

Teaching Legislative Drafting: The USP Pacific Experience

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Abstract

In the recent past, there have been many studies on the teaching of legislative drafting at law schools of universities and other institutions by such authors as Donaldson⁷³, Miers and Page⁷⁴, McHenderson and St.John Bates⁷⁵, Hopperton, Stern⁷⁶, Crabbe⁷⁷, Webster⁷⁸, Xanthaki⁷⁹ and most recently Jaja⁸⁰.

Collectively, these articles demonstrate the growing international recognition of legislative drafting as a discipline within the legal profession worthy of study.

It also demonstrates the evolution of a common international approach to redress the shortage of legislative drafting staff especially in small jurisdictions.

This article narrates the efforts of Fiji to address these challenges through its Diploma in Legislative Drafting course, at the School of Law, University of the South of the Pacific.

INTRODUCTION

It is universally accepted that there are many legal challenges which face small island jurisdictions. There are common elements to these challenges and they are more acute and

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⁷³ See A.G.Donaldson, on Teaching Legislative Drafting (A Review Article) (1983) *Statute Law Review*, Vol.4 No.1, pp.179-191

⁷⁴ See generally D. Miers and A.Page, Teaching Legislation in Law Schools, *Statute Law Review* (1980) p.23 and

⁷⁵ H.McHenderson and T.St.J.N.Bates, Teaching Legislation in Edinburgh: An Outline (1980) 151 cited in A.G.Donaldson supra p.180

⁷⁶ See B.J.Stern, Teaching Legislative Drafting: A Simulation Approach (1988) *Journal of Legal Education*, Vol.38, No.3 pp.391-399 at p.391

⁷⁷ V.C.R.A.C., Teaching Legislative Drafting: The Commonwealth Experience (1998) *Statute Law Review*, Vol.19, No.2, pp.113-128

⁷⁸ R.Webster, Teaching Legislative Drafting: Reflections on the Commonwealth Secretariat Short Course (2010) *Commonwealth Law Bulletin* Vol.36, Issue 1, pp.41-56

⁷⁹ H.Xanthaki, Duncan Berry: A Visionary of Training in Legislative Drafting in (2011) *The Loophole*, Journal of the Commonwealth Association of Legislative Counsel (CALC) February 2011 pp.18-26

⁸⁰ Tonye Clinton Jaja, "Teaching Legislative Drafting: The Necessity for Clinical Legal Education" *European Journal of Law Reform*, (2012) Vol.14.No.1, pp.101-109

more prevalent in the much smaller jurisdictions. Legislative drafting is one such challenge. The shortage of drafters in drafting offices throughout the small Pacific Island jurisdictions is a persistent problem that has remained ever since the former colonies gained independence from their colonial rulers. The shortage of drafting expertise impedes implementation of many governments' legislative programmes.

Most Pacific nations share similar experiences. Small nations have tried their utmost over the years to adopt special procedures, policies and infrastructure at the national level to deal with this problem. However, often the lack of interest from young qualified lawyers to take up legislative drafting as a career of first choice means that governments more often than not rely on donor friendly countries to send their experienced drafters to assist with much of their work.

The Republic of Fiji being one of the larger Pacific Island countries has also had to rely over the years on direct assistance from Commonwealth Secretariat, Australia and New Zealand aid to draft much of its legislation since gaining independence from Britain in October 1970. As First Parliamentary Counsel, Rupeni Nawaqakuta, said in the law journal, *The Legal Lali*⁸¹, “In the Fiji Islands, expatriate lawyers from England were always engaged in legislative drafting until the coup in 1987 when most of the expatriate legislative drafters left the country. Most of the local lawyers then regarded legislative drafting as requiring special skills and experience.”

All Pacific Island nations are now members of different international organisations. They have witnessed varying degrees of social and economic development, and in some cases, fairly rapid development in a few short years. With an increase in economic activity, there have been constant demands by international organisations and lending institutions to implement new legislation. Maintaining good governance demands that countries implement modern laws of good quality. There is an expectation that certain laws will be enacted, and often strict timelines are placed by international agencies, foreign governments, lending institutions and potential investors on their enactment. This adds to a growing list that an incoming government will bring as its own major policy initiatives that need to be translated into legislation. Added to this are ongoing social problems which need to be addressed quickly.

