

Commonwealth Association of Legislative Counsel

# THE LOOPHOLE



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**THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel**

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The Loophole is a journal for the publication of articles on drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. It features articles presented at its bi-annual conferences. CALC members and others interested in legislative topics are also encouraged to submit articles for publication.

Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word processing software.

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## Editor's Notes

The 2013 October issue includes papers presented at Session 7 of the CALC 2013 Conference, held in Cape Town in April of this year. With each Conference, the standard of the papers presented is reaching higher standards. This is something which all CALC members ought to be proud of. This is largely due to the direction given by the present President of CALC, Peter Quiggin. His insightful comments contributed in no small way to the selection of the Conference Theme and the sub-themes. The matter of subjects and papers and presenters and Chairs of each session were ably managed by the team headed by John Mark Keyes, the present Editor in Chief of the *Loophole*.

The common theme of the papers presented at Session 7 was the “*Development of Drafting Skills*”. This issue is a perennial problem for drafting offices the world over. The dearth of experienced legislative counsel in most jurisdictions and the lack of funding for training appear to be the biggest problem in developing drafting skills in junior officers. Each drafting office and its head deal with this issue in the manner best suited for that particular office, its legislative counsel and its traditions, its ethnicity and its customs.

The Session 7 papers comprise,

**Daniel Lovric’s** “*A Strategic View of Drafting Training for Tomorrow’s Needs*”, which highlights the gradual shift from customized training to standardized training for legislative counsel and emphasises that though customized training will remain the major aspect of a legislative counsel’s training, standardized training will play an increasingly important role in the next few decades;

**Willie Ferrie’s** “*Development of Legislative Drafting Skills: The Benefits of Exchanges Between Drafting Offices*”, which speaks of the wealth of opportunity that exchange programmes hold for legislative counsel of all levels as they seek to challenge them and help to develop new insights into the drafting process and drafting techniques;

**Toni Walsh’s** “*Addressing the Decline of Capacity to Give Drafting Instructions*”, which focuses on the fact that the capacity of instructing agencies within a jurisdiction to instruct on legislation is becoming minimal, whilst there is a tendency to undervalue the skills of drafters to the point where it fundamentally changes the role of the drafter;

**Sandra Markman’s** “*Climbing Constitution Hill - Teaching Legislative Drafting in Ireland*”, which comments on the limited availability of formal academic programmes to train legislative counsel, laments the fact that in-house training and instructing simply will not produce sufficient numbers to close the gap which exists in most drafting offices and opines that developing a training programme for drafters in an academic setting in one’s jurisdiction appears to be the answer; and

**Dale Dewhurst, John Mark Keyes and Archie Zariski's** *"The Winds of Open Education: A New Era in the Training and Professional Development of Legislative Counsel"*, which focuses on the educational value of "Open Educational Resources" where the resources are an integral method of communication of curriculum in educational courses (i.e. resource-based learning), and the ease with which such resources, when digitized, can be shared via the Internet, are certainly illuminating and thought provoking and designed to illustrate that being innovative is definitely the way forward to developing drafting skills despite the overwhelming impediments which exist. Sharing drafting resources over the Internet, is definitely cost effective.

Being a member of the Editorial Board which was set up after the April 2013, Cape Town CALC Conference has been a very challenging and stimulating experience. My thanks to John Mark for leading me through the dilemma's I faced when I first embarked on the job and the encouragement given whenever I cried "help". Therefore, his request that I write the Editorial for this issue of the *Loophole* humbles me greatly. I trust that the confidence he has placed in me is not misplaced.

Therese R. Perera, P.C.

Guest Editor

Colombo, October 2013

# A Strategic View of Drafting Training for Tomorrow's Needs

Daniel Lovric<sup>1</sup>



## Abstract

*This article looks at the needs that legislative drafting training must meet, not only for the present, but for the future as well. It reviews current approaches to training, likely trends in legal practice and education and the training opportunities offered by IT. The article promotes a strategic approach to training through the identification of the broad issues one needs to consider in taking small, pragmatic, steps.*

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## Part 1 - Introduction

When I sat down to write this paper I quickly realised one thing – it's hard to say something new about training legislative drafters. Papers abound on the subject.<sup>2</sup> I read around the literature, and stumbled upon a provocative article by an English academic, Richard Susskind.<sup>3</sup> He seems to have made a big mark in the ongoing debate about the future direction of legal education. His article dealt with trends in the legal profession, and the

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<sup>1</sup> First Assistant Parliamentary Counsel, Australian Commonwealth Office of Parliamentary Counsel, Canberra. All the material in this paper reflects my own personal views.

<sup>2</sup> Many references to this literature is to be found in Dewhurst, D., Levert, L. and Zariski, A., "Producing Legislative Counsel: Ways and Means" (2012), 33 Statute Law Rev 339.

<sup>3</sup> Susskind, R., Provocations and Perspectives, A working paper submitted to the UK CLE Research Consortium (Legal Education and Training Review),, available at <http://letr.org.uk/wp-content/uploads/Susskind-LETR-final-Oct-2012.pdf> (visited 21 October 2013).

impact that these trends would have on legal education. My interest perked up: here were the beginnings of an idea for a paper.

Most literature on the training of legislative counsel deals, not surprisingly, with the needs of today. However, it's also important to consider what the needs of tomorrow will be. That is, in considering how to train legislative counsel, it's important to consider not only what they need at the moment (and what resources are available to meet those needs), but also what they will need in the future (and what resources will be available to meet those needs).

This strategic view fits in with the current debate on legal education in general. The traditional approach to legal education is now under serious attack. The skills that universities impart are seen by many as inadequate in relation to the skills that lawyers will need in the coming decades. Furthermore, the traditional lecture-based method is slipping out of favour.

How will today's legislative trainers be judged in 2 decades? Will the drafting skills that we focus on now be seen as marginally relevant in the future? Will our methods appear to be conservative and behind the curve?

For the most part, the answer to these questions is "no". The reason is that the legislative counsel of the future are likely to be doing similar jobs to the ones of today. If the past century is any guide, their role will be slow to change. Governments need highly skilled counsel operating outside commercial considerations to draft the most sensitive and complex laws. This is likely to continue to be so for the next few decades.

Furthermore, the methods of training legislative counsel are not likely to change in any fundamental way. There will be no significant improvements to the "royal road" to gaining the legislative skills: joining a drafting office, attaching yourself to highly skilled legislative counsel, getting involved in pressured, complex and politically important projects, and doing some reading and thinking on the side.

However, one should not be too complacent in this regard. The legislative counsel of the future will be doing a *similar* job to those of today – but it will not be *exactly the same*. Even legislative counsel have to face some of the changes that are now affecting the rest of the legal profession. Furthermore, it is not clear how accessible the "royal road" mentioned above will be in the future. There are only so many opportunities to work with very experienced legislative counsel, and only so many challenging projects.

Therefore it's worth considering a strategic approach to drafting training. This is so for large drafting offices, which need to maintain high consistent standards of legislation across long time periods. It is also the case for smaller drafting offices, which need to take advantage of every new training possibility. The trainers themselves – be they practitioners, university lecturers or drafting consultants – need to take account of future trends in both legislative drafting services and in legal education.

This line of thought, however, leads to unstable ground. Rumbling under the surface of the practicalities of drafting training are some very controversial issues and themes. The eternal favourite is the question of whether drafting skills can be taught otherwise than on-the-job. Running a close second is the broader issue of what legislative counsel actually do: which skills are important and which are not? To these questions one could add a number of other contestable issues.

