

## **Commonwealth Distance Training Course in Legislative Drafting: Proposals from the Course Developers**

### **INTRODUCTION**

1. This paper sets out the conclusions and proposals of the Course Developers (Professor Keith Patchett and John Hookway of TDA Consulting Group Ltd) arising from their review of the questions raised by the testing of the pilot module of the Distance Training Course in Barbados in July. (These questions are set out at pages 23-27 of the report on the Evaluation of the Pilot Module) [LMM(93)32]. The paper is designed to provide a basis for the discussions of the Advisory Group and is arranged to follow the order of the meeting Agenda.

### **I. COURSE CONTENT**

#### **Soundness of overall approach**

2. The pilot testing gives support for the way in which the topics are covered and presented, for the integration of activities and exercises with the course work and for the use of Drafting Projects. We conclude that, in its essentials, the approach adopted provides an acceptable balance between the theory and practice and is capable of providing trainees with the basic knowledge and skills in an acceptable way of learning.

#### **Coverage of topics selected**

3. The pilot responses support the conclusion that the coverage and treatment of the topics studied were of an acceptable quality, depth and length. If these topics are to be studied in accordance with the general course approach, there is little room for substantial reduction in coverage or length. A number of improvements in detail and presentation are possible, and are to be looked for as a result of the content review to be undertaken with the help of another subject specialist, Roger Rose.

#### **Level of difficulty**

4. The module did present difficulties for those new to the subject and was thought likely to do so by those with some background in the subject. The latter group appear not to have been discouraged by the demands the pilot made upon them.

5. In assessing the degree of difficulty, it must be noted that the pilot materials were drawn from what are likely to be the middle sections of the full course and that the newcomers, none of whom have yet qualified as lawyers, had undertaken any foundation work in the subject, of the kind that will be given in the early modules. The pilot supports the view that materials such as these can be mastered by persons with full legal training if sufficient time is allowed.

6. We conclude, therefore, that those coming new to the subject should be able to undertake a course using materials of this level of difficulty, provided that:

- the first modules enable the trainees to acquire a solid understanding of the foundations of the topic and to become familiar with basic concepts and techniques;- sufficient study time is provided for.

#### **Length of modules**

7. The testing suggests that the pilot module was considerably longer than a single course module as conceived in the original planning. That called for 6 modules each requiring some 60 study hours (the equivalent of 15 contact hours and 45 hours of personal study). The full requirements of the pilot module cannot be met in the time.

8. Although some of the more experienced participants claimed to have completed the module in 60 hours, several took longer or did not finish. Some of the activities were not undertaken and some of the later Drafting Projects were not given sufficient time. The newcomers had more serious time problems. On the best estimate, the pilot module, in terms of study time, seems to have been the equivalent of 1½ modules.

9. On that calculation, 60 hours of study per module may seem to be a reasonable allowance. But the pilot suggests that this figure should be treated as the minimum time needed. Only the most able and consistently motivated trainee can be expected to achieve the minimum target throughout the programme. If trainees are to pace themselves according to their personal needs and circumstances (one of the reputed advantages of distance learning), we believe that it would be safer to plan a 6 module course on the basis of a range of 60 to 90 hours per module.

#### **Syllabus coverage**

10. The syllabus with which we are working has a more restricted coverage than that discussed by the Advisory Group. Principally for resource reasons, it has been limited to 6 modules (rather than 8), with a consequential reduction in topics. (The revised syllabus is set out in the Appendix to this paper).

11. The pilot module was intended to comprise the equivalent of one module in terms of subject coverage (Interpretation: ½ module; Preliminary and Final Provisions: ½ module). In the event, the length of the materials (as well as the necessary study time) suggests

that a full module is required for Preliminary and Final Provisions, a figure, as we have suggested, that cannot be significantly reduced.

12. This experience strongly suggests that other areas of the syllabus may prove in the writing to be longer than originally thought. Until the writing is under way, it is difficult to predict which topics may be affected and by how much. If the present syllabus is treated in the manner of the pilot materials, it is likely to call for more than the planned 6 modules.

