

## CURRICULUM DEVELOPMENT AND TRAINING IN LEGISLATIVE DRAFTING

### Paper by the Commonwealth Secretariat

#### Introduction

1. At the meeting of Commonwealth Law Ministers in St Vincent and the Grenadines in November 2002, Law Ministers recognised the continuing problems in many Commonwealth countries in attracting, training, and retaining legal drafting staff. This has impacted adversely on the quality of legislation dealing with complex issues, and law reform programmes in countries. Law Ministers mandated the Commonwealth Secretariat to arrange shorter training courses to supplement in-house training.

#### The Short-Term Curriculum

2. A short-term curriculum to be taught over a 12-week period, was developed under the auspices of the Commonwealth Secretariat in November 2003: **Annex**. A workshop was then held for the Caribbean region in November 2003 where the curriculum was modified to suit the requirements of the region. A further outcome of that workshop was a decision that a short-term programme be established at the Cave Hill Campus of the University of the West Indies (UWI) in Barbados.

3. The Faculty of Law at UWI revived its LLM Legislative Drafting course towards the end of 2004. How the short-term curriculum can be integrated into the Legislative Drafting component of the LLM programme is currently under consideration.

4. For the Africa region, the short-term course will be established at the Ghana School of Law in January 2006. Heads of drafting offices from African Commonwealth countries met in Accra, Ghana, in June 2005 to examine the curriculum and lay down the road map for preparations for the launch of the course. The course will be funded for the first three years by the Commonwealth Secretariat through its CFTC fund with a view that by the end of that period the course will be self-sustaining.

5. The short-term course will be introduced to the Asia and Pacific regions with a view to establishing it in appropriate institutes or integrating it to existing programmes in law schools.

#### Consideration by Senior Officials

6. At their meeting in October 2004, Senior Officials discussed at length the shortage of drafters in developing Commonwealth countries and appealed to the Commonwealth Secretariat to develop training programmes for legislative drafters and support assignment of personnel to Attorneys-General offices and offices of Parliamentary Counsel taking advantage of the Commonwealth network.

7. In considering the problem of retention, Senior Officials noted that developing countries had considered imposing measures to retain the services of legislative drafters who benefited from assistance programmes. One such measure was a requirement to enter into a bond with the relevant Government obliging legislative drafters to serve a minimum time before they could leave the service or to repay the cost of the training they received.

## **Action for Law Ministers**

8. Law Ministers may wish to endorse:
  - (a) the observations and requests made by Senior Officials to the Commonwealth Secretariat to develop training programmes for legislative drafters;
  - (b) the recommendation by Senior Officials for countries to consider imposing measures to retain the services of legislative drafters who benefit from assistance programmes.

## A CURRICULUM FOR TRAINING LEGISLATIVE DRAFTING

Professor Keith Patchett

## A. Introduction

1. At the Meeting of Commonwealth Law Ministers in St Vincent in November 2002 concern was once again expressed about the high turnover of staff in legislative drafting and about the expense of some existing arrangements for training. Suggestions were made that more short-term training should be made available.

2. The following curriculum is designed to provide foundation training for relatively new entrants to drafting offices that can be delivered in the equivalent of 3 months' full time study. It derives from the author's experience in organising and delivering full and part time courses of lengths varying from 6 months to 2 weeks and authoring and assessing for the Commonwealth Distance Training Course in Legislative Drafting, a joint initiative of the Commonwealth Secretariat and the Commonwealth of Learning.

## B. Underlying considerations

3. Training of new entrants to anything like full competence cannot be provided in a single short course. Such competence is achieved only with experience from performing the job that is acquired over a period of years. The aim of a foundation course, as the term implies, should be to lay a solid grounding in those matters that permit useful drafting tasks to be confidently and reliably assigned to tyro drafters sooner. Accordingly, the objective should be to develop competence in the basic essentials of drafting, rather than to expose the trainees to an academic study of the subject.

