

**LEGISLATIVE DRAFTSMEN:
THEIR TRAINING AND RETENTION**

Memorandum by the Commonwealth Secretariat
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The vexed problem of selecting, training and retaining competent legal draftsmen has been a recurring topic on the Agenda of Law Ministers and is one which, more than any other single topic, has dominated the activities of the Legal Division since its inception as well as those of the Commonwealth Fund for Technical Co-operation.

2. Since its courses began, the CFTC has provided basic training in legislative drafting for over 200 law graduates from Commonwealth countries. But, despite such an influx into this most necessary branch of the profession, the dimensions of the problem remain much the same. The courses continue to be oversubscribed (indicating both a continuing need as well as the confidence of Ministers in them), and request for experienced law draftsmen to serve as field experts outnumber all other requests to the CFTC for technical assistance in the legal field.

3. To provide Ministers with the personal insights of two highly-experienced law draftsmen, the Secretariat has invited papers from Mr. Gerry Nazareth, QC, (presently of Hong Kong but with experience also in Kenya and the Solomon Islands) and Mr. Jock Ewens (lately the Australian Federal Government's First Parliamentary Counsel).

4. In respect of training, both papers highlight the desirability of a master-apprentice relationship and point to an area in which larger jurisdictions may be able to extend assistance to smaller countries by accepting their younger draftsmen to work with and learn at the elbows of those experienced in the field. In this regard, the arrangements being concluded in Australia for this to happen in both Federal and State drafting offices (in lieu of the formal training previously offered as part of that country's foreign aid programme by the Australian Legislative Drafting Institute) is particularly noteworthy.

5. The papers also point to ways in which co-operation between the offices of law draftsmen might be further improved in order to make maximum use of their services. The question, too, of the status of draftsmen and the rationale behind more favoured treatment for them, is also addressed.

6. Neither author lays claim to any radically new approach to what are problems of long standing, but each advances the debate and makes constructive suggestions for the future.

ANNEX TO LMM(83)6

**LEGISLATIVE DRAFTSMEN:
A CONTINUING DEARTH**

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Introduction

This paper examines the problem of the continuing shortage of legislative draftsmen in the developing Commonwealth, with particular reference to the training, recruitment and retention of draftsmen, and the sharing of available drafting resources. It is not based on

any recent survey, and is intended to reflect the views of a draftsman closely involved in the practical implications of the problem for many years.

Background

2. At their Meeting in January 1973, Commonwealth Law Ministers, who had for a number of years expressed their concern at the dearth of legislative draftsmen, considered ways and means of alleviating the shortage in this expert field. They agreed that -

Arrangements should be initiated under the CFTC for an assessment of specific needs for draftsmen in each country and for the identification of appropriate tutors with a view to providing, on a regional basis, training facilities in legislative and other legal training.

Shortly thereafter the Secretary-General sought information from Commonwealth Law Ministers in respect of each of their countries as to the number of draftsmen needed, the number of legal officers who could be released for training and the number of places that might be available for in-service training of officers from other countries.

3. Following receipt of the information sought, the Secretary-General appointed a number of Consultants to undertake appraisal tours in the various regions of the Commonwealth and ascertain, *inter alia*, individual needs of member Governments; to advise on suitable locations for regional training courses; and to make recommendations on the size of training courses, the arrangements and facilities that would be required and to identify experts who might be available to provide training. Finally, and in hindsight, perhaps most significantly, the consultants were asked, if invited by individual ministers, to consider the conditions of service in the countries visited in relation to the development of drafting services.

4. Subsequently a Seminar was convened by the Secretary-General in London in March 1974 to enable the Consultants and experts in the training of legislative draftsmen to advise on the structure and content of the proposed regional training courses and related matters. The report of the Seminar (1974 Seminar Report) prepared by the Commonwealth Secretariat and incorporating the individual reports of the Consultants, is unquestionably the most valuable document on the problem. Its conclusions and recommendations remain as valid today as they were in 1974. Since then the Commonwealth Secretariat has been active in promoting the training of draftsmen, in particular through the CFTC. It has mounted a succession of regional drafting training courses attended by no less than 184 trainees from some 33 jurisdictions. Nonetheless, the problem has not been solved, nor even significantly diminished. Surveys on legal resource needs in the Pacific, Caribbean and African Regions commissioned by the Commonwealth Secretariat in 1979 clearly established this; indeed in some territories the position is said to be no better and may actually be more acute than it was in 1974.

5. No useful purpose would be served in this paper by churning over ground that has already been thoroughly covered in the 1974 Seminar Report and in the subsequent surveys mentioned. But it is necessary to restate the following observations and conclusions -

(i) Legislative drafting presents special demands, significantly in excess of those in other legal disciplines. Draftsmen have therefore to be lawyers of above average ability and must in addition possess certain other qualities not all that commonly found, e.g. a constructive imagination, a meticulous and orderly approach, facility in the use of language.¹

(ii) Despite the additional demands and the more able or even exceptional lawyer required, legislative drafting does not offer commensurate attractions and rewards; on the contrary it is subject to some powerful disincentives.²

(iii) Substantial incentives are required if competent draftsmen are to be attracted and retained.