- Where should training resources be directed (to students, beginner practitioners, experienced practitioners or instructors)?
- How transferable are drafting skills between jurisdictions?
- What is the role of undergraduate education in drafting training?

It is not the purpose of this paper to answer these questions, but they nevertheless have to be addressed.

These questions can be quite sensitive. Ask any legislative counsel which drafting skills are the most important, and you will probably get a list of that particular counsel's personal strengths. Ask a university about whether legislative design should be a compulsory undergraduate subject, and the answer will depend on the extent to which the members of the law faculty have been exposed to the legislative process. The point is that one cannot be definitive about the content of drafting training. Every training approach has its weak points and room for improvement. If a strategic approach to drafting training can help to identify just a few of these things, then it is worth exploring.

This paper proposes a strategic approach in 3 stages. Part 2 of the paper takes a brief look at the current training of legislative counsel. Part 3 then examines how some trends could affect their work and training. Part 4 then looks at some specific possibilities for training in the light of these trends.

## **Part 2 - Current training: customization and standardization**

The first real legislative counsel in the English common law world were self-trained. Path breakers such as Henry Thring and George Coode found themselves in a rather disorganised working environment and developed techniques to improve the drafting of legislation. Most legislative counsel of the common law world today apply these techniques, or at least modern derivations of them.

Few legislative counsel today have read the works of Thring and Coode (I tried, and gave up, lost in the detail).<sup>4</sup> Most working counsel today learned their technique from their supervising counsel, on-the-job. This is a practical form of training, provided by a mentor.

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<sup>4</sup> The introduction to a later edition of Thring is nevertheless well worth reading: [http://archive.org/stream/practicallegisl00thringoog/practicallegisl00thringoog\\_djvu.txt](http://archive.org/stream/practicallegisl00thringoog/practicallegisl00thringoog_djvu.txt) (visited 21 October 2013).

The training is in real time, and has an immediate relevance to the job at hand. This kind of training is often called *apprenticeship*.

Drafting offices provide a variety of options for apprenticeship. Some offer a “pairing system”, that is, a one-on-one apprenticeship with a senior counsel. Others apply a “branch model”, under which one senior counsel provides mentoring to a number of trainees.

A more recent trend is to teach legislative drafting by *coursework*. Many skilled practitioners have put enormous effort into making this kind of training a useful supplement to practical experience. Such courses are highly sought after in the developing world, where it can be difficult to obtain personal access to experienced legislative counsel.

Perhaps the key difference between apprenticeship and coursework is the degree of *customization* or *standardization* involved. Apprenticeships offer a high degree of customization. The apprentice counsel receives training directed at the particular law on which he or she is working. Comments by the senior counsel are adjusted to the immediate practical context, and to the needs of the apprentice. By contrast, coursework offers a high degree of standardization. The curriculum is designed to provide a consistent and broad ranging experience for each trainee. Comments by the trainer are adjusted to standard issues and tasks. (Admittedly, apprenticeships involve some standardization, just as coursework offers some customization.)

This contrast between *customization* and *standardization* is a key issue in the training of legislative counsel. To what degree should training be customised to the trainee and to what degree should it be standardised? Bespoke or ready-to-wear? Of course, these questions cannot be answered in the abstract, because the answer depends on the available resources and the nature of the job being trained for.

This leads to the further issues of what resources will be available in the future to train legislative counsel, and what developments in their work are possible. In other words, we need to look at likely trends to provide a platform on which to develop a strategic approach to training legislative counsel.

### **Part 3 - Likely trends in legal practice and legal education**

An important part of the art of futurology is distancing yourself from your predictions 10 years after you publish them. I'll be interested to read this part of the paper again in 2023!

Nevertheless, without some view of likely trends, it is not possible to take a strategic view on legislative counsel training. Nor is it really an option to assume that everything will stay basically the same.

Richard Susskind's paper mentions a number of trends in legal practice and education. Perhaps the most important are:

- reductions in resources;

- disaggregation (the division of legal work into component parts, and the distribution of those parts among specialists and bulk providers);
- developments in information and communications technology;
- internationalization.

All of these trends, I would argue, will encourage a gradual shift from customized training to standardized training for legislative counsel. While customized training will remain the major aspect of their education, standardized training will play an increasingly important role in the next few decades.

Let us explore this idea in more detail.

### ***Reductions in resources***

*Resource reduction* is a fairly simple, certain and powerful trend. Even before the global financial crisis, governments were beginning to take a critical look at how they purchased legal services – including the drafting of legislation. After 2008, few would deny that there is less money available. This resource shortage is not likely to change in the short or medium term.

As a result, more legislative projects will have to be completed with reduced staffing levels. Of course, there will always be politically significant projects that will attract high levels of resources and attention. But an increasing number of “second level” projects will need to be completed quickly and without the full attention of experienced counsel. Legislative counsel may need to deal with 2 types of project: the well-resourced project and the clearly under-resourced project. For the latter, they may need sophisticated skills in prioritisation, and the ability to sacrifice second-level values for the most important values.

Furthermore, pressure on costs will change what has been seen as the standard career path for legislative counsel: a long and stable career in one drafting office, with possible mid- or late-career switches to another office. If pressure on costs continues, there will be less money available to pay attractive salaries to a large number of senior counsel. In turn, this will remove an important incentive for many bright young trainees to stay at the job. There will be more churn in the early stages of a career, and many of those who try another job will not come back to drafting legislation. This implies that the drafting office of the future is likely to have fewer experienced legislative counsel, and a relatively larger number who are inexperienced.

If this is indeed the case, it poses a major threat to systems of apprenticeship. There will be fewer experienced counsel to provide personal mentoring to a larger number of trainees. Experienced counsel will have to split their attention between the increasing numbers of trainees, and less-experienced counsel will find themselves mentoring the beginners. For those offices using a “branch” style of training, there will be pressure to make the branches

bigger and with a more dispersed training approach (as compared with one-on-one mentoring).

Part of the response to this trend is likely to be a resort to standardised training techniques. Once developed, they are less expensive to deliver. They may be expensive to buy or develop, but they are economical to run.

### ***Disaggregation***

*Disaggregation* is a more complex trend, but also a powerful one. Disaggregation of legal work is the division of that work into component parts, and the distribution of those parts among specialists and bulk providers. For example, the drafting of simple contracts is increasingly being outsourced from large law firms to bulk legal providers, often in lower cost countries. Law firms retain for themselves the complex, highly profitable work.

Disaggregation is clearly affecting the legal profession generally. But what effect will it have on legislative counsel – and on their training? My own view is that legislative counsel are somewhat insulated from disaggregation, but they will not escape it completely. One can already see this trend in the increasing bulk of rules drafted “out of house, whether by instructing departments or by outsourced legal providers. In the field of economic legislation, more and more of the relevant rules are drafted in-house by regulators, or even by non-governmental actors.<sup>5</sup> In many cases, it is better for subject matter experts to draft the details of a regulatory scheme, and not a specialist legislative counsel.<sup>6</sup>

This aspect of disaggregation could also lead to pressures for standardised training - for part-time legislative counsel who are subject matter specialists. In larger jurisdictions, there may be a growing group of such part-time legislative counsel sitting in instructing departments and regulatory agencies who could benefit from such training. It is unlikely that they will get customised attention from an experienced legislative counsel. The more realistic option is to develop standardised forms of training for them.

### ***Developments in information and communications technology***

A rough rule of thumb in making specific predictions about future directions in *information and communications technology* is that you are 99.9% likely to be wrong. However, it is fairly safe to make one general prediction: the cost of producing and distributing textual, audio-visual and interactive materials is likely to drop dramatically.