13. That outcome would have serious implications for the course:

- trainees would be faced with a daunting set of course materials;
- study time would exceed considerably that considered to be desirable for this course;
- preparation of the materials would require a marked extension of the timetable;
- production costs would be significantly larger.

14. We conclude that a reduction of the syllabus content is necessary if the study time is to be kept within the proposed limits and the same standard of treatment we considered to be appropriate for the pilot module is to be maintained. We propose the following:

#### **(1) deletion of topics**

The following topics should be deleted from the syllabus (as set out in the Appendix):

- 37: Financial provisions
- 40: Statutory Authorities and corporations
- 41: Licensing and registration
- 42: Legislation implementing treaties.

These amount to about ½ module.

Once trainees have the basics of the general subject and have acquired a technique for independent study, learning about these topics from eg, Thornton should be within their competence.

#### **(2) shorter treatment**

Certain topics of a more descriptive or procedural nature should be capable of shorter treatment. These are to be found in the first parts of the syllabus:

- 1: History of parliamentary drafting
- 2: The function of legislation in the common law tradition
- 3: Legislative drafting in common law systems
- 4: The role and responsibilities of Legislative Counsel
- 5: Types of legislative instruments in common law systems
- 6: The structure of legislative instruments
- 8: Objectives in the preparation of written law

9: The organisation and operation of a Government drafting service

10: The relationship between the client Department and Legislative Counsel

14: Stages in the legislative process

15: The role of Legislative Counsel in relation to the legislative process

Again, it should be possible to confine these to ½ module, especially if greater use is made of published sources as the course material.

15. The consequences of these changes would be:

- the syllabus could be reconstituted into 5 modules;
- the minimum study period would need to be set at 75 hours (with a range of 75- 100 hours per module (ie, the equivalent of 30-40 hours per week of full-time study for each of 12 weeks).

## **II. COURSE TREATMENT**

### **Use and frequency of Boxes**

16. In developing the box technique for the purposes of the pilot module, we tried several other arrangements, on the lines suggested by the pilot testers, before selecting the present approach. We favour the continuation of the present scheme, as:

- the activities and exercises give variety to the mode of study, as well as opportunities for immediate exercises and self-testing and encouragement to acquire knowledge of local practice;
- the trainees should be encouraged to integrate their study of the course text with actually doing and discovering things relevant to their drafting and to their understanding of the preparation of legislation;
- inclusion of the boxes into a different binder from the course book is necessary if the trainee is not to feel overburdened by the apparent size of a section;
- the different objectives of Exercise and Activity Boxes justifies the continued distinction between them;
- the frequency and use of boxes must be dictated by the subject matter and not by any pre-determined requirements.

17. At the same time, we recognise that greater emphasis must be given in the advice offered to the capacity for the individual trainees to organise the study process to suit their own preferences. The loose-leaf format enables them to re-arrange their materials as they wish and to choose when to undertake the work required in the Boxes.

### Organisation of materials

18. The suggestions of the trainees on the arrangement of the materials arose, in the main, from the inconvenience they experienced in moving from one binder to another, and from one place to another in the same binder, in the course of the same study period. We are satisfied that to a considerable extent this inconvenience (some of which can be overcome by trainees rearranging the materials for themselves) is outweighed by the advantages. At the same time, we do see difficulties in having the Answer Boxes and Suggested Answers in the same binder as the Exercises and the Projects.

19. We have concluded that the course will be more easily handled if it comprises an Introductory Booklet and 4 Binders.

#### Introductory Booklet:

This would include the kinds of material at present in the first 15 pages of the Workbook, but expanded to include more detailed guidance on the various features of the course. For example it should include illustrative examples of the activities set, including the Drafting Projects.

**Binder 1:** Course text

**Binder 2:** Activity Boxes; Exercise Boxes; Drafting Projects

**Binder 3:** Answer Boxes; Suggested Answers

**Binder 4:** Course materials and precedents, locally acquired materials

20. This number of binders would better differentiate the various types of course materials. It would largely eliminate the need to refer to more than one place in the same binder at any one time. Binder 3 would also contain the material to be distributed by external moderators (paragraphs 40-41 below).

