

Review of methods for measuring the quality of legislation

Report of the Working Party

1 March 2011

Parliamentary Counsel Office

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Summary of recommendations

- R1 *Improving implementation of Drafting Services Survey*
that drafting team managers determine the relevant persons in client organisations to whom the survey should be sent:
that client responses to the survey be weighted according to client size:
that the survey continue to be dispatched electronically:
that drafting team managers be responsible for chasing up client responses:
that the SMT consider whether client responses should be kept confidential and clarify the position for team managers and clients:
that the second question in the survey be reformatted to require responses to each of its 3 component parts, with responses to the first component (which relates to clear drafting style) being used as a measure of the quality of legislation:
- R2 *Measuring extent to which PCO undertakes peer review*
that the PCO collate existing information from the legislation tracking system relating to the peer review system and report in the annual report the percentage of Bills and regulations that have been internally peer reviewed:
- R3 *Measuring extent to which PCO undertakes proofreading*
that the PCO collate existing information from the legislation tracking system relating to the proofreading system and report in the annual report the percentage of Bills and regulations that have been internally proofread:
- R4 *Undertaking quality assessment of sample of draft legislation by senior drafters*
that the PCO establish an internal quality assessment system where senior drafters review a sample of legislation and report in the annual report the number of Bills and regulations subject to this process. The target sample size would be about 5 to 10% of Bills and regulations:
- R5 *Undertaking project review of selected legislation*
that the PCO establish a process for reviewing with instructing agencies a selected number of large legislation projects following completion and report in the annual report the number of legislation projects subject to this process:
- R6 *Using computer tools to measure quality*
that the SMT explore, in conjunction with Information Services, the options relating to a computer tool to measure certain aspects of the quality of legislation:
- R7 *Sponsoring at least one Statutes Law Revision Bill per annum*
that the PCO sponsor the introduction of at least 1 Statutes Law Revision Bill (SLR Bills) per year to correct identified errors in the statute book on an “as-you-go” basis and report in the annual report the number of SLR Bills introduced each year:
- R8 *Offering a Legislation Process Course to instructors on a regular basis*
that the PCO offer a Legislation Process Course aimed at new instructors in government agencies on a regular basis (for example, about every 2 months) and report in the annual report the number of Legislation Process Courses held each year:

R9 Reporting on the use of exposure drafts in annual report
that the PCO report the number of Bills and regulations released for public consultation by way of exposure draft in the annual report.

Introduction

Purpose of the review

- 1 The Senior Management Team (SMT) of the Parliamentary Counsel Office (PCO) has asked the working party to review and report on the effectiveness of the performance measures set out in the PCO's Statement of Intent (SOI) for measuring the quality of legislation.¹

The working party

- 2 The working party consists of 3 drafters²; 1 from each of the drafting teams in the PCO. The working party's terms of reference are set out in Appendix 1.

Approach to the review

- 3 This report provides the findings of the review and makes recommendations aimed at enhancing the PCO's existing performance measures. It also proposes additional measures that could be used to measure the quality of legislation drafted by the PCO. To inform our review, we have considered the quality assurance measures that the PCO currently uses to improve the quality of legislation, the specific performance measures set out in the PCO's most recent SOI,¹ and the quality assurance measures and performance measures used in other drafting offices in Australia. We have also considered other tools that could be used to achieve high quality legislation, such as computer-based testing and an internal quality assessment system by senior drafters.
- 4 As this report will highlight, measuring the quality of legislation is a difficult task and there is no single measure or combination of measures that can guarantee "quality legislation". This is because the assessment of whether any given legislation is a "quality product" inevitably depends on the subjective view of the user of the legislation. For some users of legislation, such as the general public, this assessment may focus on whether the legislation is drafted in plain language and is "user-friendly". However, for other users of legislation, such as the judiciary and academic commentators, the assessment of quality will primarily focus on whether the legislation is legally effective and whether it achieves its policy objectives.
- 5 This reports describes and discusses potential enhancements that could be made to the PCO's existing performance measures published in the SOI and examines the potential

¹ Statement of Intent of the PCO for the period 1 July 2010 to 30 June 2015 and Statement of Intent of the PCO for the period 1 July 2009 to 30 June 2012, available at www.pco.parliament.govt.nz/statements-of-intent/ and on the PCO intranet.

² Joanne Guzman (Chair), Team B; Scott Murray, Team A; Cathy Pooke, Team C.

for adopting other new measures, some of which are based on the performance measures used in other drafting offices, particularly in Australia. The aim of this report is to make the performance measures published in the PCO's SOI more reflective of the existing quality assurance measures used within the PCO to promote the quality of legislation and to consider whether other performance measures currently used overseas that are perceived to enhance the quality of legislation would benefit the PCO.

- 6 Currently the PCO's achievement of performance measures is determined by reference to quality and timeliness standards. We acknowledge that these standards may need to be revised if any new performance measures recommended in this report are adopted.

Review of PCO's current and past performance measures

7 The performance measures set out in the current SOI² mainly focus on whether key external stakeholders such as the Attorney-General and the PCO's client departments are satisfied with the quality of legislation produced by the PCO and whether timeliness standards in producing the legislation have been achieved.³

8 In recent years, performance measures adopted by the PCO have also included—

- obtaining performance feedback from other key stakeholders to gauge the effectiveness of the PCO's plain language techniques:
- examining with Australian and English drafting offices, the possibilities for benchmarking the drafting services provided by the PCO against other drafting offices in a similar constitutional and Parliamentary environment:
- continuing to work with the Legislation Design Committee, the Legislation Advisory Committee, the Law Commission, and instructing departments and agencies to make improvements to draft legislation:
- engaging with Parliamentary authorities (including the Office of the Clerk, the Speaker, the Parliamentary Service, and the Standing Orders Committee) to identify and seek to remove or reduce procedural issues that damage the quality, clarity, and accessibility of legislation:
- continuing to develop further proposals for changes that aid access, clarity, and understanding of legislation, with particular attention to ensuring consistency of drafting practice across the office, including a training programme for new counsel:
- examining the current system of peer review, the structure of drafting teams, and the operation in practice with different types and sizes of legislative instruments.⁴

² PCO Statement of Intent for the period 1 July 2010 to 30 June 2015, pages 10–12.

³ PCO Statement of Intent for the period 1 July 2010 to 30 June 2015, page 11. The current budgeted standard for client satisfaction is 90%. This is based on the actual standards achieved in the last 3 years which has ranged from 92% to 94%. The current budgeted standard for timeliness is 100%.

⁴ PCO Statement of Intent for the period 1 July 2009 to 30 June 2012, page 16.

Review of PCO's current quality assurance measures

9 This section describes the main in-house quality assurance measures that the PCO currently uses to improve the quality of legislation. Many of these measures are similar to the quality assurance measures used in other Commonwealth drafting offices, particularly in Australia. We note that presently none of the current quality assurance measures employed by the PCO are used as specific performance measures for the purposes of the SOI or annual report. However, we believe that they are some of the most influential factors determining the quality of legislation that is enacted. Accordingly, we consider that this situation should change so that, in future, the performance measures published in the SOI and annual report are more closely linked to the PCO's in-house quality assurance measures because these measures have the most direct impact on the quality of legislation drafted by the office.

A Peer review

10 Like many other Commonwealth drafting offices, the PCO operates a formal system of peer review.⁵ The peer review system requires drafters who are no longer in training to have their drafts reviewed by another drafter in order to assist in producing a high-quality draft. Peer review occurs in relation to almost all legislation drafted by the PCO⁶ and can occur at different stages during the legislative process.⁷

11 While the focus of peer review is primarily directed at assessing the legal effectiveness and workability of a draft, a peer reviewer may also comment on the structure and overall readability of the draft, whether the draft complies with the guidance set out in the PCO drafting manual and style manual and the guidance set out in the Legislation Advisory Committee (LAC) Guidelines, and whether the draft conforms with the rules set out in the Standing Orders of the House of Representatives.

12 Unlike some Commonwealth drafting offices where drafting in small teams or pairs is the norm,⁸ the generally autonomous nature of drafting at the PCO means that the peer reviewer is not expected to read the instructions for the draft under review, but should, as a minimum, be familiar with provisions of the principal Act or regulations being amended.⁹ Also unlike other overseas systems for peer review, the peer reviewer at the PCO is not responsible for ensuring that the draft implements the Government's policy

⁵ The peer review system introduced in 1999 and last revised in June 2008, with changes taking effect from 1 July 2009.

⁶ All Bills, statutory regulations, other Orders in Counsel, *Gazette* notices, and Supplementary Order Papers must be peer reviewed. The few exceptions to the peer review policy include appropriation Bills and short regulations (including standard form commencement orders).

⁷ Peer review is generally expected to occur twice before a Bill is introduced. First at an early stage and secondly a few weeks before the Bill is approved for introduction.

⁸ For example, the Office of Parliamentary Counsel in Canberra, Office of the Queensland Parliamentary Counsel, and Office of Parliamentary Counsel in the United Kingdom.

⁹ See paragraph 1.120 of drafting manual.

intentions. This responsibility remains squarely with the drafter.¹⁰ However, the drafter is expected to adopt a receptive attitude to the suggestions made in peer review, although ultimately the drafter is able to use his or her own judgement about whether and how the peer reviewer's comments are incorporated into the draft. Where there are disagreements about fundamental issues (for example, compliance with guidance in the drafting manual or the LAC Guidelines), the peer review system provides that the matter should be referred to the drafter's team manager for resolution, and failing resolution at that level, to the Deputy Chief Parliamentary Counsel.¹¹

- 13 Before 1 July 2009, the completion of peer review was not specifically recorded in the PCO's legislation tracking system (leg tracking). Since then peer reviewers must, on completion of the review, record in leg tracking the date on which peer review was completed and a summary of the feedback given.

B Supervision

- 14 Supervision is an adjunct to the peer review system which applies to drafters who are still in training.¹² The main difference with peer review is that the drafter undergoing supervision is required to have his or her draft reviewed by the drafter's supervisor before it leaves the office and is not solely accountable for the ensuring the legal effectiveness and workability of the draft, as these roles are fulfilled by the drafter's supervisor.
- 15 Some comments made by a supervisor will be mandatory for the drafter to adopt while others may be optional. Supervision of less experienced counsel by more senior counsel operates as a form of safety-net to ensure that draft legislation complies with the various internal and external measures that promote quality legislation.

Peer review and supervision as performance measures

- 16 *Paragraphs 132 to 140* discuss the possibility of hooking into the existing peer review and supervision systems in order to provide new performance measures that are directly related to the PCO's in-house quality assurance measures.

C PCO drafting manual

- 17 The guidance material available to Parliamentary Counsel drafting legislation includes the PCO drafting manual, which was republished in 2009 after a comprehensive review over several years. The drafting manual sets out procedures, guidelines, and examples relating to most of the day-to-day aspects of drafting legislation. It includes chapters on the approach to drafting, clear drafting, and the process of making legislation (for example, Cabinet processes) as well as chapters covering specific types of legislation, such as drafting Government Bills, delegated legislation, members' bills, and local

¹⁰ See paragraph 1.1144 of the PCO drafting manual.

¹¹ See paragraph 1.128 of the PCO drafting manual.

¹² Associate Parliamentary Counsel.

legislation.

- 18 In general terms, drafters are expected to comply with the guidance set out in the drafting manual, although the manual acknowledges that ultimately the drafter's judgement is required and that common sense occasionally justifies departure from the guidance in appropriate cases. In these situations, drafters are encouraged to discuss any issues with their peer reviewer, supervisor, or drafting team manager.¹³

D PCO Style Manual and Editorial Services team

Style Manual

- 19 To aid the readability, consistency, and promotion of plain language principles in legislation, the PCO publishes a comprehensive Style Manual to assist drafters in relation to the appropriate styles that should be adopted in legislation.¹⁴ The manual contains extensive guidance and examples relating to amending terminology, the layout of schedules, the form of certain enacting words,¹⁵ as well as numerous aspects of style, format, and grammar¹⁶ that drafters are expected to adhere to in producing draft legislation.
- 20 By making certain features of legislative style constant and predictable, the Style Manual plays an important role in reducing the amount of time taken in peer review to consider these issues and frees up time to focus on substantive issues such as legal effectiveness and workability.

Editorial Services team

- 21 To further aid the consistency and readability of legislation, and to ensure as far as possible that drafts are error free, the PCO employs a dedicated team of trained editors whose main role is to proofread all types of draft legislation for consistency with the Style Manual (and where appropriate the drafting manual) as well checking for general format and sense. As draft legislation may undergo substantial change throughout the drafting process, the PCO's editors may read all versions of the draft legislation or undertake a "compare read" at various stages during the process where a particular version of the draft is electronically compared with a previous version.
- 22 The Editorial Services team also undertakes other important functions in ensuring the electronic and hard-copy published versions of legislation are free of errors to the extent that is possible. Their functions include proofreading certain pages for the bound annual

¹³ Introduction to PCO drafting manual.

¹⁴ The PCO Style Manual was last fully revised in 2007. See 3rd edition, released 17 September 2007 and as subsequently updated on 28 March and 24 November 2008. The Style Manual is available to PCO staff in hard-copy and in electronic format via the PCO intranet.

