

**LEGISLATIVE DRAFTING AT THE UNIVERSITY OF
WEST INDIES: LL.M. COURSE**

Memorandum presented by
THE GOVERNMENT OF BARBADOS
(Prepared by Professor James Ryan)

Introduction

The Legislative Drafting course was started in the University year 1979-80 at the instigation of the then Dean of the Faculty of Law, University of the West Indies, Cave Hill Campus, Barbados, (now Mr. Justice Telford Georges of Zimbabwe). The course was to be part of a Master of Laws degree and had been some time in the planning. It was to be sponsored by three Caribbean Commonwealth countries in co-operation with the University. The University would supply the instructors, space and other requirements, the governments would provide financing and students for a three-year trial or experimental period.

2. The governments concerned were naturally interested in the nature of the course to be sponsored by them. They each reserved four places each year for their own personnel. When a country could not fill its quota in any year, it would sponsor a student from another country in the Caribbean.

3. It had been intended that Professor E.A. Driedger of Ottawa be the person invited to establish the legislative course after he had retired from Ottawa University in 1979. But that could not be arranged and I was invited by the Dean to establish and teach the course in drafting. The three Governments concurred in this arrangement and the Barbados Government assigned me to the University for that purpose. The assignment, however, was an additional function to be undertaken with as little interference with my contractual duties as possible. No extra expense was incurred under this arrangement. Dr. Driedger (a long-time personal friend and colleague), helped with materials and explanations in two weeks of talks with him in August 1979 in Ottawa. It was on the basis of what was known of his course that it was begun in October 1979 with six students from five States in the region. The course was to be on the model of the Ottawa Course.

4. After twenty-six years drafting legislation in Canada (both provincially and federally) and two years in the Caribbean for the Federal Government of the West Indies and Trinidad, I was not too confident that much could be learnt from a drafting course, even one based on the methods developed by Professor Driedger. This is a common opinion of career drafters and not surprising. It was some consolation to know that even Dr. Driedger felt that the best one could do with such a course was to reduce by six months or so the amount of time required to train a drafter in-service in a good drafting office.

The Legislative Drafting Course

5. Master of Laws Degrees

The Legislation Drafting option consists of the following:

- (a) Legislative Drafting;
- (b) Public Law I, or such other subjects as the Faculty Board prescribes;
- (c) Public Law II, or such other subject as the Faculty Board prescribes;

In addition the student must submit an acceptable thesis to the University.

The Public Law courses cover Constitutional law in the West Indies and Administrative Law.

6. Diploma in Legislative Drafting

- (a) The Diploma may be awarded to a candidate who has passed all the coursework and examinations for the LL.M. degree but who fails to submit an acceptable

thesis within the regulatory time. If a candidate fails Public Law I or II, but passes the Legislative Drafting Course, he may be awarded a diploma.

- (b) A Diploma in Legislative Drafting may be obtained by a candidate who pursues only a course of study in that subject over a minimum of three terms, without attempting the LL.M. degree course.

Qualifications for the Legislative Drafting LL.M. Degree Course

7. The following are eligible for admission to the drafting course:

- (a) Graduate of the University holding an LL.B. degree or of another University holding a degree that includes such law subjects as to satisfy the Board for Higher Degrees;
- (b) Graduates of the University or of an approved University who, having obtained a professional legal qualification, are admitted to practice in any part of the Commonwealth; and
- (c) In the case of the Legislative Drafting option, persons who having obtained a professional legal qualification, are admitted to practice in any part of the Commonwealth and who have also been certified by a senior public officer in the legal civil service of any Contributing Territory as having had two years post-qualification experience of legislative drafting.

Qualifications for the Legislative Drafting Diploma

8. The admission qualifications for the Diploma are similar to the admission requirements for the LL.M. Legislative Drafting option set out above.

Results of the Three-Year Period of the Course

9. In January 1983 the first LL.M. degree of Legislative Drafting was awarded. A Diploma has also been granted by the University. Several trainees have submitted theses and are awaiting acceptance or rejection.

10. Numbers of Trainees:

Including the present year, in which there are two students in attendance, one each from Jamaica and St. Lucia, a total of 18 students passed through the course. All but one were government employees. That one was sponsored by CIDA in the first year, who would have otherwise gone to the Ottawa course.

11. States Represented:

The following eight Caribbean States have sent students: The Bahamas (1); Barbados (5); Belize (1); Dominica (1); Guyana (1); Jamaica (4); St. Lucia (1); Trinidad and Tobago (4).

12. It is understood that all but four of the trainees continue to be employed in government services as drafters.

Seven of the eighteen trainees were women. All trainees were qualified to practice locally but a few had no LL.B. degree or similar law degree from any University.

13. In the year 1981-82 three faculty members monitored the legislative drafting course for varying periods. In that year the number of trainees sent by governments fell to two; another person, who was to be on a scholarship from the UNDP failed to qualify for the LL.M. in time and did not come for the Diploma course.