6. This is both the crux of the problem and the key to solving it. Every consultant appointed in pursuance of the 1973 Commonwealth Law Ministers' Meeting Communique recorded the necessity of incentives in one form or another. The 1974 Seminar concluded that "it was essential to recognise that no training programmes, however effective, could in the long term, solve the basic problem, which was how to attract the right kind of lawyer to the drafting profession and, after recruitment, how to retain the services of competent draftsmen" (p.9, 1974 Seminar Report; emphasis supplied). That

conclusion has been shown to be entirely accurate by the three surveys conducted in 1979 in the African, Caribbean and Pacific regions, and the continuing extent of the problem today.

Training

In-service training

7. Training of draftsmen is a protracted business, regarded ideally as stretching to six or seven years and more. On-the-job training, or in-service training, as it is also known, is recognised as the most effective, indeed some think, the only effective form of training. It is the standard form of training in the developed countries, and is recognised as such even where it is sought to be accelerated or refined by training courses. Of course, like any other form of training, the quality of in-service training can be variable. Not all draftsmen have the patience or disposition to be effective mentors. When pressure of urgently required legislation mounts, trainees and their training may be neglected. On the other hand, trainees progressively participate in drafting under pressure which is an essential part of their training. Despite its shortcomings, in-service training, in my view, remains the most effective form of training.

8. However, in the developing countries, particularly the smaller territories, it can only be regarded as a distant and meanwhile limited option. The urgency of the problem precludes general reliance on so lengthy a process. Not only are draftsmen of sufficient experience unavailable to undertake training but resources are said to be so sparse that suitable candidates cannot be found or made available in adequate numbers.

9. Ideally, in-service training should be carried out locally, in the office in which the candidate will ultimately have to work. This was recommended by the 1974 Seminar (at p.15 of the 1974 Seminar Report) and it offers major advantages. Employing Governments are not totally denied the services of the trainees, who produce legislation of progressively increasing importance. Their tutors, too, are able to continue to draft legislation, though on a reduced scale if training is to be effectively provided and accorded its due priority. In addition to acquiring drafting skills, the trainees will in the process acquire the considerable body of knowledge of local constitutional, statutory, administrative, political and procedural matters with which a draftsman must be familiar to discharge his functions effectively; they will also develop the working relationships within the civil service that so usefully oil the wheels of machinery that can be frustratingly sluggish.

10. If such in-service training is not available the most suitable alternative would be in-service training in a regional legal unit or centre of the sort contemplated in the 1980 Survey Reports ³ and proposed in the Report of the 1981 Meeting of Pacific Islands Law Officers ⁴. A part of such training might conceivably be undertaken in the trainees' own country and all of it should relate to relevant legislation and relevant circumstances. Indeed the scope for providing a measure of in-service training could prove a major bonus from regional legal units or centres.

11. Yet another form of in-service training that has been of considerable benefit, is attachment to the drafting offices of developed countries. To be effective, such training needs a considerable input by the staff of the drafting office and it can cause strains and stresses not generally appreciated. In the case of novices, attachment has to be for a substantial period to be useful, I would say for at least nine months to a year at the very minimum. Draftsmen with some knowledge and experience merely seeking to sharpen their skills could benefit from attachments of even a few weeks. I believe that assistance of this sort could be provided on a much greater scale than it is, not only by the developed countries, but by some of the developing countries with adequate resources and facilities.

Training Courses

12. For the purposes of this paper, these may be said to be of two sorts: ad hoc CFTC regional courses, and other drafting courses available in Commonwealth and common law jurisdictions.

CFTC Regional Drafting Courses

13. The genesis of these is explained in paragraphs 2, 3, and 4. In recommending them in the 1974 Seminar Report, the Consultants clearly recorded the inherent limitations of such courses and emphasised the necessity to attract and retain the right kind of lawyer (see paragraph 6 above). Likewise they drew attention to the importance of selecting candidates of suitable ability and experience ⁵.

14. Inevitably there has been some criticism ⁶ of the courses and some of the small States of the Pacific have not been overly enthusiastic about them ⁷. But there can be no question that the courses have, in substance, provided what was recommended. That the courses have not had a significant effect on the problem (which was revealed by the 1980 surveys, especially that conducted by Professor Patchett in the Caribbean) is not because of any inherent weakness in the courses themselves. On the contrary, if, as the Seminar recommended, candidates of suitable experience and ability had been provided, the courses followed by in-service training, and above all the trainees retained by suitable incentives, the 184 trainees, who over the years have participated in these courses, should by now have made a substantial contribution to meeting the problem.

15. It is understood that because of financial constraints the number of these courses has been reduced. The opportunity this presents should be taken of tightening selection procedures with a view to securing trainees who at least seem to have the requisite ability, aptitude, and commitment to a career in drafting; and not least for whom subsequent in-service training is assured.

Other Drafting Courses

16. There is an increasing range of drafting courses becoming available in the Commonwealth and common law jurisdictions, particularly in North America, e.g. Edinburgh University Legislation Course, Ottawa Legislation Training Programme, Columbia University Seminar. Of necessity these courses, which are designed to provide individual attention, can only cater for very limited numbers of students. It would be useful if, in addition to all the other assistance afforded by the Legal Division of the Commonwealth Secretariat, it could also provide information on the courses available and some assessment of them in the context of the special needs of developing countries. But given the extent of the problem it is difficult to conceive of any of these courses not being of some benefit. Besides many of them, conducted as they are by prestigious institutions and organisations, may well attract to a career in drafting able lawyers who might otherwise be lost to other disciplines. Use of these courses should therefore be encouraged.