¹⁵ For example, bylaws and commencement orders.

¹⁶ Particularly since the implementation of LENZ system.

volumes of Acts and Statutory Regulations and liaising with external legal publishers such as LexisNexis and Status regarding reported errors in externally reproduced legislation. The editorial services team also maintain a queries database in relation to enacted legislation which records apparent errors in the legislation for consideration by drafters when the legislation is next amended.

Proofreading as performance measure

- 23 *Paragraphs 141 to 150* discuss hooking into the proofreading system as the basis of a new performance measure in the SOI and annual report.

E Consistency with LAC guidelines

- 24 One significant external quality assurance measure used to promote the quality of legislation drafted by the PCO is the report by the LAC on most government Bills introduced into Parliament.¹⁷ The purpose of the report is to examine and report on the consistency of the legislative proposal(s) contained in a Bill with the LAC guidelines.¹⁸ This report is made available by the Deputy Chief Parliamentary Counsel to the drafter of the Bill concerned for discussion and possible resolution with the instructing department of any matters that are, or may be, inconsistent with the guidelines.
- 25 After considering the report on a Bill, the LAC decides whether or not to take further action. Where a Bill raises issues of departure from the guidelines, the LAC may decide to make a submission and appear before the relevant select committee, write to the Minister in charge of the Bill, or raise the issues directly with the instructing department and the PCO.¹⁹ Significant changes may be made to a Bill because of the LAC's involvement in the drafting process before a Bill is introduced or during the Parliamentary stages.

F Consistency with recommendations of Legislation Design Committee

- 26 Another external quality assurance measure used to promote the quality of legislation drafted by the PCO is whether the legislation is consistent with the recommendations of the Legislation Design Committee (LDC). The LDC was established by Cabinet in

¹⁷ Except Bills implementing the recommendations of a Law Commission report where reports are given by Crown Law Office.

¹⁸ This function is undertaken by a Law Commission researcher under the supervision of a Law Commissioner on behalf of the LAC.

¹⁹ In 2008, the LAC prepared 12 submissions to select committees, forwarded 5 reports to select committees, and had numerous meetings with Ministers and officials, see Annual Report of Legislation Advisory Committee 2008, available at www2.justice.govt.nz/lac/pubs/2008/2008-annual-report.html

2006²⁰ and reports to the Minister of Justice. Its main work is to examine the legal and constitutional implications of proposed legislation and, in particular, the coherence of the proposal with other statutes. It does this by discussing projects with departmental advisers (and if appropriate, the PCO) during the policy development phase and identifying the most appropriate way of implementing the policy having regard to the overall coherence of the statute book. However, it should be noted that the LDC's role is purely advisory and departments are free to accept or reject the suggestions that the LDC makes.

G Consistency with New Zealand Bill of Rights Act 1990

27 Section 7 of the New Zealand Bill of Rights Act 1990 (BORA) provides that where any Bill is introduced to the House of Representatives, the Attorney-General must bring to the attention of the House any provision of the Bill that appears to be inconsistent with the rights and freedoms contained in that Act. While vetting Bills for BORA compliance is the responsibility of the Ministry of Justice and the Crown Law Office, the drafter of a Bill at the PCO plays a key role in facilitating this process by submitting the Bill to the team who carry out the vetting and by liaising with the relevant instructing department in relation to the resolution of any issues that are identified as breaching, or potentially breaching, BORA during the vetting process.

H Regulations (Disallowance) Act 1989 and Regulations Review Committee

28 Both the Regulations (Disallowance) Act 1989 and review by the Regulations Review Committee (RRC) provide important scrutiny of most delegated legislation. Before submitting regulations to Cabinet, drafters must certify that the regulations are in order for submission to Cabinet. In forming this view, a drafter will consider whether the regulations are in accordance with the requirements set out in the CabGuide²¹ and whether there are any grounds for the Regulations Review Committee to draw the regulations to the attention of the House of Representatives. Section 5 of the Regulations (Disallowance) Act 1989 provides that the House of Representatives may, by resolution, disallow any regulations or provisions of regulations. Where this happens the regulations cease to have effect.²²

External quality assurance measures

29 This section describes the external quality assurance measures that PCO currently uses to assess the quality of legislation it produces. The most substantive of these measures

²⁰ The LDC's membership comprises the Rt Hon Sir Geoffrey Palmer SC in his personal capacity as Chair, the Secretary to the Treasury, the Secretary for Justice, the Chief Executive of the Department of the Prime Minister and Cabinet, and the Chief Parliamentary Counsel (or their nominees). The LDC receives advice from Law Commissioners of the Law Commission.

²¹ Which include whether the regulations comply with the principles of the Treaty of Waitangi, the New Zealand Bill of Rights Act 1990, the Privacy Act 1993, relevant international obligations, and the LAC Guidelines.

²² Section 5(2) of the Regulations (Disallowance) Act 1989.

is obtaining feedback from the PCO's client instructors (clients).

A Views of Attorney-General

30 One of the measures currently used to assess whether the PCO is achieving its strategic objective in relation to best practice legislative drafting services is whether the Attorney-General is satisfied that the quality standard²³ and timeliness standard²⁴ for drafting have been met.

31 Prior to the end of each financial year the Chief Parliamentary Counsel writes to the Attorney-General seeking the Attorney-General's views on whether the PCO has achieved the standards relating to quality and timeliness in the delivery of law drafting services.

32 The responses received from the Attorney-General during the period 2002-2010 have all confirmed that in the Attorney-General's view the PCO had met those standards.²⁵

B Feedback from Select Committees

33 In December 2009, as a new initiative, letters were sent to 5 select committees requesting feedback from each committee on the performance of the PCO. The performance of individual counsel was not sought.

34 All 5 committees responded positively, expressing satisfaction with the performance of the PCO in relation to the quality and timeliness of work undertaken.

C Drafting Services Survey

35 Prior to the end of each financial year, a Drafting Services Survey is sent to all clients. The purpose of this survey is to measure the extent to which clients are satisfied that the quality and timeliness standards have been achieved.

36 The survey asks clients to indicate how strongly they agree or disagree with certain statements under the head of the following 4 questions:

- how satisfied they were with specified aspects of the drafting process?
- how satisfied they were with the drafting product?

²³ The quality standard is that Bills and Statutory Regulations are:

- legally effective, consistent with other legislation, the general law and international law, and clear
- consistent with the policy they implement, legal principle, the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1993.

PCO Statement of Intent for the period 1 July 2009 to 30 June 2012, page 14.

²⁴ The timeliness standard is that:

Bills, Statutory Regulations, and SOPs are drafted in accordance with the time-frames set by, or agreed with, the Government, select committees, and departments.

PCO Statement of Intent for the period 1 July 2009 to 30 June 2012, page 14.

²⁵ The responses for earlier years are not known.

- how satisfied they were with the advice they received from the PCO?
 - how satisfied they were with PCO's overall service?
- 37 Each of these questions also contains space for the inclusion of comments and a final question asks for any general comments.
- 38 Responses from this survey are collated, from which 2 statistics are extracted and recorded in the annual report:
- client overall satisfaction that the quality and timeliness standards have been achieved:
 - the response level to the survey.
- 39 The overall client satisfaction level for the last 4 years has been as follows:
- 2007 – 93%
 - 2008 – 94%
 - 2009 – 92%
 - 2010 – 88%.
- 40 The client response level for the last 4 years has been as follows:
- 2007 – 97%
 - 2008 – 68%
 - 2009 – 81%
 - 2010 – 77%.

Possible improvements to the Drafting Services Survey

- 41 *Paragraphs 94 to 129* discuss some of the limitations with the current Drafting Services Survey and suggest possible improvements.

International comparisons

- 42 This section discusses quality assurance measures and performance indicators used for measuring the quality of legislation in 3 drafting offices in Australia. It also briefly discusses the use of the “Lessons-learned” exercise and post-enactment scrutiny of Acts in the United Kingdom. Some of the quality assurance measures and performance measures are broadly similar to those adopted by the PCO, while others provide useful examples of measures that the PCO could adopt to improve the quality and integrity of the statute book.

A Office of Parliamentary Counsel – Canberra

- 43 The Office of Parliamentary Counsel (OPC) in Canberra was established under the Parliamentary Counsel Act 1970. Its principal functions are drafting Bills for introduction into either House of the Parliament and drafting amendments of Bills.²⁶ However, unlike the PCO, the OPC does not draft most subordinate legislation.²⁷

Quality assurance measures at OPC

- 44 The quality assurance measures adopted by OPC are broadly similar to those used by the PCO and include a peer review system and dedicated editorial checking of drafts. However, while overlapping to some extent with the PCO, the performance measures used by the OPC appear to be more extensive than the PCO’s and aimed more directly at improving the quality of the statute book overall. These measures include keeping a record of the number of legislative amendments required to fix drafting errors, recording the number of exposure drafts produced each year, producing a Statutes Law Revision Bill each year, and conducting a client survey measuring the satisfaction of its instructing departments with the drafting services provided by the OPC.

Drafting manual

- 45 Like the PCO, the OPC has a drafting manual that gives an overview of drafting matters. The First Parliamentary Counsel also issues comprehensive drafting directions which supplement the drafting manual by expanding on certain topics in greater detail.

Editorial checking

- 46 Like the PCO, the OPC also employs dedicated editorial officers who undertake editorial checking of drafts to ensure that office’s drafting standards and conventions and the normal rules of grammar are applied consistently to all Bills. This includes manual checking of the draft to detect various kinds of errors (for example, grammatical and punctuation errors) and automated checks such as spell-checking using word-processing software. Apart from things such as basic grammar and formatting requirements, and standard amending forms, the OPC accommodates various different drafting styles and

²⁶ Section 3 of Parliamentary Counsel Act 1970.

²⁷ This is drafted in Canberra by Office of Legislative Drafting and Publishing (OLD&P).

considers that some will be more or less appropriate than others for particular Bills. In its latest annual report,²⁸ the OPC reports that in the past few years discussions have taken place among drafters on the desirability of greater consistency in the drafting of provisions and ways in which such consistency could be achieved. This has led to a noticeable increase in consultation between drafting teams about the best drafting approach to adopt in particular cases.

Client adviser system

- 47 Unlike the PCO, the OPC has a formal process for making a pool of senior drafters available to its instructing departments as “client advisers”. A client adviser’s role is to provide drafting-related advice to instructors on any given legislative proposal before drafting instructions come in to the office. This process enables instructing agencies to get quick “off-the-cuff” advice about drafting matters such as advice about general legislative approaches or matters that are necessary or desirable for inclusion in legislation.²⁹
- 48 The OPC makes clear that its client adviser system is not intended to be a substitute for the need to access legislative expertise within the instructing agency itself or to replace other sources of advice (for example, from the Australian Government Solicitor). Also, a client adviser does not necessarily end up drafting the legislation for a client to whom the adviser has provided advice, as formal allocation of work still occurs at the management level within OPC. The general aim of the system is to assist the drafting process by providing drafting-related advice at an earlier stage while policy is still being developed in the hope to avoid problems down the track.³⁰
- 49 A list of client advisers along with relevant subject expertise and contact details is available for instructors on the OPC’s Internet site.

Correction of errors via Statutes Revision Bill

- 50 The OPC keeps annual records of Parliamentary amendments to Bills³¹ and the proportion of amendments required to fix drafting errors. The office also prepares an annual Statutes Revision Bill (SLR Bill) on the authority of the First Parliamentary Counsel to correct technical drafting errors³² and to repeal spent Acts.
- 51 Where a drafter comes across a mistake in a Commonwealth Act that he or she thinks

²⁸ Office of Parliamentary Counsel, Annual Report, 2009-2010, page available at opc.gov.au

²⁹ See OPC Client Advisers, available at opc.gov.au/about/docs/ClientAdvisers.pdf

³⁰ Ibid.

³¹ This is organised into the following 4 categories – amendments required because of government policy change; amendments to incorporate new government policy; government correction of drafting errors; non-government amendments (rarely drafted by OPC).

³² However, where possible, errors are still fixed in any current amendment Bill, with the SLR Bill being a backstop approach.

ought to be corrected (and that is not able to be corrected in any other current Bill), the drafter is directed to send a copy of the relevant mistake to the First Parliamentary Counsel.³³ Mistakes in legislation are also notified to the First Parliamentary Counsel by the Attorney-General's Department which is responsible for preparing consolidated versions of Commonwealth Acts. The First Parliamentary Counsel then sends the drafter responsible for drafting the legislation concerned a notification of the mistake.

- 52 The main advantage of this process over the comparable process for making technical corrections in New Zealand³⁴ is that the First Parliamentary Counsel gives the policy authority for making the amendments contained in the Bill and the usual instructing department of the legislation concerned does not need to approach its Minister for authority to make the amendments.³⁵
- 53 However, the First Parliamentary Counsel's power to approve technical amendments for inclusion in the SLR does not override the instructing agency's right to decide whether it wants the amendments to be made. Where technical amendments are initiated within the OPC for inclusion in an SLR Bill, the drafter involved must still ensure that the amendment is discussed with instructors (and, if necessary, explained to them) before the Bill is finalised. This ensures that the instructors' expertise is also brought to bear on the amendment.