Pacific nations, like many other countries around the world, have also addressed social problems by introducing new legislation. All of these laws basically add more work to the few legislative drafters working in the Attorney General's offices across the Pacific. Despite Pacific governments' best efforts, some drafting offices still have a shortage of adequately trained drafters. Whilst one draftsman in the team may possess the skills and experience necessary to draft complex legislation, the others in office clearly do not have the same degree of experience. The cumulative effect of using under-qualified drafts people

⁸¹ Rupeni Nawaqakuta, Challenges and problems of legislative drafting in the Fiji Islands (2003) *Legal Lali - Law Journal of the Office of the Attorney General*. Vol. I No. 1 June 2003. by

has at times led to inconsistencies in laws, policies and practices. This in turn has sometimes led to ambiguity in some Acts of parliament.

In addition to manpower constraints, government ministers, heads of departments and senior government officials do not always realise the time, patience and skill required for good drafting. Often it is assumed by some that legislation can materialise instantly. In Pacific jurisdictions, we do not have qualified people who can easily turn government policy into clear drafting instructions. Indeed, often those responsible for giving instructions are middle- to lower-level managers who have no training in law and are therefore handicapped in giving instructions to the legislative drafter. As Heather Holt⁸² observed, “the standard of legislative drafting could be greatly improved if there were policy officers in ministries and departments skilled at policy development. Their work then would serve as a basis for adequate drafting instructions, should it flow from the completed policy that legislation is the best or the only option. Not all ministries and departments have legal officers, and even when they do, because the skills of a lawyer differ from those of a policy officer, a legal officer is not necessarily the best person to engage in policy development.”

The Pacific experience for the drafter is also somewhat different than for the same draftsman in another country. The drafter in a very small jurisdiction sometimes doubles up as a person who at times is called up to prosecute, tender advice and act as a member or adviser to boards and committees, thereby further stretching his or her time. The University of the South Pacific (USP) today plays a pivotal role in helping build capacity for legislative drafting in the region. The drafting course started in 1998. Prior to this, regional governments trained their drafters by either sending them for short courses run by the Commonwealth Secretariat or on attachments to legal drafting offices in Australia or New Zealand. A few fortunate students received scholarships to study for a Master of Laws degree in Legislative Drafting at Universities abroad. The Pacific Islands Law Officers Meeting (now known as Pacific Islands Law Officers Network) between 1995 and 2006 also helped arrange short attachments and training for legal drafters. These courses and attachments were however not structured and offered only when donor funding from Australia and New Zealand was forthcoming. The USP’s Professional Diploma in Legislative Drafting (PDLDP) is now regarded as the premier qualification that most legislative drafters in our region have completed.

The PDLDP is a 30-week programme designed for either a beginner or for the seasoned drafter. Students that join the programme come from a variety of experiences with varying degrees of exposure to legal work. They are either working in the Attorney General’s Chambers as legal officers or as legal officers working elsewhere in government; some are magistrates, police officers, academics, lawyers in private sector, members of parliament and recent graduates. The admission requirements are:

⁸² Legal Lali – Law Journal of the Office of the Attorney General. Vol VIII No. 1 June 2005. Experiences in Legislative Drafting in the Fiji Islands.

- LLB from USP; or
 - Equivalent tertiary qualification; or
 - Equivalent professional qualification; or
 - Demonstrated experience in legislative drafting work.
1. The course is open to lawyers or non lawyers alike. The 30-week programme was developed using material provided by the Commonwealth of Learning. The course assessment comprises two components:
- (a) Completion of 8 assignments worth 7.5% each or 60% in total;
 - (b) Attendance and participation in a one-day workshop worth 40%. Students are divided into groups and are required to draft legislation based on a problem provided by the course instructor. They bring skills learned during the course to complete the exercise. The workshop is conducted at the Suva Campus.

Teaching is provided via a distance and flexible learning mode and the instructor uses the following methods for teaching:

- Using printed material;
- Face to face tutorials;
- Video conference tutorials via usernet (University of the South of the Pacific internet);
- Face to face workshop.

A short description of the course modules are as follows:

LAD 11 Back to Basics

This module provides a formal introduction to the system of legislative drafting and what is legislation. It outlines the responsibilities of a legislative drafter, the importance of grammar, and why legislative drafts take the form they do.

LAD 12 Working within limits

This module examines the rules followed by courts when interpreting legislative provisions, and teaches students to consider those rules when drafting legislative provisions. It also looks at the role of drafters in relation to constitutional provisions, Bills of Rights and international treaties.