4. The course must be concerned, therefore, with developing those skills, techniques and know-how that are the fundamentals of legislative drafting and basic to the actual practice of drafting. The learning focus throughout should be on acquiring the *practical* skills and sound methodologies for performing the most common and important drafting tasks, rather than covering the drafting of all types of legislation.

5. The curriculum should enable trainees to learn *what* to do, *when* to do it, importantly *how* to do it, but also *why* it is best done in that way. So, it should comprise an integrated programme to provide knowledge about drafting approaches and techniques and to develop the skills necessary to put those into effect.

6. A drafting course should reflect best practice in the drafting offices from which the trainees are drawn. Accordingly, the course content should be the result of close co-operation between the trainers and senior members of those offices. Every training course should be thoroughly evaluated after its completion, not least by the drafting office from which a trainee has been drawn, with a view to improving and refining future courses.

7. Preferably, a foundation course should be structured as a series of building blocks that:

- introduce the trainees systematically to analytical methods, composition skills and drafting approaches and techniques; and

- then extend and reinforce these through constant practical drafting exercises replicating the most common and important drafting functions in ways that approximate as closely to actual drafting practice as is possible in a training setting.
8. The emphasis should be on learning by doing, i.e. through undertaking frequent drafting assignments and activities. Wherever possible, these should be individually moderated and subjected to detailed feedback given, where possible, in individual tuition sessions. This replicates to an extent the way in which pupil drafters learn on the job from their seniors.
  9. Such an approach calls for the number of participants on a course to be small enough to permit this regular individual tuition and feedback on personal progress. It also requires this tuition to be provided by persons with drafting experience who are able to allocate the necessary time to undertake regular training sessions. The whole training programme should be co-ordinated by a training director who is responsible for overseeing the progress of the individual participants.
  10. Drafting assignments should be specifically devised to enable trainees to put into effect approaches and techniques to which they have been introduced and to provide opportunities to practise particular drafting skills, as well as to inculcate sound drafting values.
  11. Trainees should be introduced to drafting methodology and techniques by working through a structured set of materials presented to them by using the fullest range of teaching and information technology available (e.g. hard copy, electronic data, “show and tell” instruction, workshop-style discussion). They should be given every opportunity to become competent in using computers for producing documents and for research and conversant with the importance and impact of computer-assisted drafting, especially where that is employed in their offices.
  12. Where possible, the materials should include supporting course notes and illustrative examples or precedents that demonstrate sound practice, as well as any manuals or drafting directives in use in their offices. Ideally, these should be made available in a format that will continue to be of value, as a reference source, after the completion of the training.

### **C. A Suggested Course Syllabus**

13. The following syllabus outlines the topics that ideally should be incorporated into a foundation training course. It identifies specific aspects that justify particular attention. By no means equal weight can be given in a training course to each of the topics. Greater emphasis should be given to those that are more central to the drafting process, and time constraints will necessarily mean that less attention is possible for others. In practice, acquisition of the basic skills of analysis and composition (Parts IV to VIII below) merit more sustained attention than their application to specific types of legislation (Parts IX and X). Further, the order in which the topics should be dealt with should not follow that set out below. If trainees are to concentrate on drafting assignments, they must engage with the parts of the syllabus concerned with compositional skills (Parts V to VII) from the outset of the training.
14. The syllabus does not set out to indicate which training techniques might be best suited to the included topics. However, in most instances, a topic is best introduced either by requiring the trainees first to undertake prescribed reading that can be followed by group discussion or by group exposition by the trainer, subsequently confirmed by appropriate reading. The materials developed for the Commonwealth Distance Training Course in Legislative Drafting are designed to be used in either of these ways, and deal with most of the listed topics (but not topics 40 and 42-44). The short drafting Exercises and the much fuller Drafting Projects in that Course have been designed to give drafting practice and experience in respect of those topics that require the application of drafting skills.