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<sup>5</sup> Good examples in business tax legislation are accounting standards – drafted by accounting bodies.

<sup>6</sup> Another aspect of disaggregation is the increasing degree of specialization needed to draft certain kinds of legislation. Business tax legislation is a prime example. In jurisdictions with complex tax systems, it is difficult to make a substantial contribution to the drafting of tax legislation without several years of experience in the area. Nevertheless, the drafting of primary tax legislation is seen as a job for professional legislative counsel, (and not subject matter specialists with part-time drafting experience). Thus one sees in many jurisdictions the emergence of legislative counsel who specialize in tax legislation.

Developments in IT offer huge potential for designing and delivering standardised drafting training. Computer networks are the natural platform for such training. The actual form of the standardised training could vary widely: possibilities include online written course materials, precedents, articles and drafting notes, audio-visual materials and automated or semi-automated interactive courses. Once these materials have been produced, they will be inexpensive and quick to deliver.

### ***Internationalization***

As with information technology, *internationalization* is one of the clichéd trends of the 21<sup>st</sup> century. In spite of the hype, it is a trend to take seriously, including in relation to legal services. Large private law firms have already felt the effect of internationalization in a substantial way. They are dealing increasingly with cross-border transactions, and need to deliver legal services in more than one jurisdiction.

In respect of legislative counsel, however, internationalization is probably the least important of the trends mentioned in this paper. For the medium term at least, legislative design will be tightly bound to a particular jurisdiction, and larger governments will not be looking offshore for legislative drafting services. One can find unusual exceptions: some legislative projects do cross national boundaries, and need to satisfy the requirements of 2 or more legal systems. Recent experience in drafting trans-Tasman legislation provides a good example.

Internationalization may nevertheless have some significant effects on the training of legislative counsel. Again, it is hard to make concrete predictions here, but at least some of the following speculations are likely become reality:

- Training of legislative counsel could take on an increasingly international flavour. A good standardised training program is likely to be useful in a number of jurisdictions –and for this reason will be an extremely cost-effective approach.
- Larger drafting offices could become increasingly involved in foreign aid projects with a training component for local legislative counsel.
- Increasing opportunities for legislative counsel to meet each other to exchange ideas (whether at conferences, or over the internet or in blogs and discussion groups) could lead to a quicker adoption of drafting innovations across jurisdictions.
- Increasing opportunities for legislative counsel to work in other jurisdictions could also speed up the exchange of drafting ideas and innovations.

In any case, internationalization is yet another trend that promotes standardization in training. All of the four speculations just mentioned involve a degree of standardization or convergence in training approaches. In the next decade or two, it will become more difficult

to design a training program without first making a survey of what others are doing in this area around the world.

### **Summary of trends**

The aim of the preceding discussion has been to provoke some ideas, and challenge a few of the assumptions currently underpinning the training of legislative counsel. From a strategic perspective, these trends indicate that we should take the phenomenon of standardization seriously. The traditional, customised, approach could be undermined on two fronts. Firstly, there will be fewer resources available to provide such an approach. Secondly, information technology and international connections and economies of scale may create *new* resources for standardised approaches. I do not expect that the customised approach will disappear – on the contrary, it is likely to remain the most important aspect of training of legislative counsel. However, standardised approaches are likely to become more significant than they were in the past.

### **Part 4 - Standardised training opportunities offered by IT**

If one accepts that standardisation is a phenomenon to be reckoned with, one can start to explore some of the specific possibilities that IT offers. It is not the purpose of this paper to explore these possibilities in detail. However, a few examples will help to illustrate the strategic approach, particularly the opportunities offered by computers.

There are huge opportunities for drafting training created by the Internet. Some of them are unsurprising: online course delivery, online articles and online discussion groups. However, the unsurprising nature of these opportunities does not prevent them from being highly effective!

There are also more radical opportunities. One is the publication of training materials in the *public domain*.<sup>7</sup> At first, this could appear unattractive to training providers who have invested time and expertise in developing the materials: where is the payoff? The answer is threefold. Firstly, the trainers who publish high-quality training materials in the public domain first will enjoy a considerable first-mover advantage—and a corresponding boost in reputation. Secondly, it is likely that the first training materials to be placed in the public domain will tend to cover the most basic drafting skills. Trainers will still be in demand to help new legislative counsel develop their higher-level skills – and those with the reputational boost of high-quality public domain materials will be sought after. Thirdly, public funding may be available to support the open publication of training materials.

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<sup>7</sup> A pioneering effort in public domain training (under the auspices of the Commonwealth of Learning) is described in the paper published in this edition of the *Loophole* by Dale Dewhurst, John Mark Keyes and Archie Zariski.

Furthermore, there are major opportunities for designing training materials adapted to new media, particularly in audio-visual form. This aspect of education is starting to have a major impact in universities, so why not elsewhere as well? With today's technology, it is not expensive to film and edit training sessions, and upload the resulting videos for use by a general or limited audience.

One should not see the opportunities offered by computers as only related to the Internet. Computers also offer major opportunities for standardised training *within* a particular drafting office.

In particular, computers offer great possibilities for *just-in-time* training. This is training designed to impart a skill at just the point in time when a legislative counsel needs to use it in his or her work. There are obvious advantages to just-in-time training. It satisfies an immediate need for trainees. Furthermore, trainees are far more likely to remember training if it is linked to a job that they are actually doing at the time. This can be compared with *just-in-case training*, which deals with an issue just in case it arises in the future. Most lectures offer just-in-case training (unless they are recorded in some way). Just-in-case training can be very useful, but is often much less efficient than just-in-time training.

Computers are perfectly adapted to just-in-time training because they can deliver standardised training materials on request, instantly and cheaply. A basic form of just-in-time training is a database of papers dealing with particular practical issues.<sup>8</sup> Keeping such papers on a computer network is qualitatively different from keeping them in printed form in an office library. The searchability and accessibility of the electronic versions means that they will actually be used in the course of a pressured project (printed versions tend to get forgotten or have no priority in the rush of an urgent deadline). The value of such a database is multiplied if a procedure is in place to capture all relevant papers in a systematic way. There is no reason why such a database could not be expanded to cover audio-visual materials.

These examples demonstrate the opportunities offered by information technology for new standardised training approaches. There is considerable space here for innovation. Clearly, any strategic approach to training legislative counsel needs to take account of the emergence of these new opportunities.

## Part 5 - Conclusion

The biggest risk to any drafting office is that there will not be enough sufficiently skilled counsel to meet the demand for drafting services. This is not just a risk for the drafting office, but also to the effective machinery of government, and (without wanting to be too

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<sup>8</sup> The federal Office of Parliamentary Counsel in Australia maintains such a database. My own experience, and those of my colleagues, is that this is an invaluable tool in updating our professional knowledge when required. It is also a safeguard against the loss of "corporate knowledge" when experienced drafters retire or move on.

dramatic) to the rule of law. Legislative counsel play a quiet, unglamorous role in the legal system—but the absence of skilled legislative counsel is soon felt throughout that system, be it by politicians whose policies are stymied by technical legal problems, or by judges and advisers whose abilities are wasted in dealing with technical incoherencies in the statute book. The skills of legislative counsel reduce these problems, and those skills are worth promoting and developing!

Legislative counsel are generally highly pragmatic people, with little taste for theory. They tend to innovate in small steps, distrusting any broad doctrine. It may be that many have a limited taste for a strategic approach to training, preferring to deal with immediate issues as they arise. Indeed, there is much to be said for this pragmatic approach. However, there is also a lot to be said for a strategic perspective on legislative counsel training. Strategy at its simplest is the identification of the broad issues one needs to consider in taking small, pragmatic, steps. Hopefully this article will spark an idea or two for you, and lead to at least a small innovation in your training approach.