Director of drafter training

- 54 The OPC aims to continually improve the skills of its drafters by providing various opportunities for professional development co-ordinated by a director of drafter training (who is a senior drafter). Training takes the form of in-house sessions (along the lines of the PCO's drafting forums) and other formal training activities. In general, the approach of the OPC to on-going drafter training appears to be more co-ordinated and systematic than at the PCO.

Legislation Process Course

- 55 Currently the PCO does not offer systematic training for those new to instructing on draft legislation. While various drafters at the PCO have provided seminars for particular instructing departments from time to time, there has been no office-wide co-ordination of the process to ensure that it happens regularly and that all instructing departments receive the benefit of it. This is different to how the OPC operates.
- 56 Since 1994, the OPC has run a seminar programme called the Legislation Process Course (LPC) which aims to up-skill instructors dealing with the PCO on the content and process

³³ See drafting direction 4.4 of the 1st PC available at www.opc.gov.au

³⁴ The annual Statutes Amendment Bill co-ordinated by the Ministry of Justice on the basis of requests from departments.

³⁵ Compare the SAB which requires Ministerial approval and cross-party support within Parliament.

of legislation.³⁶ The LPC is a one-day course held at the OPC regularly throughout the year with a maximum number of 16 participants per session. The course is not aimed at any 1 department and the participants cover the breadth of the public sector. The course is explicitly aimed at inexperienced instructors who have little or no knowledge of how to instruct the PCO or possibly about the legislative process in general. At the beginning of the session participants are asked to outline their experience with any aspect of the legislative process.

57 Each course is presented by 2 drafters and different drafters within the OPC take turns in presenting the course each time so that all drafters in the office (about 25) are involved in presenting at least 1 session during the course of the year. The content of the course was originally developed by 1 drafter but the course materials are regularly updated by other drafters (usually during election periods). The content of the course is split into 3 main components covering—

- the background against which legislation is drafted (ie, basic structure of Acts, the Interpretation Act 1901, standard provisions etc):
- the instructing/drafting process (ie, the roles of the instructor and drafter):
- the Parliamentary process.

58 The course usually involves the use of practical exercises as well as course materials to prevent it from being just a day of lectures. The pace of the course is also deliberately flexible to allow for discussion and lunch is provided to allow informal networking and further discussion to occur. At the end of the course, participants are asked to fill out an evaluation form, which has been helpful to modify the contents and format of the course. To assist drafters involved in presenting the course, the OPC engages a training expert to run a presentation skills course.

Benefits of LPC for OPC

59 While conceding that the course does not solve all the problems that can arise with inexperienced instructors, the OPC reports the following direct and indirect benefits from running the course:³⁷

- the course gives people a suggested standard form of giving instructions, including a checklist of issues that should be covered in the instructions (such as policy authority, commencement, transitional issues):
- the course is not purely a one-way process. The benefit of small groups is that drafters can gain a better understanding of their instructors' particular circumstances which, in turn, can help drafters to form more realistic expectations of their instructors and develop strategies for working with inexperienced instructors:
- the course makes the OPC more visible and gives instructors a better appreciation of the work that OPC does.

³⁶ A full description of this course can be found in The Legislation process course run by the Australian Commonwealth Office of Parliamentary Counsel, published in *The Loophole* in 2001 by Iain McMillan and Camilla Webster and available at opc.govv.au and reproduced in Appendix 2.

³⁷ Ibid, page 6.

Performance measures in OPC's annual report

Client survey

- 60 Like the PCO, the OPC surveys its instructing departments regarding their satisfaction with the drafting services provided by the OPC. However, instead of this being a general annual survey as at the PCO, the survey is sent by email to the instructing agency after each Bill is introduced. Among other things, clients are asked whether the Bill as introduced reflects its policy intentions. Though, as the OPC notes in its annual report, as Bills are not introduced without clearance from the sponsoring agency, it would be surprising if the Bill's sponsor did not believe it reflected the policy intentions.³⁸ The OPC also encourages its instructors to be both frank and constructive in their responses to the survey questions as it is made clear to instructing departments that individual drafters will not be shown their responses to the survey without their consent.³⁹
- 61 On its internet site, the OPC also highlights that it welcomes feedback on legislation in any other form.⁴⁰ Particularly, it notes that the office is keen to receive feedback on how legislation actually works in practice, for example whether particular legislative structures or drafting approaches make legislation especially difficult or easy to work with or if any legislation has been interpreted by a court or tribunal in a way that is inconsistent with the original policy intentions.⁴¹

Record of amendments

- 62 Unlike the PCO, the OPC keeps records of the numbers of Parliamentary amendments drafted each year and reports in its annual report on the proportion of those amendments required to correct drafting errors.⁴²

Record of exposure drafts

- 63 The OPC's annual report also contains a section relating to its use of exposure drafts in the drafting process.⁴³ The OPC first began producing exposure drafts in the area of taxation laws following the Government's adoption of the Board of Taxation's recommendations on public consultation in 2002 and since then the office notes it has

³⁸ Office of Parliamentary Counsel, Annual Report, 2009-2010, page 15 (**OPC current Annual Report**).

³⁹ See Working with the Office of Parliamentary Counsel: A guide for clients, Third edition, Canberra, March 2008, page 37, available at opc.gov.au

⁴⁰ OPC current Annual Report, page 17.

⁴¹ Ibid, page 27.

⁴² Ibid, page 17.

⁴³ Ibid, page 27.

become an increasing preference among many of its clients.⁴⁴ Some exposure drafts are given full public exposure, while others are exposed on the basis of targeted consultation (eg, stakeholder groups). In 2009, exposure drafts were released for public comment in a wide range of subject areas including carbon pollution reduction, health insurance, freedom of information, consumer credit and extradition.

Perceived benefits of exposure drafts to OPC

- 64 In its current annual report, OPC notes that it perceives the use of exposure drafts as making a positive contribution towards improving the quality of the statute book. In particular, exposure drafts are helpful in revealing flaws in the policy process and usually generate proposals for change.⁴⁵ As a result, OPC will usually receive drafting instructions to revise the Bill before it is introduced and this may result in the Bill being less heavily amended in its subsequent Parliamentary stages.

Legislation process course

- 65 The number of Legislation Process Courses conducted over the last 12 months is an explicit performance measure for the purposes of the OPC's annual report.⁴⁶ In the 2009-2010 reporting year, the OPC's performance target of conducting 10 courses a year was exceeded (13 were held), with a total of 186 participants attending the course. A total of 193 courses have been run since 1994 (average of 11 per year).

B The Office of the Queensland Parliamentary Counsel

- 66 The Office of the Queensland Parliamentary Counsel (OQPC) was established as a statutory office by the Legislative Standards Act 1992 on 1 June 1992. The OQPC is responsible for drafting all Queensland Acts and subordinate legislation made under most Queensland Acts. Like the PCO, the OQPC is also responsible for publishing legislation in printed and electronic format and for preparing reprints of its legislation in addition to its legislative drafting and advisory role.⁴⁷
- 67 However, unlike the PCO, the OQPC has a statutory responsibility to ensure that Queensland legislation is of the highest standard.⁴⁸ It also has a specific function to advise on alternative ways of achieving policy objectives and the application of fundamental

⁴⁴ Ibid, page 27.

⁴⁵ Ibid, page 4.

⁴⁶ Ibid, page 23.

⁴⁷ See section 3 of Legislative Standards Act 1992.

⁴⁸ See section 9 of Legislative Standards Act 1992.

legislative principles.⁴⁹

Quality assurance measures at OQPC

- 68 The quality assurance measures and performance indicators used by the OQPC to gauge whether the office's statutory responsibilities are being discharged are broadly similar to the PCO's. They include the use of a peer review system, editorial checks by dedicated editorial officers, and the use of a client satisfaction survey following the completion of the drafting process.

Peer review

- 69 The peer review process at the OQPC is broadly similar to the way in which peer review operates at the PCO. However, there are some important differences. These include the stage at which peer review occurs and how peer review is structured. Peer review at the OQPC occurs when the draft is almost finalised and is usually carried out by a drafter who is more senior than the drafter responsible for the draft. Like peer review at the PCO, any concerns arising from the peer review process are usually discussed with the instructing agency and changes may be made to the draft as necessary.

Editorial checking

- 70 Like the PCO, draft legislation at the OQPC is checked by editorial officers before introduction. However, legislation officers at the OQPC appear to have a broader role in relation to draft legislation than editorial officers at the PCO which extends to polishing the format of legislation and preparing the draft for its passage through Parliament or, in the case of subordinate legislation, for enactment.⁵⁰

Drafter training

- 71 The OQPC places importance on providing internal and external training opportunities for staff. The office has a dedicated training team that is involved in developing personal development plans for staff and organising training. The office also operates a system of on-the-job training, similar to an apprenticeship, in relation to its drafting and publishing functions. The system involves a more junior drafter being paired with a more senior drafter, enabling a transfer of knowledge and skills and a quality assurance check of drafting work.

⁴⁹ See section 7 of Legislative Standards Act 1992. This kind of advice covers things like the most appropriate instrument to be used, the kinds of provisions that may be used, the use of precedent provisions, and how the law can be presented in a way to make it more user-friendly.

⁵⁰ Office of the Queensland Parliamentary Counsel, Annual Report 2009-2010, page 21 available at www.legislation.qld.gov.au/Core_pages/about_oqpc.htm.

Performance measures in OQPC's annual report

Quantity of legislation drafted

72 The OQPC specifically records the overall quantity of legislation drafted (including page numbers) as a specific performance indicator for the purposes of its annual report.⁵¹ In this regard, we note that quantity-based measures are specifically excluded from the working party's terms of reference as they do not assess the quality of legislation.

Client satisfaction survey

73 The OQPC also includes the level of client satisfaction as a specific performance measure for the purposes of its annual report. The office has a target of overall client satisfaction rating of 85%⁵² which is slightly lower than the corresponding measure of 90% at the PCO. The survey aims to measure client satisfaction with the drafting process generally, the quality of the advice given on alternative ways of achieving policy objectives, the quality of advice given on the application of fundamental legislative principles, and the quality of the overall drafting product.⁵³

74 During 2009–2010 reporting year, the office achieved an overall satisfaction rate of 95.2% from responses received from clients.⁵⁴ The main ways that the office aims to ensure a high rate of client satisfaction in relation its drafting services include:

- promptly acknowledging instructions and allocating a drafter once instructions are received:
- making a draft available within the requested time frame:
- being responsive to requests and queries, including being available for discussions:
- providing information on the progress of drafting and providing incidental advice, for example, about other relevant legislation or general drafting matters.⁵⁵

Drafter training

75 The OQPC provides internal and external training opportunities for drafters through a dedicated training team that includes representatives from all areas of the office as well as a human resources officer from the Department of the Premier and Cabinet.

76 During 2008–2009, the office ran a competency development programme for staff offering training in areas of management, leadership, and legislation. Internal drafting training also included in-house seminars covering topics such as constitutional law,

⁵¹ Ibid, page 19-23.

⁵² Ibid, page 19.

⁵³ Ibid.

⁵⁴ Ibid, page 27. This was an increase of over 2% from the previous year.

⁵⁵ Ibid, page 29.

interaction with the Crown Law Office, negotiation, and parliamentary processes.

C Parliamentary Counsel's Office, New South Wales

77 The functions of the Parliamentary Counsel's Office in New South Wales (New South Wales PCO) are broadly the same as most other Australian drafting offices and the New Zealand PCO. They include—

- drafting Acts and regulations:
- providing advice concerning new legislation and legislative policy:
- providing drafting services to non-Government members of Parliament as approved by the Government:
- publishing legislation in hard-copy and electronic format⁵⁶ through the Government Information Service (including reprints and hard-copy annual bound volumes).

78 The New South Wales PCO has a formal commitment to plain language drafting and was one of the first Australian drafting offices to adopt a plain language policy in 1986 and a policy relating to gender-neutral expression in 1983.⁵⁷

Quality assurance measures at New South Wales PCO

Peer review and editorial checking

79 Like other drafting offices, draft Bills at the New South Wales PCO receive comprehensive editorial, legal, and quality assurance checks by an editorial services team. The office also maintains a formal after-hours drafting and support service to assist drafters on the nights that Parliament is sitting.⁵⁸ Draft legislation is also scrutinised by a group of the most senior drafters in the office before being introduced.⁵⁹

Exposure drafts

80 The procedure for the drafting of exposure drafts at the New South Wales PCO is generally the same as for other Bills except that Cabinet approval is generally required to initiate the drafting process and to formalise the actual release of the finalised draft.

Statutes Law Revision Bills

81 Like the OPC in Canberra, the New South Wales PCO has a process for improving the quality of the statute book on an “as-you-go” basis via an annual programme of Statute Law Revision Bills. This process has been in place since 1984 and has broad similarities

⁵⁶ The Parliamentary Counsel's Office maintains the New South Wales Legislation Database.