## A Suggested Foundation Course Syllabus

### 1. *Introduction*

1. What is legislation? What is the function of legislation?
2. Legislative drafting in Commonwealth systems
  - characteristics of Commonwealth drafting
  - centralised drafting offices
3. The role and responsibilities of Legislative Counsel
  - an amanuensis or proactive role?
4. Types, hierarchy and structure of legislative instruments
  - statutory terminology
5. Using information technology in drafting
  - computer-assisted drafting and research

### II. *The drafting process*

6. Objectives in the preparation of written law
  - e.g. communication, clarity, conciseness, consistency, certainty, comprehensiveness, comprehensibility
7. The organisation and operation of drafting services
  - effects of time constraints
8. The relationship between the client Department and Legislative Counsel
9. The preparatory stages: policy formation, impact analysis
  - assessing policy options
10. Drafting instructions: their preparation and what to do about defective instructions
  - the role of Legislative Counsel in clarifying and refining instructions
11. Steps in the drafting process
  - analysis, research, consultation, legislative design, composition and scrutiny
  - managing the drafting process

### III. *Drafting constraints*

12. The rules of interpretation of legislation and their influence upon legislative drafting
  - how interpretation rules are to be taken into account
13. Constitutional constraints
  - supremacy of the Constitution; parliamentary sovereignty; distribution of the legislative power; separation of powers; judicial review; discretionary powers;
  - compliance with Bills of Rights and other human rights requirements;
  - access to official information, etc
14. Working under Interpretation legislation
  - complying with general statutory rules on construction and application of written law
15. Constraints from international treaties
  - complying with treaty provisions capable of having domestic application

### IV. *The legislative process*

16. Stages in the legislative process
  - submissions for Cabinet approval
  - settling the legislative programme and timetable
  - consultations
  - parliamentary stages

17. The role of Legislative Counsel during the parliamentary stages

#### **V. *Legislative syntax***

18. Principles of legislative expression – why we draft we draft as we do
19. Plain language drafting
  - techniques for achieving accessible and directly expressed text
20. Basic legislative syntax - subjects, predicates, verbs, modifiers, sentence structuring
  - techniques for writing grammatical and readable sentences
21. Punctuation

#### **VI. *Legislative style***

22. Essentials of a good style
23. Word choice
  - broad, indeterminate and vague terms
  - avoidance of ambiguous and archaic expressions
24. Practices to avoid or that require special care
  - nominalisation; front-loading; phrase-splitting; dangling and squinting modifiers
  - provisos
  - "and" and "or"; singulars and plurals
  - gender neutral language
  - time, distance and numbers; etc
25. Referential legislation
  - incorporation by reference
  - cross-referencing

#### **VII. *Legislative structure and arrangement***

26. Arrangement of provisions
  - factors affecting legislative structuring
27. Structuring legislation
  - when and how to divide into sections, subsections, paragraphs, Parts, Schedules, etc.
28. Linking legislative provisions
  - linking techniques
29. Legislative apparatus
  - section notes, headings, tables, table of sections, etc.
30. Devising a legislative plan
  - methodology for structuring legislation

#### **VIII. *Drafting preliminary and final provisions***

31. Long and short titles, preambles, enacting formulae
32. Purpose clauses
33. Commencement clauses and duration provisions
34. Definitions and interpretation provisions
35. Application provisions
  - when required
  - extra-territorial legislation, retrospective provisions

36. Delegating legislative powers
  - matters to be assigned to subsidiary legislation
  - deciding on the breadth of the powers
37. Repeal and amendment provisions
  - substantive and consequential amendments
  - structuring amendment bills
  - explaining the effect of repeals and amendments
38. Saving and transitional provisions
  - when required
  - retrospective effects
39. Schedules
  - when useful

#### **IX. Substantive provisions**

40. Financial provisions
  - appropriation and tax legislation
  - Government borrowing, guarantees and lending
  - drafting taxing provisions
41. Compliance provisions
  - drafting offences, evidence, criminal procedure provisions
  - alternatives to penal regulation
42. Statutory authorities and corporations
  - legal personality
  - drafting incorporation provisions
43. Licensing and registration
  - drafting standard components
44. Legislation implementing international standards and treaties
  - methodology for determining which treaty provisions require statutory implementation
  - direct and indirect implementation

