writer should first get the whole matter into his head, separating the important points and trusting to his memory to retain them. He should then group his facts according to their importance, and when he has thus arranged the outline of his composition, he may fill in the details by reference to his papers. It is very important for a man engaged in business transactions to acquire the habit of trusting to memory till he is master of the whole subject. Making numerous notes weakens the thinking power, on the exercise of which depends the whole art of clear and concise composition. Notes should be confined to references to passages which it is important particularly to notice.

<sup>14</sup> Lovric, above, n. 3, at 6.

internationalisation probably has more significance for smaller drafting offices, who may need at times to increase their drafting capabilities at short notice, sometimes by allowing contract drafters to work remotely. However, this raises the question of whether funds will be available to pay for such measures.

### Pressure on costs

The 4<sup>th</sup> broad trend in the legal industry identified by Susskind is increasing pressure on costs. Lawyers, including lawyers in public service, face increasing calls to provide their services more efficiently. Given pressures on public budgets that have grown following the pandemic, one can expect even more pressure on legal costs.

To some extent, drafting offices are well-placed to meet these pressures. This is because the drafting of legislation is an essential service at the core of government functioning. Legislative counsel play a quiet, unglamorous role in government but the absence of skilled legislative counsel soon makes itself felt, be it by politicians whose policies are stymied by technical legal problems, or by judges and advisers whose abilities are wasted in dealing with technical incoherencies in the statute book. This provides considerable support for base levels of funding from government in the future.

Nevertheless, drafting offices will be under pressure to demonstrate that they are functioning efficiently. Furthermore, pressure on costs will have implications for the financing structures of drafting offices, and on salaries and training programs. I'll come back to this point later in this article.

### Practical issues facing drafting offices today

I will now put Susskind's 5 trends (disaggregation, information technology, internationalisation and pressure on costs) into a concrete and practical context. This context is the set of practical issues that face drafting offices today, which I have grouped into 6 categories:

1. the nature of the drafting job
2. office structures
3. office financing
4. salaries
5. training

By looking at these issues in turn, we should have insight into a range of possible future scenarios for legislative drafting.

### The nature of the drafting job

Before the explosion in volume and complexity of legislation, the legislative counsel's job was quite different. In Henry Thring's day, it seems that counsel were intensely engaged with political and bureaucratic leaders in working out legislative solutions to the problems of the day. Thring himself spent hours alone with top political leaders such as Disraeli and Gladstone.<sup>15</sup> (Apparently Gladstone immersed himself in the detail of a draft, while Disraeli merely suggested a general approach and left it to Thring to work out the details.) Competent advice in close proximity to real power is a winning combination. Thring built up a reputation as a close and trusted advisor to higher levels of government, and we are still benefitting today from his efforts. In smaller jurisdictions, legislative counsel may still have frequent direct contact with top politicians.

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<sup>15</sup> Thring, above n. 12, at 6.



My view is that the key issue for legislative counsel in the future is the extent to which they can maintain this reputation as a close and trusted advisor to government. I doubt that they can maintain this reputation simply through producing large volumes of legislation, quality controlling that legislation, and using plain language and innovative drafting devices. A trusted advisor needs to understand the issues facing his or her client. In the future, as legislation becomes ever more complex, legislative counsel need to engage with that complexity, and look beyond the analyses given to them by instructing departments.

This is particularly so in cases where governments have staked their political reputation on legislative reform. Such high stakes projects often deal with taxation, employment, immigration and criminal law. In such cases, governments will reward those who offer accurate substantive advice: technically competent and connected to the real world. Consider a hypothetical example of a proposal to remove major anomalies in legislation on criminal process. Is it reasonable to expect that the legislative counsel will have a good knowledge of the law of criminal process, including knowledge of the relevant case law – enough knowledge to question the assumptions behind the departmental instructions, and enough knowledge to avoid writing something that appears transparently wrong to a criminal law specialist?