⁵⁷ These are available at www.pco.nsw.gov.au/corporate/plainlanguagepol.pdf

⁵⁸ See Parliamentary Counsel's Annual Report, 2008-09, available at www.pco.nsw.gov.au/corporate/PCOAR_0809.pdf

⁵⁹ Ibid, page 32.

with the programme run at OPC but is different in that SLR Bills comprise both minor and non-controversial amendments sponsored by Ministers and purely drafting amendments sponsored by the PCO.

82 In its 2008-2009 Annual Report, the office reports that SLR Bills are widely accepted as an effective method of making numerous minor legislative amendments that do not warrant separate Bills and an efficient way of repealing unnecessary laws.⁶⁰ The office routinely prepares two Bills each year, although a third Bill may be prepared if necessary.

83 The process for including items in an SLR is broadly similar to the process at the OPC in Canberra, except that because an SLR Bill may contain minor amendments proposed by instructing departments, the drafts are prepared on the basis of formal instructions from departments as well as instructions from the Chief Parliamentary Counsel.⁶¹ Generally, SLR Bills contain the following kinds of amendments:⁶²

- minor amendments proposed by government departments:
- minor amendments of a purely technical nature proposed by Parliamentary Counsel (for example, typographical errors, missing words, or incorrectly described amendments):
- the transfer of savings and transitional and other provisions of ongoing effect from amending Acts into the relevant principal Act. This permits the repeal of the otherwise obsolete amending Act:
- the repeal of obsolete or unnecessary Acts proposed by Government agencies or Parliamentary Counsel. In general, this is aimed at repealing defunct amending Acts that are no longer necessary because the amendments have been incorporated in reprints of the relevant principal Acts or transferred to the relevant principal Act:
- savings and transitional provisions. This deals with the effect of amendments on amending Acts, savings clauses for the repealed Acts and a power to make regulations for transitional matters as necessary.

84 The New South Wales PCO also considers that the SLR Bills have important functions in maintaining the integrity of the statute book and facilitating electronic searching of statutes.

Performance measures used in New South Wales PCO's annual report

Number of exposure drafts

85 The number of exposure drafts prepared by the New South Wales PCO is a specific performance measure reported in the office's annual report. In the 2008–2009 reporting

⁶⁰ Ibid.

⁶¹ This process appears to be something of hybrid of SLR Bills at OPC in Canberra and SAB Bills at PCO.

⁶² See the Manual for the Preparation of Legislation, Parliamentary Counsel's Office, New South Wales, 8th Edition, August 2000, available at www.pco.nsw.govt.au/corporate/mpl.pdf

period, the office prepared 5 exposure drafts for public consultation.⁶³

Number of amendments in committee stages

86 Like the OPC, the New South Wales PCO also reports on the number of amendments it drafts to government and non-government Bills in committee.⁶⁴

Number of SLR Bills

87 The New South Wales PCO also reports on the number of Statute Law Revision Bills that were introduced or passed in the financial year. In the 2008–2009 reporting period, 2 SLR Bills were passed that amended 299 Acts and instruments and repealed 24 Acts and instruments.⁶⁵

D Post-legislative scrutiny in the United Kingdom

88 Unlike the United Kingdom Office of Parliamentary Counsel (UKOPC) in London, the PCO does not currently participate in any formal processes for analysing either how the drafting process went on a job or how any specific legislation is working in practice. By contrast, the OPC in the UK is directly or indirectly involved in two forms of post-legislative scrutiny with the aim of analysing what could be improved in the Bill drafting process generally and how well legislation is working in the short term after Royal assent. The following is a brief description of these processes:

The Lessons-learned exercise

89 _____ The Lessons-learned exercise is a relatively new form of post-legislative scrutiny that was first applied in 2008. The process is a joint exercise by the Cabinet Office and instructing departments with input from the OPC drafter that extends to reviewing the “whole Bill project”. The aim of the exercise is to “produce lessons” that will help future Bill teams on other projects.

90 The exercise is held as soon as possible after a Bill is enacted and is primarily led by officials in the instructing department. The format of the exercise is relatively flexible and may include the OPC drafter of the Bill as a full member of the exercise or as a person who is consulted. Feedback on the exercise is given by the nominated official from the instructing department to the First Parliamentary Counsel and the PB Committee Secretariat.⁶⁶

⁶³ Parliamentary Counsel’s Office Annual Report 2008-2009, pages 32–33.

⁶⁴ Ibid, page 32. In the 2008–09 reporting period, the PCO drafted 69 amendments in committee.

⁶⁵ Ibid, page 32–33.

⁶⁶ The PB Secretariat is part of the Economic and Domestic Secretariat in Cabinet Office that services the PB Committee. The PB Committee is the Ministerial Committee of the Cabinet with oversight of the Government’s legislative programme.

- 91 On its Internet site, the OPC states that it considers the lessons-learned exercise is useful both to departments and more generally. Things that have been learned in the lessons-learned exercises carried out in the 2008–2009 period include—
- the importance of not underestimating the time it takes to develop policy to the level where departmental lawyers and the OPC team can produce a satisfactory draft. There needs to be a timetable for Ministers to make the policy decisions that will enable drafting to progress. If policy involves agreement with other departments extra time will be needed:
 - the importance of keeping an open mind throughout the drafting process. Sometimes the process of development may require a change of track at a relatively late stage. The office reports that some Bill teams have found it useful to hold “challenge sessions” with members of the departmental Bill team seeking to test the evidence base for the policy, whether it stands up to criticism, and whether it will meet its objectives, and the importance of good communications. This involves the acceptance of reciprocal requirements both for the department and Parliamentary Counsel.

Post-legislative scrutiny 3 to 5 years after Royal assent

- 92 The second main form of post-legislative scrutiny that occurs in the United Kingdom is the requirement, since March 2008, for all new Acts to undergo post-legislative scrutiny by a relevant Select Committee 3 to 5 years after their Royal assent.⁶⁷ The purpose of the review is to establish whether the intended policy objectives have been met by the legislation, and if so, how effectively. The review is intended to be wide-ranging but also may touch on specific questions of a purely legal, drafting, or technical nature.
- 93 The process of review is initiated by the responsible Department submitting a memorandum to the relevant Select Committee that previously dealt with the legislation which gives a preliminary assessment of how the Act has worked in practice in relation to its intended purpose. The memorandum also covers when and how different provisions of the Act have been brought into force, explains why any provisions have not been brought into force, describes any associated delegated legislation, and identifies specific legal and drafting difficulties (for example, issues that have been the subject of actual litigation) and gives a summary of any other known post-legislative reviews. The purpose of the review is not to just focus on where legislation or its implementation is defective but also to identify where the legislation has worked well.

⁶⁷ The post-legislative scrutiny process arose from the UK Government’s agreement to adopt the recommendation in a 2002 Law Commission Report on the need to develop a process for post-legislative scrutiny.

Possible improvements to PCO's Drafting Services Survey

- 94 The Drafting Services Survey is currently used as a direct measure of the extent to which the PCO is achieving its quality and timeliness standards.
- 95 We acknowledge that the survey is subject to a number of limitations in terms of its ability to measure quality. Whether or not a particular department is “satisfied” with the PCO’s performance may be influenced by political and other factors rather than quality per se. For example, a high-quality Bill or regulation takes time to draft. The need for more drafting time often conflicts with a department’s desire to introduce a Bill by a particular deadline. If, in the interests of quality, the PCO requires more drafting time, a department’s “satisfaction” may decline. Also, in the interests of quality, the PCO often debates with the department the appropriateness of its policy. This can also lead to a decline in “satisfaction”.
- 96 However, despite these limitations, the survey is an established tangible measure that requires relatively simply administration.
- 97 We consider that the Drafting Services Survey should continue to be used as a measure of quality and timeliness, but suggest the following improvements which could be made with little or no compliance costs to the PCO.

Participants

- 98 Currently the survey is sent to the Chief Legal Adviser of every agency to whom the PCO provides drafting services.
- 99 Responses to the survey are sometimes returned by the Chief Legal Adviser and sometimes by other staff. Clearly agencies use different internal processes for the purpose of completing and returning the survey.
- 100 In those cases where a response is returned by the Chief Legal Adviser, it is not clear the extent to which, if any, input has been obtained from relevant persons within their office. Relevant persons are those individuals or groups of individuals to whom the PCO provides services, usually the instructors with whom drafters liaise on projects. This will not always be the Chief Legal Adviser, and indeed is often a policy adviser. Particularly for larger agencies (for example, the Ministry of Justice and Ministry of Economic Development) there may be a number of relevant persons across the agency.
- 101 To ensure that input to the survey is sought from relevant persons it would be preferable for the survey to be sent to these persons directly. However, where there are a large number of relevant persons in any agency, it may be appropriate to select only those persons who have regularly provided instructions to the PCO or who have been the instructors on large projects. Drafting team managers should be involved in compiling the list of names of the relevant persons to whom the survey should be sent.

Multiple responses from agencies

- 102 Currently, where 2 or more responses are received from an agency the responses are averaged to yield a single response.
- 103 The effect of this is that each agency is afforded 1 response which is of the same “weighting” (that is, the response of a larger agency is treated as having the same value as that from a smaller agency).
- 104 We strongly urge that consideration be given to treating the business units of large agencies as different clients for the purposes of the Drafting Services Survey (for example, in the Ministry of Justice the various groups within the Public Law Group and the Crime Prevention and Criminal Justice Group that provide drafting instructions to the PCO could be treated as separate clients). This would afford the larger clients, for whom the PCO provides more services, a proportionately greater input or “say”.

Method of dispatch

- 105 Last year, for the first time, the survey was completed online by agencies. A letter from the PCO was dispatched by email advising of the Internet site and providing a link. Although the email advised that hard copies of the survey were available on request, no requests were received.
- 106 With greater use of technology generally favoured, we consider it prudent to continue dispatch by this method.

The questions

- 107 The current survey seeks scaled responses to 7 specific statements and also provides the opportunity for the inclusion of general comments.
- 108 We have considered whether any change to these statements might be made, having regard in particular to the survey questions in the Common Measurement Tool (CMT) that State Services agencies may use to measure client satisfaction.⁶⁸
- 109 The CMT survey contains 8 core questions. The first question is about satisfaction and is essentially the same as question 4 in the PCO survey, relating to satisfaction with overall quality of service delivery. The second and third questions are about expectation and compare the quality of service expected with the quality of service received. The remaining questions are about performance and enquire about staff competence, keeping promises, fair treatment, regard to individual circumstances, and being good value for tax dollars.
- 110 Questions relating to expectation are always subjective. While expectation in relation to the quality of the PCO’s services should unquestionably be high, the quality of the services provided is prone to influence from a number of external factors (for example,

⁶⁸ www.ssc.govt.nz/display/document.asp?docid=7633

time frames and quality of instructions). Of the questions in the CMT survey relating to performance, only 2 have potential relevance for the PCO – those pertaining to competence and keeping promises. However, competence is a matter best determined by internal review procedures rather than by clients, and doing what was promised can again be dependent on factors outside of a drafter's control (for example, subsequent change in policy).

111 Overall we do not consider that the CMT survey translates well into the PCO environment and that the incorporation of all or any of its questions would enhance the current PCO Drafting Services Survey.

112 Further, we are aware that to achieve a high response rate from agencies the survey needs to be easy to complete in a short amount of time. The current survey meets these criteria and produces the required statistics. We therefore consider that no changes to the statements are required.

Are options for answers appropriate?

113 Currently the available options for responses to the statements in the survey are “strongly disagree”, “disagree”, “agree”, and “strongly agree”. Alternative to options of this kind is a numerical scale, offering a wide range of options. The difficulties we perceive with adopting such a scale are:

- greater complexity in collating the results; and
- greater subjectivity so that the results become less meaningful (ie, 1 client may afford 9 out of 10 and another 7 out of 10 for an equivalent response).

114 We do not recommend any change to the options for responses.

Response rate

115 We understand that the response rate varies each year, largely according to the effort expended chasing clients, urging that they complete the survey.

116 The chasing-up for responses is inevitable given the busy workload of the public sector. This is so even though clients are advised that completion takes only about 5 minutes.

117 This chasing is usually done by the PCO's communications officer or other corporate support staff.

118 We consider it worthwhile to delegate this “chasing” task to drafting team managers. Drafting team managers will have a closer relationship with the participants and therefore are likely to be more successful in securing prompt responses.

Feedback to drafters

119 We understand that sometimes a client response will include comment on the services provided by 1 or more identifiable drafters. Some drafting team managers may pass these comments on to drafters indirectly. The specific responses to the client survey are, however, generally not disclosed to staff.

- 120 The issue of whether client responses should be kept confidential to the SMT needs consideration.
- 121 On the one hand, it would be helpful for drafters to be aware of client comment about their work so that they can be aware of what is and isn't working well and make any necessary or appropriate changes to their work methods.
- 122 On the other hand, client responses can be very subjective and reflect a drafter's performance in relation to a specific project only. Client responses are therefore not necessarily an accurate representation of a drafter's overall performance and contribution.
- 123 Another relevant factor to consider is whether the disclosure of client responses to drafters would result in less client participation and curtail free and frank comment.
- 124 We recommend that, following consideration of this issue, the SMT—
- clarify the position with drafting team managers to ensure that the approach taken across all drafting teams in respect of feedback is consistent; and
 - ensure appropriate text is included on the front page of the survey so that the position is clear to clients.