Training of Graduates

17. Within the Commonwealth, subject to one significant exception, it seems to have always been the rule that draftsmen should be qualified lawyers. The exception referred to is the Barbados LL.M drafting course designed primarily for graduates and not professionally-qualified lawyers. Professor Patchett in his 1980 Report on Bermuda and the Caribbean strongly supported this approach, pointing out that there is no obvious reason why the career draftsman should need to complete the two-year professional course. He also stressed the necessity for an associated career structure and attractive remuneration.

18. I believe there are major advantages, particularly in the developing countries where drafting instructions tend to be rudimentary, in having as draftsmen qualified lawyers who have had some professional experience. This does not mean that law graduates, though not professionally qualified, should not make competent draftsmen. Given the difficulties, therefore, of attracting lawyers of suitable ability, Professor Patchett's view deserves strong support. Besides, not being professionally qualified, such draftsmen would not be directly exposed to the allurements of private practice or appointment to the Bench, not that that should be reason for denying them an appropriate career structure and attractive advancement prospects. On this basis there would be no reason why law graduates of suitable ability should not be sponsored for all available means of drafting training. This is obviously a limited option and would certainly not displace professionally-qualified lawyers as the overwhelming source of draftsmen; but it could prove useful and merits serious consideration.

Training - General Situation

19. In general though there must, as always, be some scope of improvement, the training situation does not seem to be unsatisfactory in the circumstances prevailing. If effective incentives were provided and attracted trainees of the necessary experience, ability, aptitude and commitment to a drafting career, they would have to be matched by a corresponding effort to effect all practicable improvements in training. In regard to CFTC drafting courses, I believe some minor shift of emphasis would be useful. Specifically, I think the courses could, where that was not already the case, be made more intensive, and have more emphasis placed on practical drafting. This is no reflection on the able and experienced Directors of the courses to whom all concerned must be indebted. In addition, the essential follow-up of in-service training should be assured, if necessary, as a pre-condition to admission of trainees to such courses.

20. In-service training, too, needs to be accorded higher priority and importance. All too often it assumes secondary importance to the drafting of urgent legislation. It is not unknown in my experience, for trainees to be neglected or to receive cursory supervision and instruction during periods of pressure for urgent legislation. It is not unknown in my experience for trainees to be neglected or to receive cursory supervision and instruction during periods of pressure for urgent legislation. Officers expected to provide in-service training should be afforded sufficient time to do so, which means a reduced workload of drafting. Ideally a particular draftsman should be charged with the responsibility of ensuring that each trainee is put through a programme designed to meet his particular requirements.

Recruitment and Retention of Draftsmen

21. This, as has been indicated, is both the crux of the problem and the key to its solution. Insufficient numbers of draftsmen are being recruited, particularly lawyers of appropriate ability and aptitude. And far too many draftsmen move on to other occupations. The surveys conducted by the Consultants in 1974 indicated that over 100 additional draftsmen would be required during the following three years. By all accounts that shortage persists.

22. The Consultants in 1974 saw the solution as being essentially the provision of suitable incentives. Their views were summarised at page 195 of the 1974 Seminar Report in the following way :

"14. All the Consultants examined the conditions of service of legal draftsmen in the countries visited and their Reports go into considerable detail about such matters as salary differentials, working conditions and promotional prospects. The Consultants emphasise that the training schemes by themselves, however efficient, are unlikely to remedy the serious shortage of draftsmen. Among the suggestions made are the following :-

- (a) there should be an increased recognition of the status and the central role of the draftsman in the legislative and law reform processes;
- (b) attractive salaries, perhaps with special incentives, should be offered both at recruitment and throughout the working career;
- (c) promotional opportunities should be improved;
- (d) suitable working conditions (principally proper office accommodation and support staff, adequate library and research facilities, planned drafting programmes) should be provided;
- (e) attempts should be made generally to improve the standard of written instructions issued to draftsmen on the legislation they are required to draft."

23. One of the Consultants, Mr J.Ö. Ewens, CMG, CBE (formerly First Parliamentary Counsel, Australia) expressed himself in these forceful terms :

".....the chances of arranging any course in legislative drafting in the Pacific area in the near future are slight. The reason is, of course, that there are no, or few, candidates in sight. This illustrates what I have been saying for years, namely, that the problem of legislative drafting is not in training people but in attracting people to the work. Legislative drafting is specialised and difficult work. It requires lawyers of the highest attainments. Those who are capable of becoming legislative draftsmen can command a high income in other fields of legal work. The need is to increase the status and remuneration of drafting work, as has been done in Australia, the United Kingdom and, I think, New Zealand and is in course of being done in Papua New Guinea. The status of the top draftsman can be improved by making him responsible directly to a Minister, not to another law officer, such as a Solicitor-General or similar officer. His salary should equal that of the Solicitor-General or other officer in charge of a Law Department. It should not be less than that of a puisne judge. In Australia, a deliberate decision was made to pay first Parliamentary Counsel more than a puisne judge. By paying a high salary to the top man, those below him can also be paid higher salaries. Good draftsmen are scarce and they should be encouraged to make their work a life-time job. For promotion, they should not have to look to other legal work, such as that of Crown Counsel or Solicitor-General, or to judicial appointments. (Emphasis supplied)

The other Consultants were no less forthcoming ⁸.