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## **Development of Legislative Drafting Skills - The Benefits of Exchanges**

**Willie Ferrie<sup>1</sup>**



### **Abstract**

*This article describes an inter-office exchange between legislative counsel in the Office of Scottish Parliamentary Counsel and the Australian Commonwealth Office of Parliamentary Counsel.*

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### **Introduction**

Toni Walsh of the Australian Commonwealth Office of Parliamentary Counsel (OPC) and I swapped jobs for a 6 month period during the first half of 2009. That was some 4 years ago now, but the experience has left a lasting impression on me and still resonates with me and my colleagues.

This article discusses how that exchange came about, what my experience of it was like and what lasting benefits it has had for me and my office. Hopefully, it will serve to encourage others to think about the possibility of an exchange not just as a personal development opportunity for the legislative counsel involved but also as a potential opportunity for the drafting offices involved to learn from each and to improve.

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<sup>1</sup> Scottish Parliamentary Counsel in the Office of the Scottish Parliamentary Counsel in Edinburgh, which is the legislative drafting Office of the Scottish Government.

### **The origins of the exchange**

The exchange in my case was initiated by the OPC in Canberra. In 2007 Peter Quiggin wrote to the then head of the Office of the Scottish Parliamentary Counsel (OSPC), Colin Wilson, suggesting the possibility of an exchange. The idea of an exchange was not something we in OSPC had ever considered. We had recent experience of hosting legislative counsel from drafting offices in a number of Commonwealth jurisdictions in Africa, under an arrangement set up at a Commonwealth Law Ministers' Conference by one of our law officers.<sup>2</sup> But as a relatively small and busy drafting office with not much capacity to spare there was an immediate concern as to whether we could afford to lose a legislative counsel for a 6 month period. But it was clear that the exchange envisaged a swap of senior, experienced legislative counsel. That was important in selling the idea of the exchange to us – it was only feasible from our point of view if we got a senior and experienced legislative counsel in return on whom we could rely to do substantive drafting. From my experience in Canberra, this was also key to the success at their end. The Canberra Office, although bigger than OSPC, is a busy Office and I certainly felt the expectation that I would very quickly have to wade in and get some drafting done.

Another important factor in the workability of the exchange from our point of view was that the form and structure of the legislation produced in Edinburgh and Canberra is broadly similar and familiar. That again goes to the notion that, for the exchange to work effectively, at least from the OSPC perspective, it would be important that the exchange legislative counsel be able quickly to settle into the new environment in their hosting offices and get to work effectively on drafting.

### **The exchange experience**

Having said that the exchange was only workable on the basis that the legislative counsel involved should be able to hit the ground running and get down to drafting in their host offices, I can confirm that I was quickly put to work on drafting. I worked under the supervision of one of the senior legislative counsel in Canberra, but I certainly didn't get the impression that I was being spared the full burden of a legislative counsel (well, not much more than would have been sensible in the circumstances).

I drafted 4 Bills<sup>3</sup> during my 6 month stint in Canberra, covering a varied range of subject matters. This number is probably fewer than the number drafted by other senior legislative counsel in Canberra over the same period, but it is certainly more than I might have expected to draft in the same period back home in Edinburgh. I have had a quick look on the

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<sup>2</sup> Under this arrangement, OSPC has hosted drafters from Uganda, Ghana and Malawi.

<sup>3</sup> National Greenhouse and Energy Reporting Amendment Act 2009, Social Security Amendment (Training Incentives) Act 2009, Health Workforce Australia Act 2009 and Access to Justice (Civil Litigation Reforms) Amendment Act 2009.

Australian federal legislation website<sup>4</sup> to see if those 4 Acts are still on the statute book. And it seems they are. So I must have got something right!

I would say that this was something positive that I got out of the exchange – a sense of having contributed something lasting to the statute book there. And that is something to be borne in mind when arranging exchanges. All too often when legislative counsel spend time in the drafting office of another jurisdiction they find themselves doing nothing more than observing and sitting in on meetings, and so on. While those can be valuable learning experiences, it is much more rewarding, not to say productive, to be able to actually draft something and see it through to completion. Fortunately, the timeframe within which Bills are produced in Canberra made it possible for me to see a Bill through from beginning to end. That may not be possible in other jurisdictions but it is an important factor to bear in mind when deciding on the duration of an exchange.

Also, I had a period of induction during the first 2 weeks or so of my time in Canberra, during which I was introduced to the various office manuals and policies on drafting and given a run through of the operation of the specialist drafting software and other IT systems. I found that I learned a lot more about these in the course of actually drafting for real. This again confirms that being able to put an exchange legislative counsel to work on real Bills really does produce the best learning experience while minimising the disruption to the work of the host office.

So, was the learning experience all one way? Well, I certainly found that I, and my home drafting Office, had quite a lot to learn from the way the drafting work is conducted in the Canberra drafting office. But I always made sure that, where there was an opportunity to point up the differences in the way we do things back home in Edinburgh, I took the opportunity to do that. While my description of the Scottish way of doing things was always politely listened to, I am not sure to what extent it ever caused anyone in Canberra to rethink their approach!

One thing I was asked to do during my time in Canberra was a presentation on how we do things in Edinburgh. That was well received, so much so that I had to reprise it 3 times – once for the Canberra Office and then again for 2 other drafting offices that I visited while there – the New South Wales state drafting office in Sydney and the drafting office of the Australian Capital Territory. But my own view is that that was probably an appropriate level of reciprocation in terms of learning. The main point of my being hosted in Canberra was for me to learn from them, which I certainly did.

### **Benefits of the exchange**

One benefit of an exchange like the one Toni and I took part in is the opportunity for personal development it provides. Too often senior and experienced legislative counsel can

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<sup>4</sup> ComLaw, <http://www.comlaw.gov.au>.

struggle to find something to stimulate and challenge their drafting skills within their home drafting office. My exchange experience showed me that legislative drafting is a highly portable skill within the Commonwealth jurisdictions. Bearing that in mind, the CALC network presents a wealth of opportunity for legislative counsel of all levels to challenge themselves and develop new insights into the drafting process and drafting techniques. The 4 Bills I drafted while in Canberra, and their varied subject matters, proves that with the right support there is nothing to stand in the way of experienced legislative counsel applying their skills and experience in other jurisdictions.

Another main benefit that an exchange at the senior level provides is the provision of opportunities, and the stimulation of ideas, for improvements in the respective drafting offices. It proved invaluable to me to see at first-hand how the drafting task is undertaken in Canberra and to experience directly the systems and processes they have in place to support them in delivering their demanding legislative programmes and for maintaining quality in the face of those demanding work pressures. I found there was much to learn from OPC.

There were a number of differences I found between the drafting experiences in Canberra as compared with my experiences back home in Edinburgh. In Canberra, they seem to produce a lot more Bills<sup>5</sup> and much shorter timetables. Another major difference is that legislative counsel there take instructions directly from policy officials, without much in the way of input from legal advisers. I certainly found that a challenge as it put more pressure on the legislative counsel to guide the policy officials through the detail of the existing legislative landscape to try to find the drafting solution that was needed for the policy. A legal adviser was involved in instructing one of the Bills that I drafted in Canberra and I certainly found that a very different experience. There was much greater clarity around what was needed in terms of a legislative fix.

