

Training and Development of Legislative Counsel in Commonwealth Africa – the Way Forward

Estelle Appiah¹



Abstract:

The dearth of legislative counsel in Commonwealth Africa has posed cause for concern for the Rule of Law for some time. This article focuses on the training programme for legislative drafters in Commonwealth Africa over the last five years. It considers the scope of the training and explores the development of legislative counsel as they multi-task in their role in policy formulation, as legal advisers, in peer review mechanisms, as Parliamentary Counsel, as legal advisers and as legislative drafters.

The article also deals with the challenges of attrition and provides recommendations for the retention of legislative counsel. It concludes with ideas for collaboration with the developed Commonwealth in the training and development of legislative drafters.

Introduction

The rule of law is the *sine qua non* for good governance and development. It is trite that without the rule of law social transformation is in jeopardy.

¹ Director of Legislative Drafting, Attorney General's Department, Ministry of Justice, Ghana, West Africa.

The concept of “Good Governance” comprises four elements:

- (1) Governance by rule: decision-makers decide, not pursuant to the decision-makers intuition or passing fancy, but according to agreed-upon norms grounded in reason and experience.
- (2) Accountability: decision-makers justify their decisions publicly subjecting their decisions to review by recognised higher authority.
- (3) Transparency: officials conduct government business openly so that the public and particularly the press, can learn about and debate its details.
- (4) Participation: persons affected by a potential decision – the stakeholders – have the maximum feasible opportunity to make inputs and otherwise take part in governmental decisions.²

Good governance requires the exercise of political powers through rules, rules that are transparent and create accountable and participatory decision-making procedures.³

The absence of rule by law causes government decisions to become arbitrary and leads to the failure of public officials to seek the welfare of the majority and rather seek their personal interests. Accountability, transparency and participation are minimised. This leads to dissatisfaction and may cause unrest, instability and security problems.

It is the role of the legislative counsel to transform policy into law after the Cabinet has approved the policy for a Bill.

“Legislative drafting is a discipline. It requires continuous training and experience. It demands hours and hours of concentrated intellectual labour.”⁴

Legislative counsel are required to write with clarity, precision and consistency so that the will of the executive as translated by the Legislature promotes democracy and enhances the wellbeing of society in an orderly environment. It is the responsibility of the legislative counsel to ensure that legislation is drafted in such a way that government officials conduct government business without ambiguity

2 Ann Seidman, Robert B. Seidman and Nalin Abeysekere, *Legislative Drafting for Democratic Social Change. A Manual for Drafters* (Kluwer Law International, London: 2000) at.8

3 Seidman et al. above n. 2 at 343.

⁴ V.C.R.A.C. Crabbe, “Teaching Legislative Drafting: The Commonwealth Experience” (1998), 19 Statute Law Review 113.

and abuse of power and the public complies with the law for a just and orderly society.

It is therefore the role of the legislative counsel to facilitate the rule of law by drafting good laws that promote democracy, good governance and avoid tyranny. The question is: how do legislative counsel achieve maximum efficiency to draft laws that ensure that all persons, irrespective of their position, rank or status in society are subject to the law?

“Absence of clarity is destructive of the rule of law.”⁵

To reach a level where laws can be drafted with clarity, the legislative counsel must be well trained to draft legislation that is precise and consistent. Aristotle has stated that the “rule of law is preferable to that of any individual” and further states:

It is more proper that law should govern than anyone of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians and servants of the law.⁶

The law must transform society. Government officials must have prescriptive roles. The discretionary power of a Minister and others in decision-making roles should be curtailed to avoid corruption. This requires the ingenious use of language and, in the context of the law, particular use of language and syntax to craft a legislative sentence that will succinctly convey the meaning of the law in such a way that those for whom it is intended will understand it and those duty bound to implement it will not misinterpret it.

Justice V.C.R.A.C. Crabbe states the qualities of parliamentary counsel who draft legislation:

It is a discipline in itself. Its practitioners must have a facility in the use of the language of legislative instruments. Experience in legal practice is desirable. So is an interest in drafting, a mastery of the use of the relevant language, a systematic mind and orderliness in the formation of thoughts, the ability to pay meticulous attention to detail and to work with accuracy under pressure.⁷

⁵ Lord Diplock, *Merkur Island Shipping Corp. v. Laughton* [1983] 2 AC 570 at 612.