This harks back to the eternal question of whether legislative counsel are merely wordsmiths. I will not go into that question here. However, my view is that we have an opportunity to show a deeper understanding of underlying issues, and my experience is that instructing departments and others would welcome that approach. I once spoke to a roomful of accountants and tax lawyers, and suggested that tax law drafters needed a good general knowledge of tax cases and the particularities of tax administration. I was met with disbelief – that is, disbelief that I found it necessary to say something that the audience thought was blindingly obvious.

In the future, legislative counsel will be faced with a strategic choice. Do we write laws as quickly as possible, offering quality-controlled drafting services, together with project management, plain English and innovative drafting devices? Or do we also offer a degree of expertise in the underlying case law and policy – and sometimes question the nature of the proposed solutions? In the end, it is a question of emphasis. Do we emphasise the skills that affect the surface appearance of legislation, or do we emphasise a deeper knowledge and understanding of the underlying issues affecting governments and regulators? To preserve our role as trusted advisor to government, I think it is the latter.

### Office structures

I now move on to the more concrete question of how legislative drafting offices may be structured in the future. A crucial issue here is the size of the office. As I mentioned earlier, the past 100 years have seen drafting offices grow enormously. Given increasing demands for more legislation, one might expect this growth to continue. However, it is worthwhile noting that smaller drafting offices have some advantages. A smaller office is able to offer its members a broad range of work, avoiding dangers of over specialisation, and potentially, disaggregation. Furthermore, a smaller drafting office may sometimes be better placed to innovate. I mention as an example the efforts of the Jersey drafting office in exploring legislation as code.<sup>16</sup> Nevertheless, the efficiencies of scale of larger offices may lead to further expansion.

From time to time, suggestions have been made to outsource particular legislative drafting projects to the private sector (rather than increasing the size of drafting offices). The underlying assumption appears to be that private sector lawyers can provide drafting services more efficiently, and can

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<sup>16</sup> See above, note 10.

produce better quality drafts by virtue of their intensive experiences with the realities of day-to-day legal practice. This assumption has not always coincided with the realities of day-to-day legislative drafting. Commercial drafting styles do not always adapt well to the statute book, and the drafting of legislation requires an intimate knowledge of a raft of specialised technical issues and of the processes of government. Furthermore, concerns have sometimes been raised about potential conflicts of interest raised by private sector drafting. In 2018, the Australian Commonwealth government trialled the use of private sector drafting for certain Treasury projects, but soon discontinued the trial.<sup>17</sup>

Before the creation of the Parliamentary Counsel's office in the United Kingdom on the 19<sup>th</sup> century, legislative drafting was organised in a decentralised basis, often by individual private sector lawyers. Not surprisingly, this system gave rise to significant problems of consistency, priority setting and drafting quality.<sup>18</sup> Nowadays, drafting offices tend to enjoy a monopoly over the most contentious and complex drafting projects.<sup>19</sup> Such a monopoly places a heavy responsibility on drafting offices to provide high-quality services while continually increasing efficiency. In an era of high demand for legislative services and cost-cutting, drafting offices need to demonstrate that they take this responsibility seriously.

### Office financing

In the past, the financing of governmental legal activities was relatively simple. For drafting offices, this meant direct funding from a governmental annual budget. Where the drafting office enjoyed some degree of independence, this might be a separate budget, where it did not, the office would gain a share of a larger developmental budget.

The options for office financing today are somewhat more complex. Modern governmental legal operations are often financed on a fee-for-service basis. Such fees may be measured through a cost recovery yardstick, or by the yardstick of analogous commercial legal fees.

A significant challenge for drafting offices in the future is the extent to which they will rely on traditional budget funding as opposed to fee-for-service funding. This will in turn be heavily influenced by the major trends discussed earlier in this paper. For example, where drafting services have been disaggregated - and partly commoditised - there may be increasing pressure to use a fee-for-service funding model. Such a model encourages ever more efficiency in producing a legal commodity. By contrast, where the drafting office has retained the role of a trusted advisor to government on complex issues, it may have a better claim to budget funding. Indeed, where a drafting office provides advice on very complex issues, the government may get better value from budget funding than from allowing the drafting office to charge the equivalent of commercial legal fees – which could be very steep indeed in such projects.