#### Supporting materials

21. The materials provided in the pilot module comprised articles, statutory material specifically developed for the learning (Model Interpretation Act) and general statutory precedents. The pilot participants favoured a general extension of these. We have considered two possibilities:

- (1) a general Course Reader containing a wide range of materials relating to legislative drafting (including judicial precedents) designed principally to supplement the course text;
- (2) a selection of materials tailored for use with the course.

22. We conclude that provision of selected materials is to be preferred. The selection would be designed to provide materials that are directly concerned with the study, either by way of illustration or to provide an alternative perspective, where that is valuable, or for use

in the exercises or projects. The reasons for referring to that material would be made evident in the course text, and trainees would be encouraged to draw ideas from them in elaboration of their current study.

#### Course textbook

23. We agree with the comments of the participants favouring a course text. There are a number of advantages in stipulating a published textbook as a required source:

- it would provide a second different or confirmatory perspective;
- it would constitute an alternative type of reading of a more conventional kind, to supplement the course text;
- certain matters already appropriately treated in the text book could be relied upon, rather than going over the same ground again in the course text (eg, discursive and descriptive sections);
- where appropriate, the course could build upon or draw on matter in the textbook, thereby providing greater variety of material.

We propose, therefore, that a course text book be prescribed and supplied as one of the course materials.

24. There are three possible texts: Driedger's Composition of Legislation, Thornton's and Vincent Crabbe's new text. In our view, Vincent Crabbe's text best fulfils the requirements for a textbook that complements the course. In comparison with the others, it contains fuller coverage and discussion of general issues in the first part of the syllabus and is more in keeping with the structure of the course. Much that is found in the Driedger and Thornton will be replicated in the course. Although they contain numerous examples, illustrations and references of value to drafters, Vincent Crabbe's book is more accessible and instructive for our purposes. In particular, it is best suited to supporting those parts of the syllabus that we have proposed should be slimmed down.

#### Audio-materials

25. The evidence of the pilot testing is that audio-materials were a useful and practical support for the Drafting Projects. We conclude, however, that audio support should not be standard for all Projects; it should be used selectively for those which will most benefit from it, which, in most instances, will be the later Projects that do not go for external moderation. It is conceivable that it could be useful in the development of instructions for some of those Projects.

26. In line with the suggestion of the pilot participants, we also conclude that, in principle, use be made of audio materials to support the course work, in addition to those used for the Drafting Projects. There are places in which such material could be useful and would provide

variety in discussion or in explaining or illustrating particular matters.

27. There is, however, provision for only 4 audio tapes. The major expense of these is in the recording process. Experience in preparing tapes for the pilot module suggests that it is unnecessary to use studio recording. An acceptable product can be provided adopting the method used for the pilot; the major expense would lie in editing out minor infelicities. We are satisfied that 4 tapes of 90 minutes each can be prepared without any financial implications.

28. This total of 6 hours of audio-support offers an opportunity for extended use of this type of material. We propose that audio-materials should be used also to support the subject-matter of the course, in cases where it is suited to that purpose.

### III. DRAFTING PROJECTS AND ASSESSMENT

#### Number of Drafting Projects

29. The Drafting Projects are planned to be the central feature of the course. It is intended that:

- the earlier Projects will have a narrower compass and be less demanding than the later;
- they will constitute a series of building blocks, the later Projects depending on, and reinforcing, the earlier;
- they will enable the trainees to develop their skills systematically through a series of Projects which cover more ground to greater depth as they proceed, to the point where they can undertake significant drafting tasks.

30. The trainees' capacity to complete the Projects satisfactorily will be the principal indicator of progress and of the acquisition of the skills to do the job. The Projects must, then, be of a frequency, cover a sufficient area of the course and give experience in a wide enough range of matters, to permit such judgments to be made.