24. Substantial improvements to incentives had in fact preceded the surveys conducted by the Consultants in 1974. However, an unfortunate feature of these was that they were centred upon improving the status and emoluments of the senior or chief draftsman, to the point that one Consultant was moved to observe that "it is not just the salary of the senior post in the drafting service which needs to be attractive" ⁹. But even these improvements only succeeded in bringing the emoluments of the senior post in some instances to the level of those of judges. As the Consultants observed, judicial careers are more attractive to lawyers than those in drafting. This has been demonstrated by some loss of senior draftsmen to judicial office. The need for some additional incentive is therefore obvious. It is difficult to see what realistic alternative there is to the better remuneration suggested by the Consultants. It is no less difficult to foresee other incentives and fringe benefits proving effective without better remuneration. Having regard to the largely wasted training over past years, it may well be cheaper to provide effective monetary incentives than to sustain the continuing cost of training and the damage resulting from the inability to produce much-needed legislation.

25. Despite the unanimity of expert advice on the necessity for effective incentives, these have not really been provided. Little wonder then that the shortage of draftsmen persists. I believe that it will not be solved until suitable monetary incentives are provided. I believe also that the major obstacle to the provision of monetary incentives is the view of establishment and civil service departments of Governments that this will produce unacceptable distortions of civil service remuneration relativities. If this is so, is the preservation of these relativities not too high a price to pay? And would something in the nature of an inducement allowance for drafting work necessarily damage such relativities? Even if that were so in principle, would not such an allowance readily been seen to be what it is? This incentive, the most effective if not the only effective incentive, should not be ruled out without careful consideration or reconsideration if need be.

26. But although in my view necessary, monetary incentives within the limits that can be realistically contemplated, are unlikely to prove effective without more; working conditions and other incentives need also to be considered. The Consultants listed the incentives they encountered or thought appropriate ¹⁰. These remain so comprehensive that in all the eight years that have followed the 1974 Seminar, the only additional incentives that I have heard suggested are extension of the retiring age to that of judges at the option of the draftsman, and recognition of the status of senior draftsmen by permitting them to appear with the law officers in court cases concerned with constitutional and similar issues (of which they tend to have special knowledge).

Sharing of Drafting Resources

27. By and large, trained draftsmen are locked into the Public Services of their employing Governments. And with virtually every Government short of draftsmen or without any to spare, the matter of sharing draftsmen simply does not arise save in exceptional cases.

28. A few countries have seconded the odd draftsman or two, to other countries or have offered to do so. It would seem that the possibilities are neither fully explored nor exhausted on an on-going basis.

29. Also, as I have mentioned, a trickle of experienced draftsmen does seem to come on to the market. Hong Kong, for instance, has been able to recruit a few and has been approached by several over the last few years.

30. As far as I can see it is only in relation to these two categories that any scope for sharing arises. Legislation can always be divided into two classes: the relatively simple, usually less important and generally straightforward; and the relatively difficult, usually more important and complex. It is the latter that demands the attention of experienced, skilled draftsmen. The sharing of such draftsmen may well produce the optimum use of their services and certainly the most equitable. How that should be achieved is another matter. The only scheme I know of that offers possibilities is that of regional legal units or centres which I believe the Legal Division of the Commonwealth Secretariat has under consideration¹¹. There must be formidable practical difficulties to be overcome, but there are obvious merits. The constraints of national civil service remuneration relativities will be avoided, which should enable experienced draftsmen to be recruited. The serious limitations and drawbacks of long range drafting will also be contained. In-service training could be provided. Above all sharing of the services of the draftsmen concerned could be achieved.

31. If a draftsman is available to assist more than one small country, and it is not possible to arrange for this through a regional unit or centre, then it may be possible for him to be based in one of those countries and to visit the others as judges have for long done in the Pacific Islands. I do not see this as a particularly effective or convenient arrangement, but I believe it could be made to work. I doubt whether it would be possible to obtain personnel, even unmarried personnel, on a wholly itinerant schedule; they would need to have a base. A draftsman's visit to the other countries would have to be long or often enough to enable the drafting of measures to be completed without undue delay. He would also require some secretarial assistance. The apportionment of them, costs, priority and so on are likely to pose considerable problems. Nevertheless, given the acuteness of the problem and the necessary will to make such an arrangement work both on the part of the draftsmen and the countries concerned, there is no reason why it could not be made to do so.

32. Drafting services have, in the past, been provided for very small and isolated dependent territories by draftsmen based overseas, using ordinary postal services for the purpose of communication. Those drafting services were never very satisfactory and were never called upon to meet anything like the present-day demands of even the smallest independent countries. I need hardly say that I do not consider that such arrangements would be satisfactory. Without the severe constraints of long distance communication and despite their sophisticated resources, even the developed countries experience difficulty in furnishing their draftsmen with adequate drafting instructions. It is therefore idle to suppose that small developing countries without such resources should be able to do so by corresponding through the mail.