⁶ Aristotle Politics 3.16.

⁷ V.C.R.A.C Crabbe, “The Ethics of Legislative Drafting”, Commonwealth Law Bulletin 18 March, 2010 at 13.

Other qualities necessary are an ability to work with colleagues and others skilled in other disciplines as well as rigid self-criticism.

One method used to train a legislative counsel is the system of apprenticeship. Although this may be an effective method of learning, it is not the swiftest and in African Commonwealth jurisdictions the absence of legislative drafting mentors makes this form of training impracticable. Senior legislative counsel are generally overwhelmed with their own work and therefore do not have sufficient time to teach on the job.

Background to Training of African Commonwealth Legislative Counsel

The genesis of training for legislative counsel can be traced to the early 1970's and to the first Secretary-General of the Commonwealth, Arnold Smith. He noted that the Secretariat's primary function was to provide information about legislation in Commonwealth countries, including through the "launching of an ambitious publication, the Commonwealth Law Bulletin."⁸ Smith went on to note that "another logical advance was to inaugurate a series of training courses for Parliamentary draftsmen".⁹

In response to an appeal made by Commonwealth Law Ministers at their meeting in London in January 1973, the Commonwealth Secretariat conceived the Legislative Drafting Scheme.

The initial training course was organised in 1974. These courses were regionally based and the course for Africa was organised in Accra, Ghana in 1974. Other courses were subsequently organised by the Commonwealth Secretariat in Nairobi, Harare and Cave Hill in Barbados for participants from the different regions of the Commonwealth. Subsequently, the course was institutionalised in Barbados at the University of the West Indies (UWI) as the Commonwealth Training Centre. In 1986, the Secretariat institutionalised its ad hoc legislative drafting programme by concentrating its efforts on the drafting programme established by UWI in, Barbados. The programme was designed to train Parliamentary Counsel from across the Commonwealth.

As of October 1992, UWI delivered the programme entirely as a university course but with funding from the Commonwealth Fund for Technical Co-operation (CFTC) to support a certain minimum number of participants as it had done over

⁸ Arnold Smith and Clyde Sanger, *Stitches in Time: The Commonwealth in World Politics* (General Publishing: 1981) at 120.

⁹ *Ibid.* at 121.

the years. Some participants were also funded from other sources. From 1974 to 1993 a total of 445 participants had undergone training, a vast number of them funded by the CFTC. At first there were three levels, a certificate, advanced diploma and the LLM degree in Legislative Drafting. The certificate level was subsequently phased out in 1993.

There have been other training courses in Africa but this presentation will focus on training organised by the Commonwealth Secretariat for African Commonwealth jurisdictions to address the dearth of legislative counsel in the African Commonwealth.

At their meeting in Saint Vincent and the Grenadines in 2002, Law Ministers recognised that there were problems in the delivery of service by legislative counsel. It was acknowledged that shorter courses in the subject were required to avoid long periods of absence from the offices of legislative counsel for training. Consequent to that mandate, the Secretariat established a 12-week short course at the Ghana School of Law in Accra in January 2006 for the Africa region. In 2003 a Commonwealth Curriculum developed by Professor Patchett with a focus on short-term training and practical drafting exercises was adopted.

In 2005, Law Ministers meeting in Accra were pleased to note that a 12-week course had been devised in accordance with the Commonwealth Curriculum and was being initially offered in Ghana in conjunction with the Ghana School of Law with strong support from the Government of Ghana through the Ministry of Justice. This course was offered to the legislative drafting offices of all the 17 African Commonwealth countries following a workshop to determine the way forward for the training of African legislative counsel. The first course was held at the Ghana School of Law in 2006 for 12 weeks. It has been held annually since then.

Nature of the Course

To quote Justice V.C.R.A.C. Crabbe, the Course Director in his 2008 report of the third Course,

Legislative Drafting demands hours and hours of concentrated intellectual labour. The training afforded by the Course is not to make a participant a glorified amanuensis. The skills are learnt over a period of time. And a Course of the present nature can only impart the very essential rudiments of the art – and science as it is sometimes called of Legislative Drafting.

The Course comprises four elements: lectures, discussions, exercises and tutorials. Theory is combined with knowledge of the practical skills needed for legislative drafting. The lecturers deal with the theory. The discussion periods at class level deal with the theory and the practice.