Interestingly, the “classic” 3 party, linear Bill instructing process that operated in Scotland has begun to break down recently. More and more we are finding that we have to work more flexibly in drafting Bills. In particular, in many instances now we have to draft on the basis only of instructions from policy officials. We are also finding that we have much less time to draft. And, indeed, that we have more Bills to draft. I am now finding that drafting in Edinburgh is coming closer to what I experienced in Canberra. These changes have been partly driven by the need to find better ways of working as a consequence of cutbacks in the public sector. Inevitably, for some areas, that has meant cutting back on staff. The Scottish Government has lost a significant number of people over the last year or so, including many lawyers and policy officials. Those left are finding that they have more to do and are spreading themselves thinly. If any areas of Government work have shrunk in line with the shrinking of staff resources, the production of Bills is not one of them! But we as legislative

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<sup>5</sup> In 2009, the Australian Parliament passed 136 Acts compared to the Scottish Parliament’s 12 in the same year. The number of drafters in OPC Canberra is roughly double that in OSPC Edinburgh.

counsel have managed successfully to adapt to meet these challenges and it is interesting to note that those adaptations are taking us closer to the Canberra model.

While my experience in Canberra has taught me that it is possible to draft Bills according to a different model and to shorter timescales, it has also taught me that, for that different model to be effective, legislative counsel need a lot of support to ensure that quality is maintained and to ensure that the often frantic process is properly and effectively managed on their behalf.

Tellingly, the Canberra drafting office is a self-contained department with its own administrative and IT support and a number of good quality law graduates providing editorial support. They also have a number of sophisticated IT applications, developed in-house over the years to help in both maintaining drafting quality and in supporting the management of the Bill drafting process. They also have a wealth of resources available to the legislative counsel in terms of online drafting manuals, guidance and directions.

In contrast, the drafting office in Edinburgh is not self-contained. We have 14 legislative counsel and that is it. We share administrative support with the Scottish Government's main legal office and have to rely on the Scottish Government's central IT office for IT support. We have recently begun to build up a repository of our knowledge and guidance.

There are two things from my experience in Canberra that left a lasting impression on me.

The first is the extensive array of manuals, guidance and drafting directions that is available on the desktop computer in Canberra. Over the years, they have built up an impressive store of drafting knowledge, which I found to be an invaluable resource to me, as it would be to any legislative counsel. Indeed, I understand it is available to other drafting offices both within and beyond Australia. It certainly made my task there as a legislative counsel a lot easier having ready and easy access to that information.

The second is their extensive use of IT applications to assist the legislative counsel in drafting and also to facilitate the checking of Bills for quality. They also have other IT based resources and systems for managing their Bill work effectively and efficiently. These useful tools have been developed in house by both legislative counsel and the dedicated IT support staff in OPC who clearly have a very firm grasp of the job of the legislative counsel. As alluded to above, I think that having good administrative and IT support, and other online resources, is essential in the 21<sup>st</sup> century to support legislative counsel in these days when they have to work more quickly while maintaining standards.

Since returning from Canberra I have tried to push forward developments in the Edinburgh Office based around the two main themes of building up our store of knowledge and guidance and trying to work out ways of making better use of IT to support our work. The former theme has seen some success in that we have developed more in the way of Office policies and guidance and have integrated these with our knowledge database and made some of that data store more widely available to other legislative counsel in Scotland, both

inside and outside the Scottish Government. It has been a challenge largely because we have no dedicated administrative support and no spare capacity to devote to these tasks, so legislative counsel have had to take these projects forward as best they can in addition to their legislative drafting work.

On the IT front, there has been less progress. But the priority for us is the improvement of our Bill-drafting software. That is something that is being taken forward in conjunction with the other drafting offices in the UK and parliamentary officials. We are all excited at the prospect of a better drafting tool that will vastly improve the legislative counsel's job.

In summary, there is a wealth of opportunity throughout the Commonwealth for legislative counsel, even experienced legislative counsel, to learn from each other and for drafting offices to learn from each other. The portability of our drafting skills means that there should be nothing to stand in the way of us going to work in other jurisdictions to gain that learning experience. And the exchange arrangement is a useful means of facilitating that experience without affecting the drafting capacity of the offices involved.

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# Addressing the Decline of Capacity to Give Drafting Instructions

Toni Walsh<sup>1</sup>



## Abstract

*In 2009, Toni Walsh of the Office of Parliamentary Counsel (Australia) worked with the Office of the Scottish Parliamentary Counsel as part of an inter-office exchange. This article describes her experience and resulting insights into the effect the organisation of instructing agencies, and a declining skill set within those agencies, has on the skills required of legislative counsel. The role of legislative counsel in managing legislative projects is changing, with legislative counsel becoming increasingly involved in teaching instructors, working through solutions to process issues and developing models for giving effect to policy.*

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## Introduction

In 2009, I was lucky enough to participate in an exchange between the Australian Office of Parliamentary Counsel (OPC) and the Office of the Scottish Parliamentary Counsel. One of the most significant insights of that experience was not into the workings of another office but into my own. I looked at my own office from the perspective of an outsider and found that while the core skills used in drafting were common across jurisdictions, the environment in which a legislative counsel operates can change how those skills are exercised and at times require differing additional skills.

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<sup>1</sup> Senior Assistant Parliamentary Counsel, Australian Office of Parliamentary Counsel.

This article focuses on the way in which the organisation of our instructing agencies at federal level within Australia affects the way in which the OPC's legislative counsel work and what the OPC has done to respond to declining capacity to give drafting instructions.

### **Declining Capacity to Give Drafting Instructions**

One of the things I admired most about the way in which legislative projects were handled in Scotland was the contribution of the instructing solicitors. Within the Australian public sector, a number of factors have contributed to a loss of core instructing skills:

In the 1990s there was a move to operate government legal services on a private sector model. This resulted in many cases in the loss of legal teams within agencies who instructed on legislation as part of their core function. It also resulted in an undervaluing of legal expertise in matters at the core of government, such as developing and interpreting legislation.

The way in which the public sector superannuation scheme was structured created strong incentives to retire at 54 years and 11 months. This led to the loss of large numbers of experienced public servants and their corporate knowledge.

Successive governments implemented public sector cuts that have resulted in experienced public servants taking redundancies. Again, this has led to the loss of large numbers of experienced public servants and their corporate knowledge.

The Australian Public Service Commission promotes mobility within the public sector which, while valuable in many ways, also results in the loss within agencies of any depth of expertise in the legislative process.

Little training is offered on instructing on a legislative project. OPC offers a 1 day course that covers the entire legislative process, from the point where a policy is announced to the point where a Bill is passed and assented to. The Australian Government Solicitor also offers a half-day course for government lawyers and policy officers who are new to the legislative process. The course relates to subordinate instruments.

Resources such as the Legislation Handbook (last updated in May 2000), the Cabinet Handbook<sup>2</sup> (last updated in March 2012) and the Federal Executive Council Handbook<sup>3</sup> (last updated in September 2009) are available on the website of the Department of the Prime Minister and Cabinet. However, many instructors are not aware of those resources unless told about them. OPC also publishes a guide to working with OPC.<sup>4</sup>

Most of the larger agencies in the Commonwealth have now returned to a model in which the agency itself maintains a legal team. The extent to which, and the way in which, those

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<sup>2</sup> Available at [http://www.dpmc.gov.au/guidelines/docs/cabinet\\_handbook.pdf](http://www.dpmc.gov.au/guidelines/docs/cabinet_handbook.pdf).