Summary of Conclusions and Recommendations

33. (a) In-service training is the most effective form of training. (para. 7)
- (b) It should be undertaken (in order of preference) in the trainee's own country, in a regional legal unit or centre, or on attachment to a drafting office in any country willing to provide facilities. (paras. 9, 10 and 11)
- (c) Countries with adequate facilities could probably make more places available for in-service training to other countries that lack such facilities. (para. 11)
- (d) CFTC drafting courses should be continued, but selection procedures tightened to secure trainees who are suitable and for whom subsequent in-service training is assured. (paras. 14 and 15)

- (e) The Legal Division, Commonwealth Secretariat, should, if feasible, provide information on other drafting courses which may be available, use of which courses should be encouraged. (para. 16)
- (f) Law graduates, even if not qualified to practice, should, if of suitable ability and aptitude, be sponsored for training as draftsmen. (paras. 17 and 18)
- (g) Although existing training facilities are not unsatisfactory, there is probably some scope for improvement. (paras. 19 and 20)
- (h) The basic cause of the shortage of draftsmen is not training but the inability to recruit and retain lawyers of suitable ability. (paras. 21 to 26)
- (i) The solution is to provide appropriate incentives, of these suitably enhanced remuneration would be the most effective, but other incentives concerned with status and working conditions are probably also necessary. (paras. 21 to 26)
- (j) Sharing between small countries of draftsmen seconded or recruited ad hoc would probably best be achieved through regional legal units or centres, but a similar arrangement without the establishment of a unit or centre might also prove feasible. (paras. 27 to 32).

FOOTNOTES

1. "..... the work of the draftsman is central to the whole process of government. it calls for individuals with exceptional legal ability and all-round competence, it involves specialist skills and techniques which have to be learned but for which some, perhaps even most, have neither aptitude nor interest. The present shortage of legal draftsmen in the Caribbean is not so much the result of any general shortage of lawyers, nor the consequence of an absence of a training programme: it is directly related to the widespread failure to recognise the crucial importance of the work and, therefore, to agree upon a priority policy of trying to recruit the quantity and quality of persons actually needed, to provide conditions of service which are commensurate with their responsibilities and to make the conditions of work attractive to the more able young lawyer faced with a number of professional choices." Professor Keith Patchett - 1974 Seminar Report, p.78.

"It was generally agreed that in view of the difficult discipline of legislative drafting, aspiring draftsmen should be selected from the best of lawyers available. After considerable discussion the Seminar felt the following were the qualifications and qualities which should be looked for:-

- (a) Above average basic professional qualification in the legal field.
 - (b) Experience in legal practice, preferably in the legal service of the Government.
 - (c) Facility in the use of the language of legislative enactments.
 - (d) Interest in drafting as demonstrated in the trainee's practice; a systematic mind, orderliness in the formulation of thoughts, meticulous attention to detail and ability to work with accuracy under pressure.
 - (e) An inquiring, critical and imaginative mind.
 - (f) Ability to work with colleagues and those skilled in other disciplines, and a disposition to give and take constructive criticism and advice.
 - (g) Commonsense and social awareness." 1974 Seminar Report, p.12.
2. "..... drafting work itself imposes great demands upon its practitioner: there is no room for error, nothing can be left to chance or to be dealt with off-the-cuff. It requires special skills and techniques which are not quickly learned: job satisfaction is for that reason perhaps slow to come. It can be exceptionally hard work. In recent years, with the overall shortage it has often come to involve long hours of unremitting pressure and urgency where shortcomings or mistakes evoke criticisms by the politician, the judiciary and the legal professions which cannot be publicly answered. It is hardly surprising, therefore, that many officers introduced to this work have concluded that other parts of the legal service give at least equal possibilities of advancement with less drawbacks, whilst established officers wonder whether a different kind of appointment might not be better for themselves and their families. Thus I was informed that in one country in the last ten years some thirteen persons had been brought into the drafting service at the trainee level: only one has remained."

"The lawyer is seen as one whose work is primarily in or about the courts, whose success is judged by forensic achievements and whose professional life carries a certain glamour enhanced by the special dress for court and by photographs and mentions in the daily press. It follows, for those who hold such views that a job which entails full-time devotion to desk-work and the preparation of documents and which is anonymous and unpublicised is not "proper lawyer's work" and is within the competence of any ordinary person with a legal background. There is a regrettable tendency to see the office of draftsman as suited to those who cannot make a success of court practice and for that reason as less demanding work." Professor Patchett, ibid, pp.78 & 79.

"In the developing countries in particular, the attractions of private practice are very considerable. Apart from financial considerations, it must be borne in mind that the private practitioner is his own master and can live and work when he likes. Moreover, many young lawyers enjoy the prestige and publicity which attaches to private practice. Even if a young lawyer is attracted to the public service, he will often seek work in a department which is in the public eye or where the work does not make such heavy demands on his time and energies. There are so many opportunities open to young men and women of the very high calibre needed to make good draftsmen. Some do not wish to enter into a field which requires them, in effect, to become pupils again." Mr. Justice K.T. Fuad, then Director, Legal Division, Commonwealth Secretariat, ibid, p.140.