Whether other statistics should be extracted from the survey results

- 125 Currently 2 statistics are extracted for inclusion in the PCO's annual report (see *paragraph 38*).
- 126 Question 2 of the survey asks participants to agree or disagree with the following statement: "The resulting legislation was drafted as clearly and simply as possible, gave effect to Government policy, and was legally effective".
- 127 There are 3 distinct elements to the above statement, yet there is provision for a singular response only. Participants are necessarily required to roll the 3 elements together to give a response that is an intuitive average.
- 128 We recommend the SMT consider reformatting question 2 so that separate responses are required to each of the constituent elements of the statement (as in question 1 of the survey). If this is done, the responses to the first element, which relates to the satisfaction level with the PCO's plain language drafting techniques, could be used as a measure of the quality of legislation.
- 129 Neither of the 2 remaining elements of the statement in question 2 appear useful for reporting purposes. In relation to the second element, responses are not necessarily meaningful since all Bills are vetted by agencies prior to introduction. In relation to the third element, not all persons participating in the survey are well placed to comment on the legal effectiveness of legislation. Accordingly, we do not recommend using the responses to these elements for reporting purposes.

Possible new performance measures

- 130 This section suggests new performance measures that could be included in the SOI and annual report. Some of these performance measures derive from making better use of the information that already exists in relation to the PCO's in-house quality assurance measures for reporting purposes and should be fairly straightforward to implement in a timely way. However, other ideas, particularly our recommendations relating to the use of a computer tool and certain performance measures used by overseas drafting offices, require consideration of the allocation of office resources in terms of time and value for money.
- 131 In summary, we recommend that the SMT consider including the following new performance measures in the SOI and annual report:
- measures relating to the extent to which the PCO carries out its existing quality assurance procedures such as proofreading and peer review:
 - a measure relating to the extent to which the PCO carries out an assessment of a sample of legislation by 1 or more principal or other senior counsel:
 - a measure relating to the number of legislative projects reviewed by the PCO with instructing departments:
 - a measure relating to the extent to which the PCO uses a computer-based tool to assess the quality of draft legislation:
 - a measure relating to the number of Legislation Process Courses that the PCO runs for client instructors each year:
 - a measure relating to the number of Statute Law Revision Bills that the PCO drafts to clean up the statute book on an "as-you-go basis" each year.

A Measure relating to peer review system

- 132 We have given some consideration as to whether the existing peer review system could be used as the basis of a new measure of quality.

Peer review option that we recommend

- 133 One option for hooking into the peer review system in order to measure quality is to measure the *extent* to which this quality assurance process is being carried out. Peer review information is now included in leg tracking. This option would involve collating this information and including a performance indicator in the annual report along the lines:

The PCO aims to ensure that at least 90% of the Bills that are introduced and of the regulations that are drafted by the office are peer reviewed or reviewed by a supervisor. This review involves ... [brief description of the peer review/supervision system]. During the 2012–2013 financial year over 93% of those Bills and regulations were subject to such a review.

- 134 The 90% target specified above is merely indicative. No doubt some allowance should be made for situations where peer review is unnecessary (for example, budget Bills and very straight-forward jobs). However, the percentage should be set at a fairly high level.

- 135 The advantages of this option include the following:
- (a) it easily hooks into the existing peer review system (including the recording of information in leg tracking):
 - (b) a high target for the percentage of Bills and regulations that should be reviewed fits in well with the PCO's existing quality assurance policy to require a review except in certain limited situations.
- 136 The basic idea here is that if there is a high degree of compliance with the PCO's quality assurance processes, then there is reasonable assurance that quality drafts are being produced.
- 137 However, we note that this option is subject to some limitations in terms of being an effective measure of quality. These include the following:
- (a) the basic idea referred to above is subject to the assumption that peer review helps to produce a better product. In our opinion, the PCO's existing peer review system does, on the whole, help to produce a better product. However, the mere fact that a particular draft has been subject to peer review does not necessarily mean that it is of "good" or "high" quality:
 - (b) peer review often occurs at a time when the draft is still very much a "work in progress". Significant changes are often made after the peer review has occurred. This means that peer review does not involve a complete assessment of the final product.
- 138 While the option described above is merely an "indirect" measure of quality that is subject to some limitations, we consider that, on balance, it has merit and we recommend that the PCO adopt it. However, in making this recommendation we note that other more "direct" measures of quality may also provide more useful information. We discuss those options below (see *paragraph 151 to 194*).

Peer review option that we do not recommend

- 139 Another option relating to the peer review system that we have considered but do not recommend involves giving the peer reviewer a new function of making an assessment of the overall quality of a draft against a standard set of criteria. This would require the peer reviewer to assign the draft a score. These assessments could be recorded in leg tracking and ultimately collated into a single performance indicator that could be included in the annual report.
- 140 We do not recommend this option because—
- (a) such an assessment would compromise the effectiveness of the peer review. Peer review works best when there is a free and frank exchange of views between the peer reviewer and the drafter. Ideally, the peer reviewer and drafter should work together as a team to improve the product. Putting the peer reviewer in the position of formally assessing the draft would compromise this working relationship:
 - (b) due to time constraints, peer review often occurs at a time when the draft is still very much a "work in progress". Assessing the draft at this stage may not give an accurate impression of the final quality of the draft:
 - (c) it would be extremely difficult to ensure that the assessments were carried out in

a consistent manner.

B Measure relating to proofreading system

- 141 We have also given some consideration as to whether the existing proofreading system could be used as the basis of a new measure of quality.

Proofreading option that we recommend

- 142 One option for hooking into the proofreading system in order to measure quality is to measure the *extent* to which this quality assurance process is being carried out. Proofreading information is now also included in leg tracking. This option would involve collating this information and including a performance indicator in the annual report along the lines:

The PCO aims to ensure that [all?][at least 97%?] of the Bills that are introduced and of the regulations that are drafted by the office are proofread by its editorial services team. This involves ... [brief description of the proofreading system]. During the 2012–2013 financial year over 98% of those Bills and regulations were subject to such a proofread.

- 143 We have also considered whether the performance target should require *all* Bills and regulations to be proofread or merely a specified percentage. On the one hand, we think that all Bills and regulations *should* be proofread at some stage. On the other hand, there is always the possibility that a small percentage of Bills and regulations will not be proofread for some reason. Setting a 100% target is likely to result in the PCO failing to meet the objective on a regular basis. In any event, the percentage should be set at a very high level.
- 144 The advantages of this option include the following:
- (a) it easily hooks into the existing proofreading system (including the recording of information in leg tracking):
 - (b) a very high target for the percentage of Bills and regulations that should be proofread fits in well with the PCO's existing quality assurance policy.
- 145 This option, however, is not without limitations in terms of being an effective measure of quality. These are similar to the limitations relating to the peer review system. Namely,—
- (a) the basic idea referred to in *paragraph 136* is subject to the assumption that proofreading helps to produce a better product. In our opinion, the PCO's existing proofreading system does, on the whole, help to produce a better product. However, the mere fact that a particular draft has been proofread does not necessarily mean that it is of “good” or “high” quality. This is because, for example, proofreading comments may be ignored, proofreading errors may be missed by Editorial Services, and proofreading does not focus on some important aspects of quality:
 - (b) a full proofread often occurs at an early time. Significant changes made after that point are often subjected to only “compare reads” (which may not pick up significant errors).

146 This option is, accordingly, merely an “indirect” measure of quality that is subject to some limitations. On balance, we consider that this option has merit and we recommend that the PCO adopt it.

147 At this stage, our recommendation does not extend beyond hooking into the existing proofreading system. Suggesting changes to that system is not directly included in our terms of reference. However, we do note that changes could be made to mitigate the effects of the limitation referred to in *paragraph 145(b)*. Drafters currently have a lot of discretion as to when a draft is proofread and the type of “read” (and, indeed, whether it is proofread at all). Our “system” is largely informal given that the PCO currently does not have a formal proofreading policy or even formal guidelines relating to proofreading.

148 We suggest that the PCO give consideration to developing a formal policy on proofreading or at least guidelines. In developing a policy or guidelines, consideration could be given to requiring a “full” proofread at a stage when the draft is substantially settled in order to reduce the risk of significant proofreading errors slipping through. However, this change may have resource implications for the Editorial Services team. In addition, there may be significant difficulties in specifying the ideal time for a “full read”.

Proofreading option that we do not recommend

149 Another option relating to proofreading as a performance measure that we have considered but do not recommend involves giving the Editorial Services team a new function of making an assessment of the quality of a draft in terms of—

- (a) the extent to which the Bill or regulation is drafted in plain English, complies with the Style Manual, and is free from error; and
- (b) general readability.

This “proofreading assessment” would require the editorial services team to assign the draft a score. These assessments could be recorded in leg tracking and ultimately collated into a single performance indicator that could be included in the annual report.

150 We do not recommend this option because—

- (a) putting the Editorial Services team in the position of formally assessing the draft would compromise the positive working relationship between counsel and the team. It would also provide a distraction from the fundamental objective of proofreading (namely, to help improve a draft in terms of readability, consistency, compliance with the Style Manual, and the removal of errors):
- (b) a proofreading assessment may take place at the wrong stage. Currently, a “full” proofread will take place in respect of an early draft with only “compare reads” occurring at later stages:
- (c) it would be extremely difficult to ensure that the assessments were carried out in a consistent manner:
- (d) the proofreading assessment would not focus on some very important aspects of quality (for example, legal effectiveness, giving effect to the Government’s policy, and compliance with the LAC Guidelines).

C Quality assessment of sample of draft legislation by senior drafters

151 The basic idea of “indirect” measures of quality is that if there is a high degree of compliance with the PCO’s quality assurance procedures, then there is reasonable assurance that quality drafts are being produced. This idea is subject, however, to some limitations that have prompted us to look at more direct means of measuring the quality of legislation for the purposes of the SOI and annual report.

152 We think that a system could be developed where a suitably qualified person or group considers a representative sample of the PCO’s Bills and regulations and makes an assessment of their quality against a standard set of criteria. The criteria could, for example, relate to—

- the use and effectiveness of the PCO’s existing plain language drafting techniques; and
- legal effectiveness.

153 Given that the assessments would need to be fairly thorough, it is unrealistic to expect that every Bill or regulation would go through this process. In order to assess the overall quality of the PCO’s output, we think that it is enough to assess a representative sample of our work (say 5 to 10%).

154 A particular draft could be given a score (95/100) or a descriptive grade (“satisfactory quality”, “good quality”, etc). These direct assessments could then be collated into a single performance indicator for the purposes of the annual report along the following lines:

The PCO aims to assess for quality a representative sample of at least 5% of the Bills and regulations that it drafts. This involves assessing the Bills and regulations against specific quality criteria (including the use of plain English and legal effectiveness). During the 2012–2013 financial year, a randomly selected sample of 8% of Bills and regulations were assessed.

About 50% of the drafts that were assessed scored between 80–89 (out of 100). The remaining 50% of the drafts that were assessed scored between 90–100.

or

About 30% of the drafts that were considered were assessed as being of satisfactory quality. A further 40% of the drafts that were considered were assessed as being of good quality. The remaining 30% of the drafts were assessed as being of very high quality.

155 Some of the issues relating to this suggestion are—

- who would carry out the quality assessment?
- against what criteria would the quality assessment be made?
- when would the quality assessment be made?
- which Bills and regulations would be assessed?
- what are the benefits and costs of the proposal?

Who would carry out the assessment?

- 156 The two main options that we have considered are—
- an outside group (a **readers’ panel**) that is independent of the PCO in terms of membership. This group could include, for example, 1 or more Law Commissioners, Judges, representatives of the NZ Law Society, academics, departmental lawyers or officials, experts in linguistics, MPs, and economists; or
 - 1 or more experienced Parliamentary Counsel (such as the Principal Counsel). As is noted below, we prefer the second option.
- 157 The main advantages of a readers’ panel are—
- perceived independence and objectivity;
 - the PCO would receive advice and comment on its drafts from a broad range of outside perspectives. This advice and comment may challenge some settled PCO ideas in a healthy and constructive manner. In other words, the PCO may gain some fresh insights about what makes legislation easier to understand and apply.
- 158 However, the idea of a readers’ panel has some significant disadvantages, including—
- in order to make a reasonable and informed assessment, we would expect that the person or group that carries out the assessment would need to conduct a detailed examination of the relevant draft. They would also need to take into account the background (including the instructions, the policy approvals, the political context, and so on). This will take a significant amount of time and effort. It may be very difficult to find a group of “outside” people who are able to make the sort of commitment that is required;
 - a lot of the background material will be confidential. Accordingly, it may be difficult to make this background material available to persons from outside Government;
 - a complete assessment of the circumstances of a particular Bill or regulation should involve discussions with the responsible drafter (for example, “... this Part was drafted in this way because...”). It would be difficult for a readers’ panel to have this sort of interaction with the responsible drafter.
- 159 While a readers’ panel from outside the PCO may provide fresh insights, it would suffer from a lack of understanding on a number of fronts. First, a readers’ panel would have difficulty in differentiating between what is “drafting” and what is “policy”. Quality legislation depends a great deal on the quality of the policy and the instructions. Even the best drafters can’t make “a silk purse out of a pig’s ear”. Second, a readers’ panel may not fully understand that drafters are subject to a number of constraints. These include, for example, timing constraints, having to fit the proposed new law into the larger framework of existing law, the limitations of departmental solicitors and policy advisers, political considerations, and so on.
- 160 The quality of a particular Bill or regulation depends on a wide range of factors that are outside of the PCO’s control. The person or group who makes the assessment must be able to take all of the above constraints into account if a fair and reliable assessment is to be made of quality.
- 161 In summary, we consider that a readers’ panel would be unlikely to be able to fully

appreciate whether a particular deficiency in quality is attributable to the drafter and whether it is attributable to the policy or some other outside factor. As the well known poem notes:

I'm the parliamentary draftsman,
And they tell me it's a fact
That I often make a muddle
Of a simple little Act.
I'm a target for the critics,
And they take me in their stride.
Oh, how nice to be a critic
Of a job you've never tried.