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<sup>17</sup> Tom McIlroy, "Treasury outsources legislation drafting to law firms", Australian Financial Review, 13 April 2018; Tom McIlroy, "Treasury quietly stops outsourcing draft bills", Australian Financial Review, 3 November 2020, [www.afr.com](http://www.afr.com) (visited 18 August 2022).

<sup>18</sup> According to a Treasury Minute of 1871, Thring had "succeeded in systematising and greatly improving the method of preparing the Government Bills... My Lords can have no doubt as to the advantage to the Public Service of placing the Department on a permanent footing"; Spitz, R., "150 years of the Office of the Parliamentary Counsel"; <https://civilservice.blog.gov.uk/2019/03/28/150-years-of-the-office-of-the-parliamentary-counsel/> (visited 29 August 2022).

<sup>19</sup> In my own office, this monopoly is set out in a legislative instrument: *Legal Services Directions 2017*, clause 3 of Appendix A.

Furthermore, the increasing role of information technology in drafting offices raises the issue of how the development of such technology can be funded. Drafting offices are very small when compared to other government agencies, and will often find it difficult to fund complex information technology projects. The solution may be found in special budget appropriations. Alternatively, the cost of developing such projects may be reflected in fees charged to clients. For example, my own office provides an electronic registry service for all legislative instruments, and charges registration fees based on the overall cost of the registry system.<sup>20</sup>

Internationalisation could also exert an influence over office funding models, although probably to a minor extent. For example, special budget funding may be provided for international assistance activities. It is unlikely that such funding would form a major part of an office budget, however. Furthermore, the heads of drafting offices are likely to be wary to commit too much resources to such assistance projects if this would endanger the completion of domestic legal projects.

### Salaries

Related to the issue of office funding is the rather delicate issue of salary levels. Legislative counsel have generally been well remunerated by public sector standards. This reflects the central role that fully trained counsel often play in government strategy, the high level of training that they receive and their constant scarcity. Indeed, governments have a major incentive to pay competent legislative counsel well, so as to encourage them to pursue lifelong careers in drafting legislation. This dynamic is very strong, and one would not expect it to change in a major way, at least in the medium term.

However, as Susskind points out, legal industries of all kinds are facing major pressures on costs. Drafting offices are not immune to these pressures. Indeed, it is already possible to identify some symptoms of these pressures.

As I argued earlier in this paper, I see the central issue here is the extent to which legislative counsel retain their role as trusted advisors to government. Legislative counsel face an ongoing question: do they bear a similar level of responsibility to other government lawyers who are paid at a similar level? If legislative counsel retain the role of trusted advisor, the answer to this question should be relatively painless. By contrast, if drafting offices allow drafting services to become simplified and commoditised, there will be clear downward pressures on salaries.

Such downward pressure poses a major risk to drafting offices, as it will discourage talented lawyers from pursuing long-term drafting careers. There will be less money available to pay attractive salaries to a large number of senior counsel. In turn, this will remove an important incentive for many bright young trainees to stay at the job. There will be more churn in the early stages of a career, and many of those who try another job will not come back to drafting legislation. This implies that the drafting office of the future is likely to have fewer experienced legislative counsel, and a relatively larger number who are inexperienced.

This will in turn diminish the general skill level of drafting offices, thereby encouraging an increased simplification of drafting services – and thus further discouraging talented lawyers from pursuing drafting careers – and so on in a continuing negative spiral. This is one reason why managers of drafting offices should be extraordinarily careful in allowing disaggregation of the legislative drafting task.

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<sup>20</sup> OPC website, <https://www.opc.gov.au/opc-services/publishing/registering-instruments>, (visited 29 August 2022).