"Most West African lawyers are generally averse to any specialisation which confines them to chamber work. To most people within and without the legal profession, legal practice is synonymous with advocacy. There are very few lawyers who derive inherent satisfaction from legal drafting simpliciter, and who would therefore be content to devote their whole professional career to drafting. The strong cultural bias in favour of drama and public ceremony in West Africa also militates against engrossment in the back-room chores which are associated with drafting." Dr. S.K.B. Asante, ibid, p.180.

3. Bermuda and the Caribbean, Professor Patchett.
East, Central and Southern Africa, Mauritius and Seychelles, G.C. Thornton, OBE, QC.
Some Pacific Jurisdiction's, Dr G.P. Barton
4. Commonwealth Secretariat, 1981
5. "A scheme for training is unlikely by itself to remedy the shortage of draftsmen." p.110, 1974 Seminar Report.

"... officers should not be proposed as candidates for the course until they have had at least two years relevant experience"

"... the success of the whole scheme depends on the careful selection of candidates ... it should not be too difficult to determine whether he has the intellectual calibre, application and imagination required. He must, whatever else he is, be a good lawyer first and foremost" ibid p.137.
6. 1980 Report on Bermuda and the Caribbean: Professor Patchett, para. 4.45
1980 Report on East, Central and Southern Africa, Mauritius and Seychelles: G.C. Thornton, OBE, QC, para. 148.
7. 1980 Report on Some Pacific Jurisdictions: Dr. G.P. Barton, para. 131.
8. "The point was however continually made that it was much easier to find a person for appointment as a Judge than to find an efficient draftsman. For this reason the holder of the latter post either was already, or is about to be, paid a salary equivalent to, or higher than, that paid to Judges; this should assure the draftsmen that their chances of promotion are not prejudiced and should encourage them to remain as draftsmen." Mr. R.M.M. King - "Report on Asia", 1974 Seminar Report, p.48, para. 45A.

".... it was heavily impressed upon me that conditions of service and the present shortage were so inextricably joined that there was little value in offering

training facilities if officers were not likely to join or stay long in the drafting services once trained because more attractive alternatives existed elsewhere. Indeed it was suggested that training could actually improve the marketability and usefulness of these officers in other places. In my view, each Government for whom officers are trained will have to examine seriously whether training will have any substantial impact on establishments given the present conditions of service." Professor Patchett - Report on the Caribbean, ibid, p.79, para.2, see also pages 78-80.

"There is, I suggest, a strong case to be made out for a salary structure that is untrammelled by comparisons with other positions in the public service. Both the image and the status of the draftsman needs to be enhanced if any worthwhile and lasting progress is to be made." Mr. Justice Faud - Report on East and Central Africa, ibid, p.140, para.42, and see also paras. 39-44.

For inducements suggested by Dr. S.K.B. Asante in his Report on West Africa, see ibid, pp.130-131.

9. Ibid, p.140, para. 42.
10. See the Appendix to this Paper.
11. See paragraph 10 above.

APPENDIX

Incentives mentioned in the 1974 Seminar Report

1. Conditions of Service

- (a) The provision of more attractive salary scales which -
 - (i) offer financial rewards for those who have undertaken extra training and have acquired specialist qualifications which are at a premium;
 - (ii) encourage officers to choose to stay with drafting rather than to transfer elsewhere in the service merely to obtain an increased income;
 - (iii) are at least as good as, and preferably better than, found in other parts of the public service.
- (b) The provision of a career structure in legal drafting which involves a sufficiently large number of intermediary grades to allow early promotion to be gained by those who prove their quality and to offer regular promotion prospects for those who elect to stay with drafting.
- (c) The creation of a separate department or division of the public service for legal drafting, headed by a senior officer with salary and perquisites on a par with those enjoyed by those in high judicial office.
- (d) Where an officer in the drafting service is regarded as qualified for promotion to a post outside that service, a system of "notional promotion" whereby he may be offered additional pensionable emoluments personal to him so long as he remains a draftsman and equivalent to those which he would have gained on transfer.
- (e) Where a draftsman is appointed to the judiciary, the possibility of secondment back to the drafting service without loss of judicial status or perquisites.
- (f) Where the establishment of a drafting service is not feasible, the provision of special additional emoluments for the officer primarily responsible for drafting and provision for special payments to other officers whilst substantially engaged in drafting.
- (g) In connection with the training programme -

- (i) the payment during the period of training of additional emoluments over and above the normal legal service salary;
- (ii) immediate recognition of the successful completion of training by appointment to the special salary scale for the drafting service or at least by the payment of additional increments.

2. Standing and Prestige

- (a) The use of appropriate titles for the officers associated with legal drafting, e.g. "Chief Parliamentary Counsel" or "Director of the Legislative Service".
- (b) Equal treatment with other senior public legal officers for the award of honours, the conferment of Silk or similar status.
- (c) Affording opportunities for involvement with prestigious activities, e.g. international conferences.
- (d) Governmental recognition on public occasions of the essential importance of the work and the value to the community of the drafting service.
- (e) Full involvement of the draftsmen at all stages of the preparation of legislation with Government Departments and Committees and its enactment by Parliament

3. Working Conditions

- (a) The provision of a satisfactory working environment, especially the proper kind of office accommodation which allows concentration undisturbed by external activities; each draftsman should, whenever possible, be given an office of his own.
- (b) Discussions in connection with the draftsman's work should as a rule be conducted in his own office.
- (c) Whenever numbers permit, draftsmen should be encouraged to work in pairs, a procedure which has been found to produce better drafts and to contain a useful training element.
- (d) The provision of supporting non-professional staff of good quality.
- (e) The provision of adequate library facilities by -
 - (i) the allocation of sufficient capital and recurrent funding (if necessary with the assistance of technical aid);
 - (ii) arrangements for interchange of legislative materials with appropriate Governments.
- (f) The reduction of "emergency" conditions in which urgent legislation is sought, by the institution by the Government of planned drafting programmes for a Parliamentary session.
- (g) Improvements in systems for the communication to draftsmen of the policies for new legislation and for the provision of adequate drafting instructions.
- (h) The institution of "workshops" involving draftsmen and senior public officials in order to discuss the technical problems involved in the drafting process and the methods by which these can best be obviated.