162 In contrast, an assessment by 1 or more experienced drafters is more likely to be able to make a reliable assessment of the drafting aspects of a particular Bill or regulation rather than the policy.

163 In addition, an assessment from within the PCO would have a number of additional advantages. These can be summarised as follows:

- an internal assessment could identify areas where there are inconsistencies between the 3 drafting teams. At the moment, peer review is usually conducted from within the team. Drafters do not often move between teams. As a result, teams can develop a particular culture or style. This is not necessarily a bad thing. A team culture may reflect the nature of the legislation that the team drafts. A team culture may also reflect the character of its client departments. However, there are no doubt areas where more consistency between the teams would be desirable:
- an internal assessment could identify areas where drafters are having particular problems or making errors of a particular kind. This could highlight the need for remedial action (for example, an amendment to the drafting manual or style guide, further training, or an item in *PCO Quarterly*):
- an internal assessment could identify flaws in our other quality assurance systems or areas where improvements could be made:
- an internal assessment could identify areas where a set of standard provisions could be developed. For example, infringement notice forms is one area where there are numerous precedents with slightly different wording:
- an experienced counsel who carries out an internal assessment will be in a good position to provide helpful feedback to drafters:
- an experienced counsel will be in a good position to discuss with the drafter concerned the various background circumstances that need to be taken into account to ensure that the assessment is fair.

164 The main disadvantage of an internal assessment as opposed to an external assessment is a lack of perceived independence. The argument here would be that, as an employee of the PCO, the experienced counsel that carries out the review would feel pressure to produce the “right result”. For example, there may be some reluctance to report a drop in quality as compared to previous years.

165 While this is a potential problem, we do not think that it is insurmountable. The Principal Counsel or other experienced counsel would be a professional. Drafters, by their nature,

tend to be quite happy to provide “free and frank” opinions even when it is unpopular. This should provide some assurance that the assessment will be carried out in a professional manner. Second, structures could be put in place to promote the independence of the role. For example,—

- the counsel who carry out the role could be outside the drafting team structure; and
- the need to act independently could be included in the job description.

166 We note that our suggestion has some similarities with the informal systems and processes of the PCO in past years. We understand that some former Chief Parliamentary Counsels (in particular, Walter Iles) used to read a sizable proportion of the output of the office before LEG. This would allow some high level oversight that quality standards were being maintained across the office. While the PCO of today has a reasonably effective peer review system, this tends to operate on a team-by-team basis. There is perhaps not the same sort of “umbrella” system of quality oversight at a high level as existed in the past. Given the current size and complexity of the PCO’s output and other demands on the time of senior management, we are not suggesting a return to the systems of the past. However, our suggestion of internal assessment by highly experienced counsel is designed to help provide the PCO with this sort of high-level quality oversight.

Against what criteria would the assessment be made?

167 We think that an assessment could consider matters along the following lines:

- is the draft consistent with the drafting manual, the Style Guide, and the LAC Guidelines?
- is the draft drafted in plain English?
- is the draft otherwise readable and does it have an appropriate structure?
- is the draft legally effective? Is it consistent with other legislation and general legal principles? Does the draft contain loopholes, gaps, or ambiguities? Does it provide for contingencies? Are the machinery provisions appropriate?
- to what extent is the draft free from minor errors (being errors that may not compromise the legal effectiveness of a draft)?
- is the draft workable?
- does the draft give effect to the Government’s policy?

168 As noted above, various limitations and constraints will need to be taken into account. For example, a failure to comply with the LAC Guidelines could be as a result of the Government’s policy. In addition, allowances would need to be made where timing constraints are a factor.

169 Taking into account these limitations and constraints means that an assessment of quality will involve some subjective judgment on the part of the assessor. However, we still think that such an assessment will produce some useful and reasonably reliable information. Guidelines may need to be developed to ensure that these limitations and constraints are taken into account in a consistent manner.

170 If this idea were to proceed, the PCO would need to give consideration to the weighting that should be given to each category. For example, we could have a total score of 100 points and allocate 25 points to giving effect to the Government’s policy, 20 points to

plain English, 10 points to compliance with the LAC guidelines, and so on. The weighting to be given to each category could be set by the SMT based on its relative priorities.

When would the assessment be made?

- 171 In terms of Bills, the main possibilities are—
- before introduction and in time for comments to be taken into account by the drafter (at about the same time as the peer review):
 - between introduction and the start of the select committee process:
 - after select committee but before enactment:
 - after enactment.
- 172 In terms of regulations, the main possibilities are—
- before the regulation is made and in time for comments to be taken into account by the drafter (at about the same time as the peer review):
 - after the regulation is made.
- 173 The proposed quality assessment is intended to serve a different function as compared to peer review. The purpose of peer review is to assist in producing high-quality drafts. The primary purpose of the quality assessment is to measure quality for the purposes of the annual report and to provide “higher-level” information for drafting team managers and senior management that may be useful in improving quality drafting practices and procedures.
- 174 We think that there would often not be enough time for a thorough quality assessment to be carried out before introduction or before the regulation is made. In addition, the quality assessment should not be carried out on a moving target. A reliable assessment of quality cannot be carried out on a document that is still subject to considerable change. Finally, we think the assessment should be carried out in each case at approximately the same stage.
- 175 In light of the above, we think that the best time for the quality assessment to be carried out is,—
- in the case of Bills, immediately after introduction. At this stage, the draft should be at a reasonably settled state (albeit that further change at the select committee may be contemplated). If the assessment is carried out at this stage, there is still time for feedback to be taken into account at the select committee stage:
 - in the case of regulations, after the regulations are made.

Which Bills and regulations would be assessed?

- 176 Orthodox statistical theory suggests that—
- for a sample to be representative of the whole, it needs to be selected at random; and
 - the larger the sample size, the more reliable the sample will be as being representative of the whole.
- 177 We would expect that a randomly selected sample of between 5 to 10% of Bills and

regulations should be sufficiently representative of the PCO's output. The peer review system excludes various Bills and regulations from that system (short regulations, Appropriation Bills, etc). We would expect that these Bills and regulations would also be excluded from the quality assessment.

178 We have given some consideration to whether the assessments should only relate to Bills. The argument here is that Bills are much more important and the risk of potential problems are higher. On the other hand, a sizable part of the PCO's workload involves drafting regulations. Regulations are often complex and involve difficult issues (for example, vires issues).

179 Ideally we think that regulations should be included in the assessment system. However, if the SMT was of the view that assessing both Bills and regulations would involve too big a commitment, it could restrict the assessment to Bills.

The benefits and the costs

180 The main benefits of the proposal are as follows:

- the PCO would have a reliable and credible way of directly measuring the quality of the PCO's output:
- the PCO would demonstrate to Parliament and others a strong commitment to quality drafting:
- the assessments would provide useful information to drafting team managers and senior management. This information will help guide decisions relating to, for example, areas where improvements can be made to the PCO's quality assurance systems, areas where further training or development is required, areas where precedents need to be developed, areas where a change to the drafting manual may be required:
- the assessments could provide useful information to drafters both in terms of a particular Bill or regulation and more generally in terms of their personal development.

181 The main cost would involve the resources that would need to be dedicated to carrying out the assessments. The person or group who carry out this function would need to be highly experienced (in the top half of the advanced counsel level or at the Principal Counsel level).

182 Carrying out an assessment would involve reading the relevant draft, the policy approvals, and the main instructions, and briefly discussing the file with the drafter. Reports would need to be prepared on the consolidated results of the assessments.

183 It is difficult to estimate how much time it would take to carry out the assessments, but we estimate that it would involve the equivalent of about three quarters of the time of an experienced counsel. The workload could be spread around 3 or 4 experienced counsel. Assuming a salary of about \$160,000, the proposal would involve a cost of about \$120,000 per year. The cost could be less if the focus was restricted to Bills.

Our recommendations

- 184 We recommend that the SMT consider establishing an internal quality assessment system with the following features:
- 1 or more highly experienced counsel would be given the responsibility for assessing the quality of a randomly selected sample of between 5 to 10% of Bills and regulations:
 - the assessment would be made against specific and well-defined criteria. The various criteria would be given particular weightings depending on the priority that the PCO gives to various quality factors:
 - the assessment would need to take into account the various background circumstances (such as the Government's policy and timing pressures):
 - the counsel who carry out the assessment would be responsible for providing consolidated information for inclusion in the annual report:
 - the counsel who carry out the assessment would be responsible for providing other information to the SMT that will be useful in terms of improving quality. For example, identifying areas where consistency could be improved, where the PCO's systems or procedures could be improved, and where further training may be required.

D Review of large legislation projects

- 185 During the course of any year the PCO undertakes a number of large legislation projects (primarily in relation to Bills, but not infrequently in relation to regulations). Each project of this kind has its own challenges. These challenges can arise from the inherent complexities of the subject matter and also from other factors (such as tight time frames or policy changes).
- 186 We consider it worthwhile to establish a regular process of reviewing some of these projects. This would afford the opportunity in the case of each project to reflect on what happened during its different stages and identify where improvements for future projects could be made. Improvements may very largely focus on processes, but may also encompass developing better communication and enhancing relationships.

Which Bills and regulations would be reviewed?

- 187 It would not be appropriate for all projects undertaken by the PCO to be reviewed as to do so would be very time consuming and unlikely to be of universal benefit.
- 188 The most benefit is likely to be gained from reviewing large projects only. A large project would be one that has required substantial resourcing. This might be a project that has required a team of drafters, or a project that has required the substantial commitment of 1 drafter for a lengthy period of time. Equally, it may be a project that has been progressed over only a few months or a project that has extended over a year or more. The determinative factor would be total resourcing.
- 189 We suggest that about 5 to 10 large projects be reviewed annually with the actual figure being split roughly equally between the 3 drafting teams.

Who should instigate the review?

- 190 We consider that the reviews should be instigated and organised by the drafting team manager because—
- drafting team managers would be best placed to determine the projects most appropriate for the review; and
 - the involvement of drafting team managers at the initial stage indicates to instructing agencies the importance of the review.

Who would attend the review?

- 191 To ensure a review has beneficial outcomes, we suggest that the following persons should attend—
- the drafting team manager from the PCO;
 - the drafter or drafters involved in the project;
 - the instructors on the project;
 - the relevant manager from the instructing department.

Format of the review

- 192 We suggest that each review should follow a framework of pre-determined questions. A standard schedule of questions could be developed within the PCO for this purpose.

Feedback

- 193 Comments made at the review should be discussed with the drafters involved and, if appropriate to do so, other team members. Any matters arising of wider interest could be discussed with other drafting teams. In this way any learning from the review process could be used to improve processes and ultimately assist generally with improving the quality of legislation.

Our recommendations

- 194 We recommend that the SMT consider establishing a review process for large legislation projects, as follows:
- 5 to 10 large legislation projects would be reviewed each year;
 - the projects would be selected across the 3 drafting teams by drafting team managers;
 - drafting team managers arrange the review and invite the relevant persons from the instructing department to attend;
 - the review would follow a standard set of questions;
 - feedback from the review be used at an individual, team, or office level to improve processes and practices within the PCO.

E Using a computer tool to improve the quality of draft legislation

- 195 We have considered whether it might be possible to harness computer technology to help

us to measure the quality of legislation in a meaningful way. In this regard, we have considered 2 possible types of computer tool that may measure certain aspects of the quality of legislation. Option A involves an electronic tool that uses search “macros” to perform a number of checks on Bills and regulations. This tool would be developed specifically for the PCO either in-house or by Unisys. Option B involves a commercial product that could assess a Bill or regulation for readability.

Option A - a computer tool similar to the tool used in the OPC, Canberra

What is it?