#### **X. Drafting subsidiary legislation**

45. Preparatory procedures
  - avoiding *ultra vires* instruments
46. Form and content of subsidiary instruments
  - characteristic features
47. Parliamentary scrutiny and post-enactment procedures
  - when to include

#### **D. Training delivery**

15. Ideally, foundation training should be provided for those who have already been assigned to drafting duties and have been exposed for a time to the drafting process and the work of a drafting office. This enables the trainers to proceed on reliable assumptions about the trainees' knowledge of what the work entails and of their future responsibilities. Trainees are more likely to benefit from formal training if they have become familiar with the role and operations of their drafting office. A group that mixes such officers with other participants who have no drafting work experience or who may not be engaged in the work when the training is completed will not share the same footings and may not have the same motivation. This ideal is not always achievable, but better results appear to be obtained when all the participants are being trained specifically to work as drafters in government

service. This helps confirm that training is to be seen as an integral part of the development of such persons.

16. For similar reasons, trainees, on returning from training, should be given as full as possible opportunities to put into effect what they have learnt. Drafting offices should see this as an important responsibility. Experience is the best teacher and immediate experience is essential to consolidate and reinforce what has been learnt on a formal course. If this practice is to be followed, those delivering the training have a reciprocal responsibility to ensure that the training they provide equips the trainees to perform their duties consistently with the practice in that office.

17. Delivery of a foundation course may be organised in different ways.

(a) **In-house**

18. Those drafting offices that are staffed with an adequate number of senior drafters may be in a position to provide all the necessary training they require from internal resources. It is helpful then if an experienced drafter is charged with the responsibility for organising training (for all levels of staff), in particular for ensuring that the individual trainees on the foundation programme cover the core elements of the training syllabus. Knowledge transfer can be achieved by working through suitable course materials prepared for the office and in training sessions run by the more experienced drafters and appropriately qualified persons from outside the office. To cover the course syllabus, these may have to be provided at regular intervals, programmed with the trainees' general work commitments, over a period of several months. A positive benefit is that the learning process can be integrated with actual drafting assignments suitable for the trainees' stage of development. By working on these alongside and under the supervision of a senior drafter, trainees can learn their practical skills on-the-job under the constraints of actual practice.

19. Such arrangements make considerable demands upon the personnel resources of a drafting office and may be justified where the size of the office calls for a steady flow of new officers requiring training. They are also heavily dependent upon the time, willingness and patience of senior drafters to provide detailed feedback, advice and guidance. Many Commonwealth drafting offices are not well placed to deliver training in this form.

(b) **Full-time courses**

20. In principle, it is feasible to deliver the syllabus in a full-time course lasting for a period in the order of 12 weeks, provided that it is concerned exclusively with drafting. Such a course would need to be instructor-led. By way of illustration, the following is a structure that has been successfully used:

- (1) A first module, lasting the first 4 weeks, aims at providing the **basic elements** of analysis, methodology, composition skills and essential knowledge of drafting processes (Parts I, II, V-VI).
- (2) The second, in the following 3-4 weeks, is concerned with **expanding** these, in particular to take in more demanding skills, the drafting of particular statutory components and to begin to take account of the constraints on drafters (Parts III, IV, VII & VIII).
- (3) The third, in the final 4-5 weeks, places the emphasis upon **application** of what was derived from the earlier modules to new circumstances (Parts IX and X) as well as revisiting and reinforcing the factors that influence actual practice.

21. A full-time course permits the following training methods to be used:

- presentations by the instructor(s), in a seminar setting, on the processes and fundamental principles of legislative drafting, with heavy use of legislative examples and precedents, designed to demonstrate and develop good drafting standards;
- interactive group analyses of specific legislative proposals/problems and critiques of legislative texts, designed to improve critical and analytical skills;
- regular (e.g. twice weekly) practical drafting exercises, involving redrafting of earlier legislation or preparing a range of short Bills or instruments on instructions. These should be devised and designed to integrate with the seminar work and to develop compositional and analytical skills;
- individual discussion and tuition with an instructor involving an appraisal of each drafting exercise, designed to strengthen basic drafting skills;
- class critiques of exercise drafts, designed to develop the capacity to give and receive criticism and learn from other participants' approaches;
- simulated "inter-departmental" discussions/"consultation" concerning a legislative project, designed to highlight e.g. constitutional constraints or policy considerations that may influence the content of proposed legislation and the choice of drafting approach;
- individual study of a course and legislative materials to prepare for and reinforce presentations and drafting exercises;
- occasional seminar classes with external legislative practitioners/experts and visits to institutions and bodies concerned with the legislative process.