Exercises are demanded of the participants for them to put into practice what they have imbibed from the lectures and the discussions. The tutorials on a group level or one-on-one give the participants the opportunity to assess how far they think and plan before putting pen to paper as well as their ability to identify the policy behind the need for legislation and express that policy as a law in a clear, cogent and concise manner.

The tutorials enable the participant's particular problems with legislative drafting to be dealt with. The lectures, the discussions and the tutorials take as much as two hours, depending on the topic and the needs of the participant.

Course Content

The Course has since its inception used the syllabus agreed on by the Commonwealth Secretariat as developed by Professor Patchett. Over the years some new topics have been added. These are: managing a legislative drafting office, drafting for the rule of law and drafting defensively against corruption. In response to a request from the heads of legislative drafting offices in Africa, the syllabus will be reviewed this year to include more topics that are of current interest globally.

Guest Lecture Series

Since the inception of the course, there has been a guest lecture series. The guest lecturers have come from academia, Parliament, civil society, the judiciary and law publishing among others. Their topics have ranged from constitutionalism, lobbying, statutory interpretation, Parliament, law as a tool for development to the transformation of treaties and the journalistic style of legislative drafting. The idea has been to provide the participants with background information to be able to think "outside the box" to deal with their role as legal advisers, active contributors to peer review mechanisms and as parliamentary counsel.

The statistics of participation in the Commonwealth Legislative Drafting Course for African jurisdictions from 2006-2010 are as follows:

2006	
Total No. of Participants	22
Females	15
Males	7
Countries Represented	14
2007	
Total No. of Participants	27
Females	17
Males	10
Countries Represented	11
2008	
Total No. of Participants	25
Females	14
Males	11
Countries Represented	15
2009	
Total No. of Participants	25
Females	14
Males	11
Countries Represented	14

<i>2010</i>	
Total No. of Participants	34
Females	22
Males	12
Countries Represented	15

Meetings of Heads of Legislative Drafting Offices of African Commonwealth jurisdictions

The first meeting of heads of legislative drafting offices of African Commonwealth jurisdictions took place in 2008 to review the courses run from 2006-2008. The meeting focused on the future of the course and the need to sustain it, attrition rates of legislative counsels and networking, among others.

The second meeting of heads of drafting offices of Africa Commonwealth jurisdictions took place in Mauritius in November 2010. The communiqué from that meeting is attached as Appendix 1. The meeting focused on an overview of the course, its assessment and evaluation, improving the terms and conditions of staff of legislative drafting offices and co-operation with other Commonwealth legislative drafting offices. The next meeting is scheduled for 2012 in Namibia.

Challenges to Legislative Drafting in Commonwealth Africa

The attrition of legislative counsel continues to pose a serious problem to African Commonwealth jurisdictions. Two other fundamental challenges impact severely on the capacity of drafting offices to be self-sufficient: how to attract lawyers to legislative drafting and how to retain them. The inescapable conclusion to be drawn from the continued shortage of legislative counsel, is that trained legislative counsel are not staying in drafting offices and not enough lawyers are being recruited to replace them. Many young people embarking on a legal career are not aware of legislative drafting as a specialty. To that end, it is necessary for legislative drafting to be taught in law schools, as is the case with the Ghana School of Law.

There is a lack of awareness among law graduates of legislative drafting as a viable career option. The visibility of legislative counsel is low and there is a negative image and diminished status of the discipline, although it has to be said that there is growing awareness of their role and importance.

Drafting offices are short staffed. Some of the factors which contribute to legislative counsel leaving their jobs are lack of the appropriate recognition of the value of their role. Others are the lack of properly structured offices and a career path for legislative counsel. Under-resourced offices, poor remuneration and other terms and conditions of service are also a factor as is isolation in the performance of their work. Legislative counsel are also overworked as they are required to multitask and carry out duties other than drafting.

At the 2008 Commonwealth Law Ministers Meeting, the following strategies were endorsed to address the challenges of the attrition rate of legislative counsels.

Institutional Strengthening

- The development of structures within a drafting/legal office that create an enabling environment for the development of legislative drafting expertise and a clear career path for legislative counsels;
- Drafting offices being adequately resourced.