14. In the first year, 1979-80, there were six trainees; in 1980-81 there were eight; two (plus three faculty members) in 1981-82; and in 1982-83 there are two trainees.

Expectations for the Continuation of the Course

15. The legislative drafting course has since its inception been a year-by-year matter, because of the conditions under which the instructor for that course is

retained. If a UN contract is not renewed in any year, the instructor is lost to the course; if the Barbados Government re-assigns the instructor to other duties, he is lost to the course.

16. While this situation has provided economy of operation, it has also created some uncertainty about continuity.

17. However, the three sponsoring Governments have agreed to finance the course for a further three-year period, which will end with the University year 1984-85.

Contents of the Legislative Drafting Course

18. This course deals with more than the "writing" or composition of legislation, for "legislative" drafting involves more than composition. Nevertheless if one cannot write, one cannot draft. Similarly, if one cannot form a legislative plan, one cannot draft. If one does not fully understand where he fits within the legislative process, he will not have the self-respect he needs to be a competent draftsman.

19. The course attempts to be intensive and fully rounded, but concentrating on imparting as much information and skill as possible in the hope that the trainee will be attracted to continuing his development and, if otherwise suitable, take up the discipline as a career.

- (i) Where and for whom, Legislative Drafting is done: This discusses such matters as Legislative Institutions and the various classes of the institutions.
- (ii) How to analyse the legislative problem: This process is taught through individual exercises in drafting as well as by the many statutory examples in the various statute books. The course faces up to the reality that much legislation is "copied", either poorly or well, while much else is "adapted" (copying plus necessary modifications to meet the client's). It is essential that drafters understand how to do this well because in small jurisdictions it may be the only way to obtain legislative ideas. And adapting extends beyond the precedent into an analysis of its contents, while on other occasions it may provide only the spark to ignite an idea. But the technique is important. This topic includes such mundane matters as how to make the best use of the information sources to determine the legislative purpose, background, on the factual side. How to use one's own or scanty library facilities to "research" what law one can on a given subject. This introduces the need to develop the skill of knowing what question to ask to find out what is required. It is recognised that not infrequently a drafter will have to train people to give him proper instructions or learn to elicit them in other ways.
- (iii) How to put the matter together in a legislative plan: This is the creative part of drafting and very, very difficult to teach. But some guides are developed and in a small way, some exercises are developed. Some drafters believe this skill can be acquired only by experience and instinct; and, while there is much truth in the belief an attempt must be made to give some reliable guide so that the skill can be developed.

20. In addition to practice sessions, the course attempts to prepare the trainee for the real world of drafting by describing the many differences in drafting services and how they developed. There are mostly lectures, talks or spontaneous explanations of how things can happen in a House, committee, ministry, etc.

21. A comparison of drafting services is made between, e.g. New Zealand, Canada, Australia, Barbados, Antigua, etc.

22. The relationship of the drafter to the Executive, Parliament, Law Clerk, and other Government agencies is examined.

23. The methods that can be used to save the most of a drafter's time for drafting. In this regard, available technical equipment is used to introduce modern ones such as computers, infra-red copying and stencils.

24. The legislative process, as it relates to legislation is discussed: Public Bills, Government Bills, Private Member's Bills, Private Bills, Hybrid Bills, etc. and the standing orders that drafters should be aware of.

25. Also the advantages and disadvantages of Omnibus Bills, the glossing method of amending statutes and other like matters.

26. Some instruction on revision methods, consolidation, preparing tables, cross-reference records and other aids to a drafting office to keep up with statute law are also brought in.

27. A summary of the legislative drafting subjects is set out hereunder, but it must be emphasised, that most time is taken up with routine practice of putting together and taking apart legislative measures.

28. The course attempts to get 200 hours of instruction, exercises and discussions into a course year. A test or exam is also devised, though this is difficult as the subject does not lend itself easily to "testing" a skill that is not yet developed and won't be developed without considerably more use.

29. In the instructing an effort is made to emulate Driedger's methods as much as possible.

Subjects of Legislative Drafting Course

30. (i) Legislative Institutions and classes
- (ii) Drafting environments
- (iii) Common law drafting
- (iv) Composition of Legislation: The legislative sentence, grammatical structure, critical elements of the sentence, Coode theories, Driedger's supplements
- (v) Exercises in writing of comprehending legislative provisions
- (vi) Preparing draft legislation: Policy, analysis, research, synthesis, revising, editing, checking, dialogue with own work, etc.
- (vii) Drafters role in various processes, legislative, executive and mechanical
- (viii) Statutes: Acts, Statute books, Revision, Codes
- (ix) Management and operation of Drafting Office
- (x) Interpretation of Statutes - Drafter's perspective - cause and effect

Conclusions Drawn from the Three-Years of the Course

Effectiveness

31. The effectiveness of the legislative drafting course will be fairly demonstrated only if a sufficient number of trainees remain in government drafting service. One should not anticipate more from a drafting course that it can deliver. All of the trainees will have acquired some knowledge of the techniques of drafting. They will also be able to make better use of the texts on drafting written by Driedger, Dickerson and Thornton and others, if they learnt nothing else.