31. The planning assumption was for 20 projects, all of which would be externally reviewed. The pilot contained 6 Drafting Projects of varying length, weight and complexity; each was designed to be self-assessed. If the pilot were to be followed for a course of 6 modules, there would be 36 Drafting Projects (ie, the equivalent of 3 per week on a full-time course). This is unrealistic and not intended. The principal aims of the pilot Projects were to test the suitability of these Projects and to determine the extent to which self-assessment by the trainees is feasible.

32. Our conclusions are that:

- the equivalent of 2 Projects a week over 12 weeks full-time is the maximum that should be set;

- self-assessment is feasible, under certain conditions;
- only a proportion of the Projects should be subjected to self-assessment; the remainder must be reviewed externally.

33. External review is essential to the scheme, as both the trainees and their Governments need the reassurance that the trainees work is to a good standard and reflects acceptable progress on the course. Accordingly, external review becomes more important as a trainee moves through the more testing Projects later in the course.

34. The pilot suggests that such review is not essential for every Project, however desirable it may be. We conclude that external review should be required, as a minimum for the final Project in each Module and for one other in each of the last 3 modules. If the course is limited to 5 modules, external review will take place for a minimum of 8 Projects. The remainder should be designed for self-assessment. Depending on the length and complexity (and this will have to be determined in the course of writing the remaining modules), we recommend that there should be a maximum of 12-16 self-assessed Projects, making a total of 20-24 Drafting Projects for the full Course.

#### Type of Drafting Projects

35. The pilot testing suggests that the kinds of Drafting Projects used there (which ranged from the short and straightforward to the longer and more demanding) were on the right lines and could be used at the appropriate places in the course. There were, however, shortcomings in the work submitted:

- too frequently the instructions were analysed rather superficially;
- the drafts were not carefully scrutinised for drafting or grammatical errors or by reference to the instructions;
- the trainees did not revise, and may not have adequately reconsidered, their drafts after studying the Suggested Answers and commentaries.

36. We propose that the following procedure be required for Drafting Projects (to be explained in the Introductory Booklet) to meet these shortcomings:

- (1) trainees be asked, as a first stage, in the preparation of their Project to work and write out, after studying the instructions, the topics and questions that will need to be dealt with in their draft. (In the very first Projects, these questions would be given at the end of the instructions to illustrate the technique);
- (2) in the mid-range Projects, trainees be asked to compare and revise their plan of questions and

topics with a check-list provided (with the Suggested Answer materials); in the later Projects, they would be expected to work independently in the finalisation of their legislative plan;

- (3) trainees be asked to produce a first draft of their Project from their revised plan;
- (4) in completing that draft, they would be expected to scrutinise it for errors, using a check list which they have evolved, under guidance, in the course of studying the earlier modules on syntax, style and structure;
- (5) on completion of the first draft, trainees be asked to reconsider it by reference to a series of questions provided (with the Suggested Answer materials);
- (6) the trainees be asked to prepare a revised draft of their Project to take account of matters suggested by their consideration of these questions;
- (7) they be asked to compare this second draft only with the Suggested Answer and the commentary on it.

#### **IV. COURSE SUPPORT**

37. The potential value of support from persons outside the course has been recognised by the Advisory Group and the pilot participants. This could take two forms:

- mentor support during the study of the course;
- support through the moderation of Drafting Projects.

##### **Mentor support**

38. Although there are advantages to be gained from access to a subject supervisor, on the evidence of the pilot this is not a necessity. The course is capable of being studied independently. We conclude that the course should continue to be written on the premise that this kind of support will not be available.

##### **Moderator support**

39. For the Drafting Projects, some external moderation is essential. At the same time, we believe that the course should be written on the assumption that such support may not always be locally available.

40. Where such local support can be provided, it would be open to the trainee to submit all the Drafting projects for moderation to a local assessor. In that case, the Suggested Answers and related materials would be kept by the moderator and be made available to the trainee how and when the moderator thinks appropriate. These materials would provide valuable support to the moderator in knowing what the Course Developers have in mind,

and would reduce the burden of preparation for the moderator.