**LEGISLATIVE DRAFTSMEN:
SOME THOUGHTS ON HOW TO PROVIDE
AN EFFECTIVE SERVICE**

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For an effective Legislative Drafting service a number of conditions must be satisfied. These include-

- (a) obtaining the right sort of people;
- (b) giving them the right sort of training;
- (c) furnishing them with the right sort of instructions;
- (d) providing them with the right tools of trade.

The Right Sort of People

2. I believe that legislative draftsmen are born and not made. I also believe that an adequate number of lawyers with the right sort of talents exist in the profession. The problem is to find and recruit them and then to retain them. A competent draftsman needs a number of qualifications, many of which are not widely represented in the profession but nevertheless do exist.

3. First, a draftsman needs to be a good all round lawyer. This is so obvious that it scarcely needs argument. He will almost certainly have to deal with every branch of law and specialisation is to be avoided. Specialisation leads to lack of flexibility in the availability of staff. It can also lead to staleness. A trainee draftsman should preferably have had several years in practice as a barrister or solicitor. A young person straight from University does not make the best material. Secondly, a draftsman needs command of the language in which he is writing. He needs to be able to distinguish between fine shades of meaning of words - a dictionary should always be at his elbow. Allied with this must be an ability to write grammatically. To write well, he must read widely. Next, a draftsman needs a clear and logical mind. It has rightly been said that legislative drafting is "mathematics in words".

4. A draftsman also needs the right temperament. He must be patient with impatient "clients". He must be capable of good work under pressure - which will be inevitable. The late Sir Cecil Carr, Counsel to the Speaker in London, but not himself a draftsman, described draftsmen as "the key men of Whitehall, the hardest worked, the most severely tried". Regrettably, a draftsman must be prepared to work irregular hours, to the detriment of his family and personal life. A draftsman must also have the capability of resisting pressure by those who ask him to do something that is wrong or inadvisable. He must not allow himself to be "shouted down" by his "client".

5. A draftsman needs an understanding of politics and of the working of his legislature; to quote Carr again, "Having no politics himself he must nevertheless know every move of the political game". "Bills", it has been said, "are made to pass". The most perfectly drafted Bill is useless if the legislature cannot be persuaded to accept it. All legislatures have their likes and dislikes and the draftsman must take them into account.

6. Searching out the right sort of person to become a draftsman is rather a hit and miss affair. One reads their paper qualifications and then interviews them and does one's best to select those who seem to have the right characteristics. But the failure rate is high - very high. The person selected must be given a long period of probation, during which his ability, or lack of it, must be discovered in practical work. There should be a clear understanding with him that if he turns out not to be a draftsman either his services will be dispensed with or he must accept transfer to some other form of legal work. If the latter is what happens, his new colleagues must be prepared to accept him as an equal who, although not a draftsman, may well be as

professionally competent as they; they must be discouraged from looking on him as 'a failed draftsman'. Once a competent draftsman has been found, he should be encouraged to make this his life's work. His conditions of service should be such that it is not an advantage for him to leave drafting and go to some other form of work. To this end, it is a good idea to have - as a number of jurisdictions do have - a separate "Office of Parliamentary Counsel".

The Right Sort of Training

7. I believe that the only wholly satisfactory way of training a legislative draftsman is by the "apprentice method" - that is, the newcomer works with or alongside a more experienced officer and learns from him by watching the way he goes about his work. In some jurisdictions, draftsmen work in pairs, senior and junior, with the latter learning from the former. Alternatively, there need be no formal system of pairing, each junior working more or less at random with a senior officer. In a form of class or school, legislative draftsmen can be trained to a limited extent. But one cannot teach the idiosyncrasies of the draftsman's "clients", of members of the legislature or of Ministers.

8. The respected and experienced Professor Reed Dickerson disagrees with my view about this; see the review of his Materials on Legislative Drafting in the (1982) 8 Commonwealth Law Bulletin, at p.847, from which it appears that he is a "steadfast believer in the need to teach legislative drafting to large classes of students within a law school curriculum". He regards it as a myth that "a student can learn only by personally supervised doing". Perhaps the difference between United States and the Commonwealth methods of government accounts, at least in part, for this difference of opinion. Further, I think it is a mistake to try to teach "legislative drafting" to students who are not yet qualified lawyers.