<sup>3</sup> Available at [http://www.dpmc.gov.au/guidelines/docs/executive\\_handbook.pdf](http://www.dpmc.gov.au/guidelines/docs/executive_handbook.pdf).

<sup>4</sup> Available at [http://www.opc.gov.au/about/docs/OPCs\\_Drafting\\_Services.pdf](http://www.opc.gov.au/about/docs/OPCs_Drafting_Services.pdf).

legal teams involve themselves in instructing on legislation varies from agency to agency. The level of expertise in instructing also varies from agency to agency, but overall it is fair to say that it is not high. Those instructors whom OPC might regard as expert are not necessarily valued within their own agencies.

The result has been to produce a generation of instructors who are not familiar with the legislation process and who do not have access to someone more experienced within their own organisation of whom they can ask questions. Often, instructors have little experience in converting an idea into a system for delivering a coherently articulated policy. At times instructors are unfamiliar with their own Acts and subordinate instruments and have difficulty understanding the significance of advice relating to those materials and the constitutional constraints within which the federal government operates.

These problems have been exacerbated by the timing pressures created by the increased use of exposure or consultation drafts before the introduction of legislation and the extent to which the federal government has, in recent times, relied on referrals of power by the States. At times instructors lack the experience needed to navigate the process by which outcomes are negotiated with stakeholders and the States.

As a result of these challenges, we have needed to develop some additional skills and strategies for addressing the declining capacity to give drafting instructions.

### **Assessing resources**

At the beginning of each project, legislative counsel (whether consciously or otherwise) assess the resources that they have to work with. They assess the level of experience and skill that instructors bring to the table and the degree to which the senior executive within the instructing agency is focussed on the project and can assist in resolving difficulties.

In addition, at the beginning of each legislative project the legislative counsel searches the database of the Australian Government Solicitor to find any advice that may be relevant.

### **Guidance**

Because we often find that our instructors have little experience, or access to experience, in developing legislation, a certain amount of our time is almost always spent in guiding them through the process. For example, our first meeting almost always includes a run through the legislative process setting up a timeline with critical dates. At times, this is an instructor's first exposure to this information. The information will be repeated at critical times through the process.

### **Trouble-shooting**

Often instructors do not see potential problems in the process they are following, or if they do they do not know who to talk to or how to resolve the problems. Increasingly, legislative

counsel are expected to warn instructors of potential difficulties, advise them on options for resolving those difficulties, facilitate discussions between line areas and core government agencies to find solutions, suggest the need for advice from the Australian Government Solicitor and interpret that advice.

To draw from my own experience since 2009, this trouble-shooting role can in extreme cases result in a legislative counsel:

- attending a stakeholder meeting because instructors did not have access to a legal officer to field questions on a draft; and
- negotiating referral legislation<sup>5</sup> with the States because of a lack of understanding by the instructing agency of the processes and sensitivities of the States in referring power to the Commonwealth.

### **System building**

In theory, an instructing agency would instruct OPC on the legal system they would like developed to achieve the desired policy outcome. Frequently, it is clear when analysing the model suggested in instructions that the instructing officer is inexperienced in constructing legal systems and unaware of alternative approaches that might be taken.

OPC's role in this situation will often involve suggesting alternative models to achieve the desired outcome. Usually, this begins with an exploration of the policy outcome the government is trying to achieve and the political and administrative limitations within which the legislation must be developed to achieve this outcome. The legislative counsel will then refer the instructor to other schemes that address similar issues or suggest more streamlined approaches to solve problems. At times, the legislative counsel will suggest that a problem be handled administratively, rather than legislatively. It is not uncommon for discussions on a legislative project to include both the policy agency responsible for developing the legislation, and the regulatory and service-delivery agencies responsible for implementing the legislation.

Developing a legislative system around the table often requires different tools. For example, all of our meeting rooms and offices include white-boards that are used to represent the system as it is being built, using diagrams, timelines, system maps and the like. While I was in Scotland, one of the tools I missed most was my whiteboard. Eventually, I found the courage to ask if we could find one for me to use. I understand it has languished, lonely and neglected, in Willie's office ever since I left.

While OPC takes a very active role in helping instructors to develop legislation, it is well understood that the ultimate decision on a particular approach, and the responsibility for that

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<sup>5</sup> This is legislation made under paragraph 51(xxxvii) of the Australian Constitution, which gives legislative authority to the Commonwealth of Australia to make laws on any matter referred to it by State Parliaments.

decision, rests with the instructing agency. In my own view, it is important that this remains the case. While I have some expertise in building legal systems, I am no expert in the various subject matters to which those systems relate. However, drafting in a project that requires OPC to take this kind of developmental role without having ultimate control over the decisions made can be a little like steering from the back seat of a car.

### **Conclusion**

To suggest to legislative counsel that poor instructions make drafting difficult would be preaching to the choir. That is not the point I am making here. The point is that the capacity of agencies within a jurisdiction to instruct on legislation can become degraded, and the skills of instructors undervalued, to the point where it fundamentally changes the role of the legislative counsel. The next question for us, of course, is what can we do to help rebuild that capacity within our own jurisdiction.

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## Climbing Constitution Hill - Teaching Legislative Drafting in Ireland

Sandra Markman<sup>1</sup>



### Abstract

The article describes the author's experience in creating and delivering a part-time introductory course for would-be drafters in Dublin, Ireland. The course is based on the author's philosophy that the time required to produce fully-fledged legislative counsel can be reduced by systematically exposing them to issues that legislative counsel face in practice. In addition to drafting techniques, the programme offered instruction on statutory interpretation, tools for drafters, and complementary skills such as negotiation, conflict resolution, listening and questioning skills and analysis. Examples of the materials used are included as an Appendix.

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*Starting with the ABC of it  
Right down to the XYZ of it  
Help me solve the mystery of it  
Go on, teach me tonight<sup>2</sup>*

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<sup>1</sup> Executive Director, Office of the Parliamentary Counsel, Northern Territory, Australia. All views expressed in this paper are the author's.

<sup>2</sup> "Teach me Tonight" by Sammy Cahn. Recorded by (among others) Amy Winehouse, Frank Sinatra, and Diana Krall.

## **King's Inns Legislative Drafting Programme**

In 2010, the Curriculum Committee of the Honorable Society of the King's Inns in Dublin presented me with an opportunity with which anyone interested in the training of legislative counsel would be delighted. It asked me to develop a programme for an Advanced Diploma in Legislative Drafting. From a professional perspective, because formal academic programmes in drafting seem almost to be an endangered species in the 21<sup>st</sup> Century, the birth of a new one seemed an event worth marking in a brief narrative. From a personal perspective, creating and then teaching the King's Inns programme allowed me not only to implement, test, and validate a number of ideas I have long held about how to build drafting skills, but also to have a lot of fun.

The Honorable Society of King's Inns has been the central institution for the training and regulation of Irish barristers since its founding in 1541. It derives its name from King Henry VIII of England, who was instrumental in procuring land for the institution on its original site where the historic Four Courts complex now stands. In 1800, the King's Inns moved to new quarters at its current location atop nearby Constitution Hill.<sup>3</sup> The School of Law at King's Inns is the oldest institution of legal education in Ireland. Its primary focus is the training of barristers for their initial call to the Bar, but in recent years it has broadened its course offerings to meet the need for specialized training in areas where demand for skilled practitioners exceeds supply.<sup>4</sup>

Like many other jurisdictions around the world, Ireland for several years faced a serious shortage of skilled legislative counsel and has been forced to meet its needs by recruiting people (like me) from other jurisdictions<sup>5</sup>. This stopgap solution is undoubtedly a boon to those of us in the "Have Pen, Will Travel" crowd, but it is never truly satisfactory from the perspective of good national governance. Conscious of the important role legislative drafting plays in the modern legal system, the Curriculum Committee<sup>6</sup> determined to see what could be done to help develop a cadre of home-grown legislative counsel to meet the demand for this speciality in Ireland.