22. Courses of this kind are intensive and demanding on both instructors and trainees. Good course materials are needed, although substantial use can be made of those available from the Commonwealth Distance Course. Contact hours are greatly in excess of those for typical academic courses. The drafting assignments, which should become progressively more exacting, are time-consuming if the trainees are to follow good practice. Unless the number of participants is small, a single instructor may not suffice. In any case, the numbers should be restricted (e.g. to a maximum of 10-12) to allow individualised feedback on drafting assignments.

23. If participants have to reside away from their homes, this mode of training tends to be expensive. Obviously, the trainees are unavailable to their offices throughout the course and may be required to live away from their homes.

**(c) Distance training**

24. At present no training institution is offering a Commonwealth-wide distance course. However, the course programme and materials are obtainable on licence from the Commonwealth of Learning by any training institution that wishes to institute this form of training in their region. It is designed to facilitate part-time self-learning while engaged in drafting on the job. It allows flexibility as to personal start dates and, as trainees remain in their offices, it is a more cost-effective form of training.

25. The COL course covers most of the suggested syllabus. It includes a series of drafting projects, some or all of which the trainees are expected to submit for assessment and personalised feedback. Provided that trainees are permitted (indeed guaranteed) adequate and regular time off, in addition to their own personal time, to work on the course, it can be completed in 6 –9 months.

26. Learning in this way calls for strong personal motivation and commitment, which can be hard to maintain. Accordingly, completion is more likely to occur if the delivery agency institutes effective support arrangements. These include a central director with considerable drafting experience to co-ordinate the programme, to maintain common standards for all participants and to oversee their progress. The director should also be responsible for the assessment and feedback of the course work that trainees would be required to submit. Essential too are adequate links between the institution and the individual trainees, such as e-mail and other electronic links, and for distribution of course materials, trainees' drafting assignments and trainers' feedback, and generally for keeping in regular contact. Local mentors should be identified for each of the individual trainees, to provide encouragement and guidance, and if suitably qualified, advice on the work on the course and the drafting projects.

**(d) Combined distance and institutional training**

27. Using an arrangement widely used for post-qualification learning, a foundation course may be offered through a combination of distance and institutional arrangements. Trainees would remain for the most part in their offices carrying out their normal duties, but they would be expected to work on a distance programme managed by a training institution. This would be coupled with a requirement to participate in short intensive instructor-led training organised by the institution at intervals in a residential centre. Such a scheme increases motivation, as well as providing the trainees with face-to-face guidance on their progress and regular opportunities to explore the more difficult drafting tasks with an experienced instructor.

28. This approach could offer flexibility as to individual start-dates and to the length of the programme but it can be expected that the training might last on this part-time basis between six and eight months. The cost savings compared with full-time courses are significant but rather less than what can be achieved by a completely distance course. The advantages of this scheme are that the trainees remain available to their office, continue to work for the most part in a drafting environment and are able to spread their study over a sufficiently long period to begin to apply the content of the programme to the live projects to which they are assigned. However, similar considerations concerning the provision of good individual support (see para.25, above) apply here too.

**(e) Conclusion**

29. A foundation course in legislative drafting should be viewed, by governments, drafting officers and trainees, as an essential step in equipping new entrants to perform this exacting and specialist activity, and not as a voluntary add-on. Those assigned to drafting duties should have the expectation of receiving this grounding as a matter of course. Some newcomers to drafting are predisposed against the work typically through a lack of familiarity with what it entails and fears about its apparent complexities and intellectual demands. A guarantee of early training of the kind outlined here may go some way to dispel such inhibitions.