LAD 14 Putting on the style, getting organised

This module is designed to provide an understanding that legislation is more than a set of random legislative sentences. The proposer's requirements must be converted into a complete instrument that is effectively organised and structured in accordance with the legislative practice that is conventional in the student's particular jurisdiction.

LAD 16 Particular cases

This module covers particular types of legislative provisions that are typical in Commonwealth legislation. Detailed consideration is given to legislative amendments and repeals, penal provisions, delegated powers to legislate, and the drafting of subsidiary legislation.

LAD I7 Drafting workshop

This is a practical and interactive module that applies skills learned throughout the whole programme. The workshop involves preparation and submission of an assignment that forms the basis of group discussion and presentation.

This course is now in its 15th year and much of the materials used as teaching aids remain the same, although course instructors have made improvements in updating their materials over the years. The course is generally accepted as both relevant as to its content and suitable for distance learning. The chart below presents a summary of students enrolled on the programme from 2006 to 2011 and gives a breakdown of students/ graduates/country of origin and gender. Most students who enrol in the programme came with a legal background. The table shows that not only has the programme attracted students from the Pacific Islands but the geographical spread is much wider. Students from Australia, New Zealand, Papua New Guinea and Nigeria have enrolled in the programme showing its global appeal.

PROFESSIONAL DIPLOMA IN LEGISLATIVE DRAFTING

SUMMARY 2006 - 2011

	2006	2007	2008	2009	2010	2011
Total Number of Students Enrolled	17	16	27	19	36	33
Total Number of Students Graduated	12	12	18	18	30	25
COUNTRY						
Fiji	15	10	04	03	03	05
Cook Islands	01		01	01	02	02
Kiribati		01	01		01	02
Marshall Islands					01	01

Niue						01
Nigeria		01				
Samoa		03	04	04	08	02
Solomon Islands			04	06	08	09
Tonga			04	01	01	03
Tuvalu					02	
PNG			05	04	06	07
Australia					01	
New Zealand					01	
Vanuatu	01	01	04		02	01
GENDER						
Male	07	08	15	07	22	15
Female	10	08	12	12	14	18

In fourteen years of teaching, the Law School has gained some insight into course delivery, student motivation and technology used. Many students struggle during the course. The workload of students who have full time day jobs is often quite daunting, leading to lack of attention given to reading materials and submission of assignments on time. The absence of more “face to face” contact with the lecturer has caused students to lose focus/interest in the course. Students also encounter difficulties in not being able to attend at scheduled satellite tutorial times due to prior work commitments in their home countries. It has been observed by course instructors over the years that students who are not self-motivated often lose interest a few short weeks after showing early enthusiasm. The course in its present format requires a student to be a self-starter and work through the material within a managed timeframe.

The technology used is multimedia and there are few problems associated with it. Some smaller regional countries have, for example, experienced difficulties with bandwidth and on occasions tutorials are interrupted for brief periods.

2. Students who have completed the course obtain a basic knowledge of legislative drafting. All regional governments in the Pacific have always encouraged their lawyers working in legislative drafting offices to enrol on this course. Some of those who have completed the course continue to work as legislative drafters in their respective countries. The course in its present form has its own strengths and weaknesses. The Pacific basin comprises many small islands spread across a vast ocean, hence the basic structure, design of the course and its teaching approach is the best that can be offered for now.

A legislative drafting workshop held in Auckland, New Zealand in 2006, sponsored by the Commonwealth Secretariat, rated the PDLD course highly⁸³. The current course is one which fits well around people's busy professional lives, since most drafting offices will not be able to spare their lawyers away from the office for three to six months at a time. This course alone however, is not enough to train a draftsman. After acquiring formal qualification, the drafter should be given further in-house practical training and attachments to other drafting offices and should benefit from other regular exchange programmes. Given the specialist training which this post graduate diploma provides, there are some obvious challenges which it faces. These are:

- Attracting quality students;
 - Access, cost and sponsorship;
 - Attendance and work commitment of students;
 - Attrition and non-compliance with given tasks;
 - Travel from the region for workshops.
3. The longer term hope is to further improve the course and provide more face-to-face teaching for at least 4 to 6 weeks and engage more staff to help teach the programme.

⁸³ Pacific Working Group on Legislative Drafting - Report and Framework for Action - November 2006, Auckland, New Zealand