- 196 The OPC in Canberra has developed a number of Microsoft Word macros to perform checks on its Bills.⁶⁹ The electronic tool is just one part of the OPC’s quality assurance arrangements.
- 197 The OPC’s tool uses the search function in Microsoft Word. The tool uses checks that are inputted into the macro from either a table or a database. The tool scans the document looking for particular text, combinations of text, and formatting. The tool produces a report that identifies issues. The report includes hyperlinks to the point in the document where the issue has been found.
- 198 The OPC suggests that the tool is quite versatile. In addition to searching for incorrect words (for example, “pubic” vs “public”), the tool is powerful enough to identify possible breaches of drafting directions and matters that may need consideration by counsel.

How could we use it?

- 199 The drafting manual has a large number of rules or guidelines that may be included in a search macro. For example,—
- paragraph 3.66 of the manual suggests we should never use certain archaic words:
 - paragraph 3.69 of the manual relates to gender-neutral language (so the tool could look for words like “he” or “his” and raise a flag if “she” or “her” do not also appear within a certain number of words, or raise a flag if words like “landlord” (rather than “lessor”) or “chairman” are used):
 - paragraph A3.44 of the manual states “Do not begin a sentence with the phrases “Subject to” or “Except as provided”:
 - paragraph A3.45 of the manual notes that we use “present to” rather than “lay before” the House of Representatives (so the tool could raise a flag if the words “lay before” appear within, say, 10 words of the words “House of Representatives”).
- 200 A computer tool that searched for “breaches” of the drafting manual such as those specified in *paragraph 199* will throw up some “false positives”. There may well be legitimate reasons for using a particular word or drafting technique that would otherwise

⁶⁹ See “Australian Office of Parliamentary Counsel’s quality assurance processes” by Meredith Leigh published in *The Loophole* – reproduced in Appendix 3.

be considered to be contrary to the rules. Specifying the rules that the computer program would apply would require careful thought. The types of rules could be tightly confined so that the number of false-positives is minimised. However, this may result in a failure to exploit the full potential of the tool. A broader range of rules would be more useful in terms of identifying potential issues, but would throw up more false positives.

201 The drafting manual contains many useful guidelines relating to structure. For example,—

- the “no more than 5 subsections” guideline (paragraph 3.24):
- the avoid subsubparagraphs guideline (paragraph 3.25):
- the avoid a “sandwich” guideline (paragraph 3.29).

202 Epic’s search functionality goes beyond mere text. It has the ability to search for tags, attributes, and entities (see under the “Find” tab). Accordingly, it should be able to search for matters relating to structure and identify whether, for example, a “sandwich” has been used.

203 If the PCO were to develop an electronic tool that contained a broad range of search tests, a person would still need to carefully consider the report that is generated by the tool in order to identify “true” errors. Given that the PCO’s guidelines are usually not hard and fast rules, there could be debate between drafters as to whether or not a particular result is in fact an error or just a matter of acceptable style.

How could this tool be used to measure the quality of legislation for audit purposes?

204 To answer this question, we need to bear in mind the above limitation (namely, that the tool will produce false positives and there could be debate as to whether or not a true error has been identified).

205 The performance indicator that is included in the annual report could be along the following lines:

The PCO aims to ensure that at least 95% of the Bills that are introduced and of the regulations that are drafted by the office are checked by the PCO’s Electronic Quality Assurance Tool. This tool ... [brief description]. During the 2012–2013 financial year, over 97% of those Bills and regulations were checked by the tool.

206 The comment in the annual report could end there. However, it could go further along the following lines:

The PCO aims to ensure that at least 95% of those Bills and regulations do not contain a significant number of errors as identified by that tool. During the 2012–2013 financial year, only 1.3% of Bills and 1.8% of regulations contained a significant number of errors that were identified by the tool.

207 Including this extra information may be useful. However, the annual report would probably then need to include some sort of explanation concerning the nature of the errors, how they came about, and what the office is doing about it. In addition, if this extra information were to be included, the PCO would need to develop a formal system to analyse the reports generated by the tool to identify whether or not a “significant”

number of errors are contained in a particular Bill or regulation.

What are the advantages and disadvantages from an “audit” perspective?

- 208 The PCO would be able to obtain a reliable and verifiable percentage of the number of Bills and regulations that have been assessed by the tool.
- 209 The tool would be able to be run by drafters and Counsels’ Assistants (CA’s) at any time during the drafting process in order to identify the current state of the document. However, for the purposes of the annual report, the tool could be run by (say) Editorial Services or PPU after the Bill is introduced or the signature copy of the regulation is printed.
- 210 If the annual report goes further by identifying the number of Bills and regulations that contain significant errors or a significant number of errors, more human intervention would be required. However, it should still be possible to produce a reliable and verifiable number or percentage.
- 211 To a certain extent, running an electronic tool has the advantage of objectivity. The test is run the same way each and every time. Of course, this objectivity is subject to the exercise of human judgment mentioned above.
- 212 But will the tool actually measure quality in a useful way? This will depend on the quality of the tool itself. A tool of this kind will always be fairly blunt. It will never be able to provide a comprehensive assessment of quality or guarantee that there are no errors. However, the OPC evidently finds that the tool is “an excellent adjunct to the checking of [legislation] by parliamentary counsel and by trained editorial checkers”.
- 213 Within its limitations, a computer tool could be useful from an audit perspective as part of a range of indicators to measure quality.

What are the advantages and disadvantages from a broader quality of legislation perspective?

- 214 The OPC has identified the following benefits:
- speed – the OPC tool takes less than 1 minute to run and performs over 250 checks:
 - accuracy – the tool can identify things that are difficult for a human reader to detect. The tool would perform the test in the same way each and every time:
 - flexibility – the OPC has continually added checks to the macro. Some are added as a result of errors that have been detected in Bills. Others as a result of changes in practice.
- 215 The OPC has noted that one possible drawback of the use of the tool is that drafters may rely on the tool too much and do not do sufficient checking themselves. The OPC tries to reduce this risk by—
- ensuring that drafters clearly understand their responsibilities; and
 - having in place other quality assurance processes (proofreading etc).

- 216 One other possible drawback relates to achieving “buy-in” from drafters. We understand that searching for incorrect words is a concept that the PCO has explored in the past. The system was not implemented due to doubts as to its perceived utility. Some drafters may argue that it is impossible for a mere computer program to compete with the judgment and skill of an experienced drafter. Others may argue that peer review and proofreading provide sufficient quality assurance. They may add that it would be better to put the PCO’s time and money into improving these processes and into better training and development of counsel.
- 217 Yet the experience in the OPC suggests that an electronic tool is “an excellent adjunct” to other processes. We think that “buy-in” can be achieved if the PCO was committed to developing a meaningful tool.

How difficult would it be to develop such a tool?

- 218 We have briefly consulted with Information Services about this proposal and understand that generally speaking, it is possible to develop a tool of this kind. Searching for incorrect words should be straightforward and is a concept that the PCO has explored in the past.
- 219 Given that the PCO has an XML-based system, there are no formatting errors to detect like in a Microsoft Word-based system (like the OPC), although a computer tool could check for structural oddities such as sandwich clauses. If other breaches of drafting directions were able to be expressed in terms of a search construct, then the tool could find these too.
- 220 Ultimately the benefits of detecting errors and other issues by means of a computer tool will need to be weighed against the cost of developing the tool and the utility of the tool once developed. If the PCO developed the tool through Unisys, it could be pricey. The PCO could develop it independently, but then it would be a separate thing from Epic and more inconvenient to run.

Option B - using readability software to measure quality

What is it?

- 221 Readability describes the ease with which a document can be read. Readability computer programs, which involve mathematical formulas, were originally designed to assess the suitability of books for students at particular US grade levels or ages.
- 222 Readability software measures certain features of text that can be subjected to mathematical calculations. Readability software is usually based on one semantic factor (the difficulty of words) and one syntactic factor (the difficulty of sentences). Studies have confirmed that the inclusion of other factors in the formula used by the software contributes more work than it improves the results. Put another way, counting more things does not make the formula any more predictive of reading ease but takes a lot more effort.
- 223 Many readability software products have been developed to apply readability formulas.

Some products are based on characters per word and characters per sentence while others measure syllables. The difference between computerized measures depend on the decisions of the developers about how to measure sentences or words. For example, some programs treat a full-stop, colon, or semi-colon as the sign of the end of a “sentence”. This is in keeping with some research that concludes that the sentence is not the unit for measure. Rather the “sousphrase” (or clause) represents the unit of thought for measure because it is the cognitive decoding unit.

Things readability software can do

- 224 The primary advantage of readability software is said to be that it can serve as an early warning system to let the writer know that the writing is too dense. It can give a quick, on-the-spot assessment.
- 225 Sometimes readability tests are considered useful to show measurable improvements in written documents. They provide a quantifiable measure of improvement or simplification.

Limitations on readability software

- 226 Readability software cannot measure or determine—
- how complex the ideas are:
 - whether the content is in a logical order and uses appropriate headings and structure:
 - whether the vocabulary is appropriate for the audience:
 - whether the text is free of ambiguity:
 - whether the text is legally effective, conforms to drafting standards, and complies with the LAC guidelines:
 - whether the material appears in a form and style that is easy or hard to read.
- 227 In summary, readability software can play a useful but limited screening role in the prediction of readability.

Use of readability software in other drafting offices

- 228 The UKOPC has recently been investigating the use of readability software. In a paper to the UKOPC Office Board (OPCB (08) 1/03), the following points were made:

An important point that emerges from the research is that the elements that make a text easy or hard to read tend to occur together. Writers who use long sentences, it turns out, are also writers who tend to use the passive voice, words with lots of syllables, unusual words and so forth. As a consequence, measuring two or three characteristics of a text generally gives results which are little less reliable than measuring a whole battery of characteristics. It follows, too, that a wide range of differently-constructed tests, measuring different characteristics, will tend to give similar results. There are at least 200 different tests recorded in the literature, but for our current purposes, Professor McMillan’s colleagues say that the well-known test used in our November 2007 paper (Flesch-Kincaid) serves well enough.

The tendency for characteristics of style to clump together has another consequence: you

cannot use the tests to derive a sensible recipe for improving readability. Flesch-Kincaid, for example, measures average number of words per sentence and average number of syllables in a word. Editing a text to reduce both will improve the Flesch-Kincaid score, but is likely to have much less of an effect on readability, because the other elements associated with sentence length and many-syllabled words will not have been addressed by the editing.

Perhaps the main conclusion to draw is that a readability test is not a measure of readability in some comprehensive sense. What the tests seem to be reasonably good at is acting as an indicator that there are problems with a text, but with further work needed to see how real and how serious the problems may be. The other important qualification is that the way that the tests score texts depends on the groups of readers on which the tests are calibrated. Many of the tests, including Flesch-Kincaid, were originally designed to assess readability for secondary schoolchildren or the general public. One needs to be cautious in applying the tests to texts whose principal users would be members of the legal profession.

229 Out of interest, the UKOPC has calculated the Flesch-Kincaid scores for some legislation drafted by the Office. The test was confined to Acts that were 30 sections or more long. The results are shown in the following table. “Grade Levels” are US school levels. For example, a score of 8.0 means that an average 13 to 14 year old would understand the text.

Year (and number of Acts sampled)	Flesch–Kincaid Readability Software Grade Level Score				
	Average	5.9 and under	6.0 - 6.9	7.0 - 7.9	8.0 and over
2007 (9)	7.6	0	2	4	3
2003 (20)	6.9	2	9	6	3
1998 (14)	7.9	0	3	5	6
1988 (15)	7.4	0	6	5	4

230 The report decided that:

No firm conclusions can be drawn from these figures. There is a hint that the readability of the Acts produced by the Office may have improved in the last ten years, but statistically speaking that could easily be due to chance fluctuations from one year to the next.

231 As at February 2008, the report concluded that it is a complicated issue to decide what help readability tests might offer to the UKOPC in assessing its output. The tests have proved helpful in other fields—

but to do a proper assessment of what help the tests might offer in the area of legislative drafting requires becoming familiar with a large and in some cases quite complicated and technical literature. We do not have time to do that sort of work in-house; but without doing the work it is not possible to reach informed conclusions about what the tests might offer. What is needed is to have someone identify and summarise the relevant literature and to establish, by directly approaching them, what use, if any, other

drafting offices make of such tests.

How could the PCO make use of readability software?

- 232 Two separate readability programs are bundled with Microsoft Word. These are—
- the Flesch Reading Ease test⁷⁰. This rates text on a 100-point scale. Higher scores indicate text that is easier to read while lower numbers mark passages that are more difficult to read. A score of—
 - 90.0–100.0 indicates that it is easily understandable by an average (US) 11-year-old student;
 - 60.0–70.0 indicates that it is easily understandable by 13- to 15-year-old students;
 - 0.0–30.0 indicates that it is best understood by university graduates
 - the Flesch–Kincaid Grade Level (as used by the UKOPC)⁷¹. This translates the 0–100 score to a U.S. grade level.
- 233 One way of running the software would be to—
- copy and paste the legislation from a pdf into a Microsoft Word document; and
 - tidying up the document so as to remove elements that may compromise the result; and
 - running the tool.

How could readability software be used to measure the quality of legislation for audit purposes?