41. Where no local support is available, trainees would undertake their own review of those Projects which are designated as suitable for self-assessment and would be provided with the Suggested Answers and materials, as for the pilot. They would be required to submit their work on the other Projects to an external moderator, by fax or post. The Suggested Answers and materials for those Projects would be distributed by the external moderator, when the draft is returned with the moderator's comments. (Arrangements for such a system have yet to be formulated by CoL and ComSec).

#### **V. TIMETABLE**

42. Experience from the pilot module suggests that preparation of the modules, Drafting Projects and associated materials takes longer than was planned. Unlike many courses of this size, responsibility for course content and the physical production of the final drafts (prior to publication) rests with one person.

43. Although we have recommended some reduction of the syllabus, the overall size of the programme and the approach we have adopted (with modifications now proposed) make this a formidable task. The late beginning of the project and the delayed completion of the piloting, and the course content reviews by Roger Rose also have timetable implications. Completion of the Project cannot be looked for earlier than the second half of 1994.

*14 September 1994*

## APPENDIX

### LEGISLATIVE DRAFTING SYLLABUS

#### **Introduction** (full module = 15 hours)

1. History of parliamentary drafting
2. The function of legislation in the common law tradition
3. Legislative drafting in common law systems
4. The role and responsibilities of Legislative Counsel
5. Types of legislative instruments in common law systems
6. The structure of legislative instruments
7. Judicial interpretation of legislation and its upon legislative drafting
8. Objectives in the preparation of written law - conciseness, certainty, comprehensive-ness, comprehensibility, clarity

#### **The drafting process** (full module = 15 hours)

9. The organisation and operation of a Government drafting service - constraints from the legislative process
10. The relationship between the client Department and Legislative Counsel
11. The preparatory stages: policy analysis and evaluation
12. The importance of drafting instructions, preparation and what to do about defective instructions
13. The drafting process - analysis, research, consultation, legislative plans, composition and scrutiny
14. Stages in the legislative process
15. The role of Legislative Counsel in relation to the legislative process

#### **Legislative syntax** (full module = 15 hours)

16. Principles of legislative expression
17. Composing in plain English
18. Basic legislative syntax - subjects, predicates, verbs, modifiers, sentences, etc
19. Punctuation

#### **Legislative style**

20. Common law styles - precision, particularity, ellipsis
21. Indeterminate terms

22. Practices to avoid or that require special care - the proviso; "and" and "or"; singulars and plurals; male and female; time, distance and numbers; etc
23. Referential legislation

#### **Legislative form and arrangement** (half module = 6 hours)

24. Structure and arrangement of provisions
25. Dividing legislation - sections, subsections, paragraphing, Parts, Schedules, etc
26. Linking legislative provisions
27. Legislative apparatus - marginal notes, headings, tables, arrangement of sections, etc
28. Devising a legislative plan

#### **Drafting preliminary and final provisions** (half module = 9 hours)

29. Long and short titles, preambles, enacting formulae
30. Commencement clauses and duration provisions
31. Application provisions - extra-territorial legislation
32. Purpose clauses
33. Saving and transitional provisions - retroactive and retrospective provisions
34. Repeal provisions
35. Schedules

#### **Drafting substantive provisions** (1½ module = 22 hours)

6. Amendment provisions - textual and non-textual amendment
37. Financial provisions - appropriation and tax legislation
38. Delegation of the legislative power
39. Penal provisions, evidence, liability, procedure
40. Statutory authorities and corporations
41. Licensing and registration
42. Legislation implementing treaties

#### **Drafting secondary legislation**

43. Preparatory procedures: constraints deriving from judicial review

44. Parliamentary scrutiny
45. Form and substantive provisions

**Rules of interpretation and Interpretation Act**

*(half module = 8 hours)*

46. Interpretation clauses and rules of interpretation
47. Working under Interpretation legislation

**Constitutional, international and human rights constraints**

48. Domestic application of international human rights norms
49. Constitutional constraints -
  - division of the legislative function; separation of powers;
  - judicial review of legislation; special legislative procedures;
  - in particular, compliance with human rights provisions, etc