## Training

It takes many years of training to make a competent legislative counsel - estimates range between 5 to 10 years, and arguably legislative counsel really only hit their stride after many more years of experience. Heads of drafting offices are always keen to develop quicker and more efficient ways to train new drafters - but this is very difficult to achieve in practice.

In 2013, I published a paper in *The Loophole* describing a strategic approach to training legislative counsel in the future,<sup>21</sup> based on the Susskind trends. The following remarks are based on that paper.

The gold standard of training still seems to be close supervision by an experienced legislative counsel involved in complex and politically sensitive projects – just as it was 100 years ago. Indeed, the challenge now is just to maintain this traditional system, in the face of demands for volume, reduced funding and greater career mobility.<sup>22</sup> In the future, experienced counsel will likely have to split their attention between an ever-increasing numbers of trainees. There are only so many opportunities to work with very experienced legislative counsel, and only so many challenging projects. Less-experienced counsel will find themselves mentoring the beginners. For those offices using a “branch” style of training, there will be pressure to make the branches bigger and with a more dispersed training approach (as compared with one-on-one mentoring). In other words, the capacity of the drafting office to provide individualised training is likely to decrease.

Drafting offices are likely to respond to this by developing standardised training techniques that can be scaled. The obvious tool here is information technology. It is possible to develop online drafting courses that are automated to a significant extent, creating greater efficiencies. However, such courses, however useful, are unlikely to produce fully trained legislative counsel. To some extent, the gap may be filled by person-to-person courses offered within and between drafting offices. Nevertheless, training is likely to remain a significant issue for drafting offices (particularly for those that are increasing in size).

## Conclusion

I would now like to draw together the various themes that I’ve discussed in the previous 2 parts of this paper. Drafting offices are facing change on multiple fronts, and there is no standard solution to dealing with these changes. Each drafting office will need to base its response on the particular legal, bureaucratic, financial and political environment in which it operates. However, it is dangerous to fashion these responses in a wholly reactive way, improvising fixes to immediate problems without bearing the wider context in mind. Thus, drafting offices need to develop a *high-level* strategy for dealing with the future.

Strategy is a word that has been used to describe a wide range of approaches to dealing with the future. Often, it is used to produce concrete action plans dealing with particular risks or opportunities over a timeframe of the few years. This is sometimes called strategy at the *operational level*. Bureaucratic organisations are often very good at developing this kind of operational strategy. However, drafting offices need a higher-level strategy that goes beyond mere operative planning in the medium term. Such a high level strategy will identify broad ideas and choices for dealing with the future, rather than action plans and roadmaps. By focusing on this higher level, we prepare ourselves mentally for unexpected changes of direction and allow for pivots to unexpected new realities.

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<sup>21</sup> Lovric, D, ‘A strategic view of drafting training for tomorrow’s needs’, *The Loophole*, Oct. 2013 (2013.3).

<sup>22</sup> Lovric, above note 21, at 7.

Developing a complete higher-level strategy is clearly well beyond the scope of this paper. Instead, this paper has pursued a more modest aim: that is, to explore the trends and practical issues that need to be taken into account in developing such a strategy.

I will conclude with a practical point for those who wish to develop strategic concepts for a drafting office. Developing such a concept depends on one's perspective. The perspective of an individual drafter may differ from the perspective of the manager of a drafting office, and both of these perspectives are in turn influenced by a perspective from the whole of government. So, in looking at possible strategies for drafting offices, it is necessary to distinguish each of these perspectives. Developments in drafting may look very different from the perspective of an *individual* drafter's career and as opposed to a *whole of office* perspective. In many cases, such perspectives may conflict – at least when looked at from one perspective alone. This in turn raises the question of how such conflicts can be resolved. Clearly, an individual career strategy needs to take account of the whole of office perspective, and a manager's perspective needs to take account of how a whole of office strategy can affect individuals' careers. Both perspectives need to be set in the broader context of the what governments actually want from legislative counsel. These factors, I suggest, will govern the way in which drafting offices will respond to the trends and development affecting them in the future.