- 234 The performance measure that could be included in the annual report would be along the following lines:

The PCO aims to ensure that at least 95% of the Bills that are introduced and of the regulations that are drafted by the office are assessed for readability using Flesch–Kincaid Grade Level software. Flesch–Kincaid ... [brief description]. During the 2012–2013 financial year, over 97% of those Bills and regulations were checked using this software.

- 235 Possibly the performance indicator could end there. However, if more information was considered desirable, the annual report could add:

The PCO aims to ensure that at least 95% of those Bills and regulations have a readability level of less than [?]. This means that the text is expected to be understandable by an average [x year old] student. During the 2012–2013 financial year, only 1.3% of Bills and 1.8% of regulations had a level above [?].

⁷⁰ Using the formula $206.835 - 1.015(\text{total words}/\text{total sentences}) - 84.6 (\text{total syllables}/\text{total words})$.

⁷¹ Using the formula $\text{FKRA} = (0.39 \times \text{ASL}) + (11.8 \times \text{ASW}) - 15.59$ where FKRA = Flesch-Kincaid Reading Age, ASL = Average Sentence Length (i.e., the number of words divided by the number of sentences), and ASW = Average number of Syllables per Word (i.e., the number of syllables divided by the number of words).

What are the advantages and disadvantages from an “audit” perspective?

- 236 Readability software has the advantage of applying the same test in a consistent manner. In this sense, the software offers an objective assessment free of human subjectivity. The PCO would be able to obtain a reliable and verifiable percentage of the number of Bills and regulations that have been assessed by the software and the results achieved.
- 237 The software can be run by drafters and CAs at any time during the drafting process in order to identify the current state of the document. However, for the purposes of the annual report, the software could be run by (say) Editorial Services or PPU after the Bill is introduced or the signature copy of the regulation is printed.

What are the advantages and disadvantages from a broader quality of legislation perspective?

- 238 The advantages of readability software are—
- speed – it doesn’t take much time to run the software over a document:
 - accuracy – the software performs the test in the same way each and every time:
 - cost – the software is already built into Microsoft Word:
 - usefulness – the software is reasonably good at providing a rough and ready indicator that there are problems with a text. In other words, it could act as a “screening” device.
- 239 However, the software is blunt and does not provide a comprehensive assessment of readability. In addition, the software has not been developed with legislation specifically in mind. As noted above, the software was originally developed to assess the suitability of books for students of particular ages. New Zealand legislation has particular characteristics that may skew the results one way or the other. For example, at this stage we are not sure whether the software deals with paragraphs and subparagraphs as separate sentences. Given that the software is not designed with legislation in mind, it may be difficult to assert that the software shows that the legislation is readable by persons of a particular age group.⁷²
- 240 The above factors may lead to a failure to achieve “buy-in” from drafters. Some drafters may argue that it is impossible for a mere computer program to compete with the judgment and skill of an experienced drafter and that peer review and proofreading provide better (albeit subjective) mechanisms for assessing readability.
- 241 At any rate, readability software could never be seen as a complete answer but only a potentially useful adjunct to other processes.
- 242 To further assess the potential usefulness of readability software the PCO could—

⁷² There are a number of answers to this. First, we could use the Flesch Reading Ease test rather than the Flesch-Kincaid Grade Level test. The former merely gives a score without attempting to translate this into a US Grade level. Secondly, with a little experimentation the PCO could develop an in-house bench-mark. For example, it could decide that a score above a certain level indicated that the Bill or regulation was reasonably readable.

- run the software over a reasonable sample of documents. We could ask Editorial Services to make a “human” assessment of the readability of those documents. We could then see whether there is a good correlation between the computer results and the human results (ie whether a relatively good computer score is consistent with a good score from the proofreaders):
- make inquiries with the UKOPC and other drafting offices as to their use of readability software.

F Offering a Legislation Process Course at PCO

243 We recommend that the SMT give consideration to the PCO offering a legislation process course to new instructors in the public service along the lines of the programme that presently operates at the OPC in Canberra. Although the PCO already has some measures that aim to educate officials in instructing departments about the preferred methods of working with the PCO through the Guide to Working with the Parliamentary Counsel Office⁷³ and by providing seminars to client departments on an ad-hoc basis, we are concerned that these measures have a fairly low profile and do not provide even coverage throughout the public service (particularly the seminar programme which appears to be co-ordinated by drafting team managers on an ad-hoc basis). Implementing a regular training programme for instructors across the public service would be a way of overcoming many of the shortcomings of the existing programme and also be a means of more evenly sharing the burden of providing client training among the PCO’s drafting staff.

244 We do not think such a programme would be too difficult to organise as many training resources already exist within the office. However, the programme would need to be coordinated by at least 1 or more drafters in order to organise and agree on materials and to compile a roster of drafters to give the presentations.

245 We suggest that the training programme be offered regularly, say every 2 months (or at least no less than 4 times a year) and be explicitly targeted at those with little or no experience in giving instructions to the PCO. We consider that the training occur at the PCO (instead of the premises of client instructors) and that the training be open to all instructing departments within public service so that client instructors can access the training offered by the PCO at the time most suitable to them (which would facilitate uptake of the training).

G Sponsoring a Statutes Law Revision Bill on an annual basis

246 We recommend that the SMT consider the idea of sponsoring a Statutes Law Revision Bill at least once a year as a means of directly improving the quality of the statute book

⁷³ Available at www.pco.parliament.govt.nz/

by eliminating identified errors.⁷⁴ While this idea is novel in New Zealand, experience in Australian drafting offices shows that these kinds of Bills promoted by drafting offices are considered to be non-controversial and an efficient way of improving the integrity of the statute book. Although the current Statutes Amendment Bill (SAB) may be considered as going some way towards this goal, the impediment of requiring cross-party support for all amendments included in the SAB means that some errors in certain legislation may never be addressed in a timely way because the controversial nature of the principal Act means it is simply not amenable to changes via the SAB.⁷⁵ While historically the PCO has rarely sponsored legislation, the Legislation Bill promoted by the PCO has provided the office with recent experience of this process which would stand it in good stead for sponsoring other legislation.

- 247 If the SMT was interested in adopting this recommendation, we acknowledge that it would require Ministerial and Cabinet approval in the usual way and consultation with departments with legislation affected by the proposed legislation. It may also require discussion with the Office of the Clerk if changes were required to the Standing Orders.⁷⁶ However, we do not consider that these factors are insurmountable obstacles to getting an ongoing programme of statute revision off the ground. We believe that the benefits to be gained from a programme of timely correction of the statute book are substantial, and is increasingly necessary given the advances that the PCO has made in providing electronic access to legislation to the public.

H Encouraging greater use of exposure drafts

- 248 Finally, we recommend that the SMT consider whether the PCO should become more proactive in encouraging the use of exposure drafts. Currently, some legislation drafted by the PCO is made available for public consultation by an exposure draft,⁷⁷ including some high profile draft legislation.⁷⁸ However, we are concerned that this occurs fairly infrequently relative to other comparable drafting offices⁷⁹ and the PCO could do more to encourage the use of exposure drafts, for example, by reporting in the annual report the number of Bills or regulations released as exposure drafts each year. By raising the profile of exposure drafts in the annual report, this practice could have the beneficial effect of encouraging greater use of exposure drafts for suitable drafting projects in the

⁷⁴ We note the recently introduced Regulatory Reform (Repeals) Bill and the draft Regulatory (Revocations) Order 2010 sponsored by the Minister of Regulatory Reform, if enacted, would overcome many of the current problems relating to spent legislation.

⁷⁵ For example, the Employment Relations Act 2000.

⁷⁶ Presently, Standing Order 259 enables omnibus Bills to be introduced that amend more than 1 Act but only if the amendments to be effected to each Act are of a similar nature.

⁷⁷ For example, the Patents Bill and the Insurance (Prudential Supervision) Bill.

⁷⁸ For example, the Criminal Procedure (Simplification and Modernisation) Bill.

⁷⁹ For example, the Office of Parliamentary Counsel in Canberra and the Parliamentary Counsel's Office in New South Wales.

future.⁸⁰

- 249 We do not recommend that annual report should set a specific target for the number of Bills or regulations that should be drafted using the exposure process each year, since ultimately the decision to use exposure drafts is made at Ministerial level over which the PCO has little control.

⁸⁰ This effect has previously been noted by the Office of Parliamentary Counsel in Canberra. See OPC Annual Report, 2009–2010, page 27.

Performance measures that we do not recommend

250 This section briefly discusses two performance measures that we have considered but do not recommend. These relate to “drafting errors” identified in court judgements and the frequency of remedial legislation to fix identified errors. Our reasons for rejecting these potential measures are discussed in more detail below.

A Court judgments that identify “drafting errors”

251 From time to time, court judgments are given that suggest that the legislation being considered by the court contains an error or is defective in some way.

252 We have considered whether the PCO could collect data about these judgments that could be used as an indicator of quality. The reference in the annual report could be along the lines:

During the 2010/2011 financial year, 5 court judgments identified drafting errors in legislation drafted by the office. In the previous financial year, there were 7 court judgments that identified such errors.

253 It could be argued that court judgments offer an objective and independent assessment of our legislation by highly qualified lawyers (ie Judges). Also, it could be argued that this assessment has the advantage of being practical in nature in the sense that it identifies “real-world” practical problems with legislation.

254 However, we do not recommend this option as a meaningful measure of quality. Our reasons, in summary, are as follows:

- the annual report needs to be able to measure our performance in a particular financial year (namely, the previous financial year). A problem in legislation that draws the attention of a court can be a “latent defect” that has existed in the legislation for many years and has only recently come to light. Accordingly, the fact that a court has, in a particular year, given a judgment that identifies a defect in legislation, cannot be used as an indicator of the office’s performance in that particular year:
- it is usually difficult to determine whether a particular defect is of a “drafting” nature or is attributable to the Government’s policy or to some error or omission on the part of the department. Even when the court identifies the error as being a “drafting error” it is often debatable as to whether in fact the error is attributable to the policy:
- Judges often differ as to whether a particular situation actually involves an “error”. For example, 1 Judge may attribute a particular problem to an “error” while another Judge resolves the case by means of interpretation:
- the fact that an error has been identified, does not give a reliable indication as to its significance. Merely counting the number of errors identified does not give a reliable measure of quality because it does not indicate whether the errors are trivial or significant in nature. Also, comparing the number of errors identified in different financial years would not give a reliable indication of whether “quality” had improved:

- whether or not there is a judgment in the first place depends on whether or not the matter is litigated. A particular piece of legislation could be of questionable quality (in terms of readability, workability, etc) but this may never be tested in the courts.

255 In these circumstances, we do not think that court judgments can provide a reliable measure of quality.

B Enactment of remedial legislation

256 We have also looked at whether the PCO could collect data about legislation that is needed to correct errors and whether such “remedial legislation” could be used as an indicator of quality. The reference in the annual report could be along the lines:

During the 2010/2011 financial year, 5 Bills were introduced to correct 25 separate drafting errors. In the previous financial year, there were 4 Bills introduced to correct 29 separate drafting errors.

257 It could be argued that this measure has the advantage of being independent of the judgement of the office. Also, it could be argued that this measure has the advantage of being practical in nature in the sense that it relates to “real-world” practical problems that the Government has decided need to be corrected by subsequent legislation.

258 However, we think that this option has similar disadvantages to the option relating to court judgments. Those disadvantages are as follows:

- the annual report needs to be able to measure our performance in the previous financial year. A problem in legislation that needs to be corrected by remedial legislation can be a “latent defect” that has existed in the legislation for many years and has only recently come to light. Accordingly, the fact that Parliament has, in a particular year, corrected a defect in legislation, cannot be used as an indicator of the office’s performance in that particular year:
- it is usually difficult to determine whether a particular defect is of a “drafting” nature or is attributable to the Government’s policy or to some error or omission on the part of the department:
- the fact that an error has been corrected by remedial legislation does not give a reliable indication as to its significance. Merely counting the number of errors corrected does not give a reliable measure of quality because it does not indicate whether the errors are trivial or significant in nature. Also, comparing the number of errors corrected in different financial years would not give a reliable indication of whether “quality” had improved:
- whether or not a Bill is introduced to correct an error depends on whether the Government has identified the error and has decided to correct it. A particular piece of legislation could be of questionable quality (for example, in terms of readability) but this may not necessarily be corrected by remedial legislation.

259 In these circumstances, we do not think that the amount of remedial legislation can provide a reliable measure of quality.

Terms of Reference

The working party was asked to look at the following matters under the heading improving drafting practice:

- ways to gauge the effectiveness of our existing plain language drafting techniques:
- ways of measuring the overall quality of our drafting (including in relation to plain language and legal effectiveness).

The working party was also asked to specifically consider—

- improvements to the client survey or alternative methods of gaining stakeholder feedback:
- the computer based evaluation of Bills and regulations.

The following matters were excluded from the working party's terms of reference:

- developing quantitative benchmarking with other Australian offices (for example, page counts):
- productivity comparisons (for example, number of counsel vs number of pages produced in New Zealand historically, or with Australian offices).