32. That drafting is much more than writing may also have been grasped by the trainees, a discovery that should be of value to them in the future, despite the fact that, to them, there may have been an inordinate amount of time spent on writing exercises on statutes as well as on their own practice material.

33. One other thing became apparent: it is virtually impossible to set satisfactory tests or examinations in legislative drafting. The extent of the subjective judgements is too large, and the drafting process does not lend itself easily to testing in the usual law school manner.

How to keep the course in existence

34. The most critical aspect of the UWI course at this time is how to obtain trainees in a regular, reliable manner. How can one determine the number of students to prepare for in advance of the new University year? Unless there is a solution to that problem, the course will certainly come apart.

35. Some proposals for keeping the course alive are given in the following paragraphs:-

(a) Scholarships

The Ottawa course has depended upon scholarships to keep a flow of students year after year. But Ottawa was fortunate in that it could accept foreign students. Scholarships might encourage graduate law students to pursue legislative drafting for an LL.M. before trying the certificate course.

(b) Integration with CFTC Courses

Since the UWI gives a Diploma in Legislative Drafting, as well as an LL.M., it is possible to conceive a plan whereby the CFTC could supplement the supply of trainees for the Legislative Drafting Course instead of running its own course in the Caribbean. It is also conceivable that other international aid agencies might become involved. Initiatives such as that shown by the UWI and the three sponsoring Third World Countries should be encouraged.

So long as the reserved places on each year's course were protected for the sponsoring countries, Commonwealth trainees from within or outside the Caribbean would help in both keeping not only the drafting course available but also whatever teaching skills the course had developed or might develop.

The numbers would have to be controlled. The course should be intensive and of about 200 class hours. The optimum number per instructor appears to be six in the present circumstances. Efficiency falls off as the number goes over six trainees.

(c) Admission of students from other common law areas when space is available

The costs would be high for the trainee and this option is probably not practicable unless the fees were lower.

(d) Integrating the Legislative Drafting Course with a Regional Law Centre for Legislation

This would require a more drastic change in the present structure of the course and need only be considered if a Legislative Research Centre were set up within the Law Faculty on a Columbia University model.

Some Suggestions for Improvement in the Course

The following suggestions are made following some reflections on three years of instructing the legislative drafting side of the LMM Course in Legislative Drafting:-

1. More Law Faculties' members ought to be able to take the course in depth. This could assist the dissemination of information about legislative drafting within the academic community and strip from that discipline some of its mystique and much of the suspicion that surrounds it even now. There is altogether too little known about legislative drafting and too many myths and misconceptions. An abyss exists between law educators and drafters that should be closed for the good of social and economic development in developing countries.
2. A method requires to be devised to weed out the trainee who is not really interested in legislative drafting, whose interest lies with acquiring a post-graduate degree, or who is not intellectually or temperamentally suitable. This test should only be used in the case of government sponsored trainees on whom much time and money will be spent without benefit to the government. Purely academic applicants fall within another category. The drafting instructor ought to have more effective control over admissions so that classes can be tentatively organised a year or so in advance. As it is now one never knows whether there will be trainees or not until they show up.
3. A special effort should be made by both the instructor and the Law Faculty to provide a legal drafting course, based on the conventions of legislative drafting, for the practising legal community. A number of practising lawyers have displayed

an interest in finding out more about legislative drafting. It would help remove the veil of mystery and suspicion that ordinarily surrounds the subject within the profession.

4. A suitable instructing room, together with facilities for mini-computers, printers, screens, projectors, film transparency makers and other equipment to be used in teaching the course or in supporting it, with a controlled environment, ought to be made available for the legislative drafting course. In the last three years, the instructor's accommodation has been moved three times, and his instructing equipment has to be moved twice for each class.
5. A back-up instructor ought to be available to the course. Too much depends upon the good health and presence of one instructor. The back-up might be a member of the faculty who has taken the course or a local legal officer who has done so. Learning the teaching method takes time. Too much can depend on one individual and if he is replaced much time will be lost while another teaches himself how to instruct, even with the teaching manuals recently published by both Driedger and Dickerson.
6. The drafting instructor ought to be drafting consultant for Faculty members who are preparing legislation for other Caribbean jurisdictions, as well as for other governments in the region, so long as that consultancy does not interfere with the instructing function. It is important to the course that the value of know-how in drafting be shown more often to those who need to use it; and useful to the instructor to keep his head and heels in the real world of the legislative process.