Recruitment of Legislative counsel

- Introducing legislative drafting as a component of the law degree course, or where the training already exists, its strengthening and expansion to a distinct course at degree level;
- Promoting and effectively marketing legislative drafting as a career to attract lawyers (this could involve the re-profiling of legislative drafting as a viable career option);
- Developing flexible recruitment strategies to attract experienced lawyers to legislative drafting.

Capacity building

- Developing or enhancing in-house training and mentoring;
- Training of trainers courses for senior legislative counsel to enable them develop and undertake in-house training for junior staff;
- Developing legislative drafting and style manuals and guidelines on the legislative process;
- Training government officials and instructing officers on legislative processes and policy development and the development of adequate drafting instructions;
- Effecting placements and attachments of legislative counsel from developing countries in the drafting offices of developed countries;

- Effecting secondments of experienced legislative counsel to drafting offices in developing countries, especially small jurisdictions, with the primary objective of facilitating and delivering in-house training and advising on institutional strengthening;
- Creating networks of legislative counsel to facilitate the exchange of expertise, problems and experiences;
- Introducing computer technology and the use of templates.

Retention of Legislative counsel

- Reforming the structure of drafting offices and improving the work environment;
- Improving terms and conditions of service;
- Raising the profile of legislative counsel.

Assistance of the Commonwealth Secretariat

The Commonwealth Secretariat helped implement the strategy for African Commonwealth jurisdiction by

- supporting the 2008 and 2010 African Heads of Legislative Drafting Offices meetings and the establishment of a network between African legislative drafting offices.
- developing the legislative drafting manual for African Commonwealth jurisdictions;
- continuing the advanced legislative drafting course for the Africa region; and
- convening a side meeting on legislative drafting at the October 2010 Senior Officials of Law Ministries meeting in London.

Conclusion

The Commonwealth Secretariat remains committed to assisting African Commonwealth jurisdictions to develop their capacity in legislative drafting and thereby advance the rule of law and good governance. It is in discussion with the Ministry of Justice in Ghana to institutionalise the Course at the Ghana School of Law. However, due to the fact that its resources are limited and there are competing priorities, continued assistance will be determined by the availability of financial resources, relevance, effectiveness, and the contributory effort to the

maintenance of sustainable capacity in legislative drafting by improving the conditions of service of legislative counsel.

It is the view of the Commonwealth Secretariat that there must be a shared commitment to building capacity in legislative drafting by the Commonwealth Secretariat and African Commonwealth jurisdictions. Governments must make real their aim to make legislative drafting an attractive proposition to potential recruits as well as to existing staff through the provision of remuneration and terms and conditions of service which reflect the vital importance of legislative drafting.

The good drafting of legislation is the cornerstone of the rule of law and entwined with constitutionalism and the good governance. It is essential that means be found to continually motivate legislative counsel to give of their best and this can be done by refresher courses, the attendance at conferences to share ideas such as the CALC conferences and by collaboration with the developed Commonwealth to have internship programmes.

The legislative drafting training programme for the African Commonwealth has been highly successful and may I conclude with an appeal to the developed Commonwealth to reach out to the developing countries of the African Commonwealth by arranging attachments to enable young legislative counsel to hone their skills.

To quote Confucius,

If language is not correct, then what is said is not what is meant: if what is said is not what is meant, then what ought to be done remains undone.¹⁰

The training of Parliamentary Counsel to draft legislation in Africa aims to ensure that the language is used correctly and that good laws nurture democracy. It is not only important, but also crucial that legislative counsel are given appropriate training and support to enable them perform creditably.

References

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¹⁰ Quoted by Ernest Gowers, *The Complete Plain words* (Pelican Books, London: 1983 reprint) at 159.

- (4) Overview of the Commonwealth Secretariat Support to Commonwealth Countries in the field of legislative drafting, Meeting of Senior Officials of Commonwealth Law Ministries, Marlborough House London 18-20 October, 2010 SOLM (10) 6.
 - (5) Statute Law Review Volume 19 Number 2, 1998.
 - (6) Akbar Khan, Director Legal and Constitutional Affairs Division, Speech at the CALC Africa Region Conference, Abuja, Nigeria 7-8 April, 2010.
 - (7) Bilika H. Simamba, *The Legislative Process, A handbook for Public Officials*.
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