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<sup>3</sup> A colleague, apprised of my chosen title, averred that using Constitution Hill in the title was probably more appropriate than incorporating the other possible topographical reference, the name of the street leading up to the entrance gate of the King's Inns complex. This title was chosen to avoid the ambiguity lurking in the title "Up Henrietta".

<sup>4</sup> These have included courses leading to Advanced Diplomas in Corporate White Collar Crime & Regulatory Crime, Lawyer-Linguistics and Legal Translation.

<sup>5</sup> The Irish Office of Parliamentary Counsel did succeed in finding and hiring several drafters in 2012.

<sup>6</sup> Although all of the Committee's members during this period played an important role in its work, the leadership provided on this project by the Committee Chair, The Honorable Ms. Justice Mary Finlay Geoghegan deserves mention.

## **Programme Audience**

The King's Inns' programme was envisioned as a course of 20-22 weeks (at a rate of about 5 or 6 hours per week of class time) that would reach two distinct audiences.

One of the audiences was, naturally, barristers (or solicitors) who were already working as legislative counsel, or contemplating a career in the field.

The second target audience was Government officials (both lawyers and non-lawyers<sup>7</sup>) whose duties include drafting delegated legislation, or who have responsibility for developing drafting instructions or instructing legislative counsel during the actual drafting work. This somewhat unusual focus reflects the nature of the legislative process in Ireland. In many jurisdictions, the document that asks for government authorisation to draft primary legislation—whatever form it may take—typically sets out the desired aim of the legislative project and identifies the practical and legal means proposed to achieve it, but does not directly address drafting questions in any detail. In contrast, the Irish “Memorandum to Government” typically includes drafting instructions in the form of a “General Scheme” of “Heads” that is often very specific and detailed or even, occasionally, an attempt at a draft of the provisions prepared in the sponsoring Department.

The programme I ultimately proposed combined lectures, seminars and practical exercises, and (given the amount of material to be covered in a relatively short time-frame) required a considerable amount of self-study by the students. My proposal was accepted and, with the help and support of Irish colleagues (and the outside reader engaged by the King's Inns), I developed and delivered the programme over the 2010-2011 and 2011-2012 academic years.<sup>8</sup> In the 2012-2013 academic year, the course is being delivered by a team under the direction of a former Chief Parliamentary Counsel of Ireland.

## **Training Model**

I have been involved in training legislative counsel in both academic and non-academic settings, and have written elsewhere about the need to supplement the traditional approach of learning by watching and doing.<sup>9</sup> In that traditional model, legislative counsel are gradually exposed to more complex drafting files by shadowing or partnering with more experienced legislative counsel, and learn the essential skills of the trade on an *ad hoc* basis as issues arise in the files. This less-than-fully-systematic approach to training might be the

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<sup>7</sup> Because the primary mission of the School of Law at King's Inns is the formation of barristers, non-lawyers must obtain special permission to enroll in the programme by satisfying the Dean that they possess sufficient academic or practical knowledge of drafting to take full advantage of the programme.

<sup>8</sup> The author is grateful to the former Attorney General of Ireland, Paul Gallagher S.C for his support for the development of the programme, as well as to the Chief Parliamentary Counsel, Deirbhle Murphy and my other colleagues from her Office and the Attorney General's Office for their suggestions and assistance throughout the curriculum creation process.

<sup>9</sup> See S.C. Markman *Training of Legislative Counsel: Learning to draft without Nellie* (2010), 36 Commonwealth Law Bulletin, no. 1, p. 25.

reason why it is commonly said in the legislative drafting community that it takes 7 (or 10) years to become a competent drafter.

Whatever the virtues of the traditional model may otherwise be, in a world of scarce drafting resources, drafting offices are less and less able to afford to have their personnel less than fully employed in drafting work. Juniors cannot be spared to watch, and seniors cannot be spared to mentor, critique work, and teach juniors essential skills. And of course, some juniors do not work in offices where there are senior colleagues.

No major professional discipline suggests that training in an academic setting can entirely reproduce all of the learning that takes place on the job. The formation of virtually every professional or skilled worker—from doctors and engineers to airline pilots and chefs—incorporates a period of apprenticeship or “hands-on” training as an essential element. That is certainly true of legislative counsel as well. However, an academic training programme that systematically exposes them to the skills and knowledge required in their profession can significantly reduce the number of years required to develop full working competence after they are ostensibly “qualified” as working legislative counsel.

### **Teaching Model**

I believe that a successful academic drafting training programme must be firmly skills-based, integrating drafting theory and practice in a way that requires students to experience how drafting concepts play out in actual drafting exercises. Whiskey may profitably be taken straight. Drafting theory should never be delivered without a chaser of practice, and neither theory nor practice should be narrowly conceived.

Legislative counsel are called upon to produce a product: legislative instruments that clearly communicate a policy decision in a legally defensible way that harmonises well with existing legislative provisions. They must therefore be able to deploy a range of intellectual and interpersonal skills that go beyond pure word-smithing, as Thornton’s well-known “Five Stages of Drafting” reflects:

1. Understanding
2. Analysis
3. Design
4. Composition and development
5. Scrutiny and testing.<sup>10</sup>

Moreover, in the modern world, legislative counsel always work in a context that includes more than just the particular subject-matter for the legislation they draft. They must of course have a basic knowledge of statutory interpretation and their local equivalent of the

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<sup>10</sup> G.C. Thornton, *Legislative Drafting*, 4<sup>th</sup> ed., (Butterworths: London, 1996) at 128.

*Interpretation Act*, be fully familiar with the statute book of their jurisdiction, including the Constitution and statutes of general application, and know which tools (electronic or paper-based) to use to ensure consistency across that statute book.

However, these traditional elements alone do not describe the limits of relevance. Legislative counsel must also be aware of the wider context of the social and political policy that animates the legislative project, because these factors will inevitably play a role in the interpretation of the resulting statute. Finally, it is increasingly true that legislative counsel should be aware of what is being drafted in other jurisdictions, not only to help them draw inspiration from the work of legislative counsel elsewhere, but also because courts in most jurisdictions are increasingly receptive to interpretive arguments drawn from other jurisdictions.<sup>11</sup>

### **A Modular Structure**

I am also a strong partisan of a modular course structure, where concepts are grouped together into largely self-contained units that can be delivered easily by more than one instructor in a variable order depending, for example, on the availability of the various instructors. The modular structure offers several advantages over the usual cumulative approach (where Unit 2 follows and builds upon the concepts taught in Unit 1, Unit 3 builds on Unit 2, and so on). The cumulative structure means that the course must be delivered in an invariable sequence, and where more than one instructor is involved, each instructor must, to be an effective instructor, understand exactly what has, or has not, been covered in previous Units.

In a field such as drafting, it can be very useful to draw on a team of instructors, each with special areas of expertise. In the King's Inns programme, the modular structure made it easy to integrate subject-matter experts into the teaching team in some of the substantive law portions of the modules, without any duplication of effort or loss of efficiency (a key consideration in an intensive course like the King's Inns').<sup>12</sup> As an added benefit, the inherent flexibility of a modular approach allows modules or parts of modules to be excerpted and adapted for other audiences and particular training needs. In the case of the King's Inns course, portions of some modules were, in fact, used in-house for the Office of Parliamentary Counsel in Ireland and in training for legislative counsel of statutory instruments in Government Departments.