9. The recently-disbanded Legislative Drafting Institute in Australia, although well-meant and competently conducted, was based on the assumption that drafting can be taught in a class. Its teaching, although useful, was necessarily limited. It was used in the main by Commonwealth countries that are suffering from an acute shortage of draftsmen and are unable to make satisfactory arrangements for on-the-job training. Undoubtedly they have benefited significantly from the training their personnel received, but I understand that the Commonwealth Secretariat has been informed that in place of the formal teaching once offered at the Institute, the Australian Government now proposes to arrange attachments in Federal and State Law drafting offices as a part of its aid programme.

The Right Sort of Instructions

10. Good draftsmen are so rare that it is essential that their time be spent to the best advantage. A Bill is to give legislative or legal force to a pre-determined policy. A draftsman should not be concerned directly with policy. It is not his function to prepare plans or schemes of legislation. It is a waste of a draftsman's time to ask him, for example, to draft a Bill to control air pollution. It is for his client to determine the policy and to work out as many of the details as he can before an approach is made to the draftsman at all. But this statement needs some qualification. A client may not be versed in legal matters - for example, he may not know what penalties are appropriate for offences, how the laws of evidence will apply and what courts are appropriate to be given jurisdiction with respect to matters arising under his proposed legislation. The draftsman is in a position to help with matters such as these, although he may prefer that they be decided by policy makers in the Law Department. Further, a draftsman can often help with formulating a practical scheme of legislation to achieve the desired policy. He may be aware of similar legislation in other jurisdictions. Nevertheless, nothing is more frustrating to a draftsman than to have to sit for hours on one side of the table while his "clients" on the other side of the table thrash out among themselves what it is that they really want.

11. There has been a suggestion made to the Commonwealth Secretariat that if draftsmen in jurisdictions that produce legislative programmes were to circulate these programmes as soon as they were in a position to do so, this would be a great help in promoting mutual assistance between jurisdictions and the use made of comparative material. The extent to which such programmes are produced is perhaps limited. In Australia it would be difficult to discover anything that might usefully be explored and a greater degree of co-operation between draftsmen around the Commonwealth would be sure to return significant dividends to their governments. The formation of a "Commonwealth

Association of Parliamentary Counsel", along the lines of those of other Commonwealth professional associations, might be one way of bringing this about.

12. Even more useful would be to devise some machinery by which particulars of enacted legislation were systematically sent by draftsmen or by Law Departments to some central place to be recorded - perhaps by computer - and made available on request to those contemplating similar legislation. Thus, if Australia completely re-wrote its law relating to bankruptcy, it might be helpful in other jurisdictions - helpful to both the client and the draftsman - to know of this. Perhaps the second-reading speech on a Bill could be used as a basis for the description of its contents.

13. Over the years, considerable resort has been made to comparative legislation, although to a variable extent and perhaps in rather a haphazard fashion. Thus, United Kingdom Acts such as the Sale of Goods Act, the Bills of Exchange Act, the Partnership Act, and the Marine Insurance Act have been substantially copied in other Commonwealth jurisdictions. The spread of the Torrens system of land title from South Australia through the common-law world is well known. Often legislation will be based on a report prepared by an ad hoc committee or by some form of law reform body. Obviously, these reports should accompany the legislation to which they relate.

14. For many years before the 1939-45 War the Society of Comparative Legislation was sent particulars of legislation in many Commonwealth countries. These particulars were published in the Society's journal - the Journal of Comparative Legislation. However, the quality of the material supplied was variable and in some cases of little value. Further, there was no systematic way of digesting the material and making it known to enquirers.

15. It may well be that the systematic collection and digesting of legislation is something that could be undertaken by the Commonwealth Secretariat. Probably one legal professional officer would be sufficient for this purpose.

16. At the present time the Commonwealth Law Bulletin has an excellent, although limited, review of legislation. In effect, what I am suggesting is that this should be systematically expanded and become a separate publication. An example of the lack of system can be seen in the April 1982 issue, which mentions new Food Acts in Queensland and New Zealand but makes no attempt - probably because of lack of resources - to relate one to the other.

17. A word needs to be said about the danger of uncritical copying. What is suitable as a bankruptcy law in Australia may be totally unsuitable for, say Sri Lanka. Moreover, every Bill must take into account the existing law of the jurisdiction concerned, particularly its Interpretation law. Expressions may be used in e.g. an Australian Act without definition because they are defined in the Australian Interpretation Act, and they may need the same or different meanings to be expressly given to them in the law of some other jurisdiction.

18. There are, of course, additional sources of information about what is going on in the larger Commonwealth jurisdiction by way of legislation as their law journals usually have articles dealing with new and important legislation.

Tools of Trade

19. It goes without saying that a draftsman should have ready access to a comprehensive law library. In particular, there should be available to him a selection of current law reports and law journals. The Commonwealth Law Bulletin is extremely useful.

20. A word processor is a great help. It saves many hours of checking and proof-reading drafts. It has other advantages - such as making a search for a particular word wherever used in a draft.

General

21. Apart from the suggestion that the Commonwealth Secretariat might be invited to collect and collate particulars of legislation and that draftsmen around the Commonwealth be encouraged to assist each other to a greater degree than they do at present, there is little in the foregoing that has not been said before, but the writer is not at all sure of the extent to which the practices described are carried out. Nevertheless it can confidently be said that adherence to these practices is the best way not only of securing an adequate supply of legislative draftsmen but also - and this is perhaps even more important - of using their services to the best advantage.