The nine modules developed for the King's Inns were:

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<sup>11</sup> A notable exception is the U.S. Supreme Court where some judges steadfastly reject this "dangerous" practice. See: *Lawrence v. Texas*, [539 U.S. 558](#) (2003) *per* Scalia, J. at 598.

<sup>12</sup> In the first session of the 2010-2011 King's Inns course, for example, Oran Doyle, LL.B., LL.M. (Harv.), Ph.D. very generously agreed to prepare and teach the Public Law Module.

## **1. Background**

In this module, the key concepts relating to legislation, and the contribution of legislative counsel to the making of legislative instruments, were introduced. Some concepts developed in the other modules were briefly discussed, including the notion of house style/drafting conventions, instrument choice, writing for different audiences and the international dimension of legislative drafting.

## **2. Statutory Interpretation**

As one of the key audiences for legislation is the judiciary, students were introduced to the various historical approaches to statutory interpretation and the extent to which current Irish practice relies on them. There was considerable discussion of the theory and practice of statutory interpretation, and the rules enshrined in the Irish *Interpretation Act* were discussed. Various other canons of construction were introduced.

## **3. Public Law Considerations**

This module reviewed key concepts of Irish public law, including constitutional and administrative law, and briefly introduced international law considerations in drafting in Ireland (including the particular challenges posed by EU Law requirements).

## **4. Key Tools for Legislative counsel**

This short module included a hands-on session on using the online Irish Statute Book as an aid to drafting, both as a search tool to increase consistency of expression and as a vital early step in the drafting of a legislative instrument. As Irish law is not consolidated, every lawyer in Ireland must be able to reliably state the current law. Students learned to use the online and hard copy versions of the statutes to ensure that they could reliably produce an up to date “in house” consolidation of a given legislative instrument, which is necessary if amendments to that Act or statutory instrument are to be accurately drafted. There was also a brief introduction to international legislation databases that legislative counsel should know about in order to draw “inspiration” from other jurisdictions’ laws.

## **5. Cabinet and the Legislative Process**

This module provided brief answers to the question of how an idea becomes a law. The students learned about the relationship between Bills and Acts, and about delegated legislation made under Acts.

Students studied the relevant portions of the Cabinet handbook, to understand the preparation of the Government legislative programme (explaining the prioritisation of certain Bills over others) and the processes whereby the Cabinet approves the drafting of particular Bills and approves the text of them after they are drafted.

The legislative process was also discussed from a drafter's points of view, with an emphasis on the drafting of amendments for committee stage or report stage, as well as the restrictions on the introduction of Bills in the upper or the lower house of Parliament, and the rules governing amending Bills in each house.

Assent and commencement of primary legislation were discussed, as well as the process for making delegated legislation

## **6. Effective Writing**

The next 3 modules dealt with core drafting skills.

The first emphasised effective writing in general (although, given the compressed timeframe, many of the examples chosen were from legislative writing).

In this module, the concept of writing clearly and some techniques for clearer writing (including the "25 words or less" rule) were introduced. Students were asked to think about styles of writing for different audiences and the tension between brevity and clarity.

In order to be able to write more effectively, students needed a review (or in some cases instruction for the first time) on some basic concepts of grammar, including the parts of speech and their functions, the use of punctuation, and sentence structure, including (always fun after a long day's work) avoiding syntactical ambiguity.<sup>13</sup>

The students were also invited to make use of the "Mongoose Principle"<sup>14</sup> which suggests that there is a workaround for every drafting difficulty.

## **7. Legal Writing**

This module dealt with some of the common pitfalls for lawyers and suggested ways to avoid some of the traditional barriers to understanding, including legalese and other jargon and convoluted style. We discussed some plain language principles, sentence length, the use of verbs instead of nouns where possible, "and" and "or" and word choice, as well as inclusive language.

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<sup>13</sup> Avoiding ambiguity was always a favourite class. The students enjoyed sentences such as "Last year on holidays I met a girlfriend of Bill Clinton and Tiger Woods". The students in the first session of the programme were particularly taken by a sentence with a misplaced modifier about a woman walking a dog in a skirt – they included a reference to it in a "Diploma" they made up for me and presented to me at graduation.

<sup>14</sup> See the Introduction to Ian McLeod, *Principles of Legislative and Regulatory Drafting*, (Hart Publishing: Oxford, 2009). I was fortunate enough to have the benefit of Professor McLeod's comments as my "outside reader" at King's Inns but was a "fan" of the Mongoose Principle before actually meeting him.

## **8. Legislative Drafting**

In this module, we concentrated on legislative instruments. Because the programme was so compressed, I took a general approach, rather than spending too much time on scrutinising different types of provisions. We looked at the structure of legislative instruments, including George Coode's influence on the style of common law Acts. We then looked at the Irish Statute Book's evolving style, and discussed the use of legislative precedents.

We discussed the benefits of textual over non-textual amendments, and the pros and cons of using the technique of "pinpoint" amendments instead of replacing larger passages of text being amended.

Some particular issues discussed were the use of "shall" or "must" and "may" or "it shall be lawful to" or "a person is entitled to". Some time was spent on the use of legal fictions (deeming, "considered as") and the related concepts of "nothing... shall be construed as...", "for the avoidance of doubt..." etc.

We also touched on some particular kinds of provisions, including definitions, preambles and purpose or objects provisions, commencement and sunset provisions, collective citations, creating offences (including penalty notices, liability of directors,) and the creation of statutory bodies. Finally, we briefly considered the additional challenges of drafting to implement EU or international instruments.

## **9. Essential Complementary Skills**

I am of the view that being able to draft a good legislative text is a necessary, but not sufficient requirement for being a good drafter. Legislative counsel need to understand – and learn – a variety of other skills. Given the timeframe of the programme, all that could be done was to sensitise the students to the types of skills they needed to develop to illustrate what mastering those skills entailed and to practise some of them.

The types of skills dealt with included managing drafting files (including understanding the roles of the various participants in a drafting project), listening and questioning skills, analysis and synthesis, negotiation, teamwork, conflict resolution and the ever-important time-management. Students reflected on what was required, and practised some of the skills in the time available.

## **Exercises and Assessment**

The curriculum committee – and the Dean – agreed with me that it is much better to evaluate drafting students through continuous assessment rather than relying on a final examination. This allows both the student and the instructor to ensure that the student has truly mastered earlier material before proceeding, and permits students to seek assistance that they might need before continuing. This represents perhaps a difference between academic programs that are geared primarily to awarding professional qualifications by

winnowing out a large field of applicants—where a “sink or swim”, “learn or lose” approach may be appropriate—and academic programs geared to developing capacity for a field faced with chronic undersupply of skilled practitioners.

There were several assignments during the term and they were never due until at least a week after the material was discussed in class. The exercises were generally not long but they did require thought and, occasionally, some research. There was also one in-class assignment, which counted towards the final grade but did not carry much weight.<sup>15</sup> This test evaluated attention to detail and time management skills and required the students to improve, in a relatively short period, a text that had typographical, grammatical, and logic errors. Examples of assignments, including one of the in-class tests, are found in the Appendix to this article.

In addition to the assignments on which the students were graded, there were group projects and in-class exercises. The emphasis was not only on understanding the theoretical requirements of drafting, but also on giving the participants the opportunity to practise skills—and to understand that there are often many acceptable approaches to solving a drafting problem.

For one of the exercises, the students worked in pairs: one was the “instructing officer” and one the “drafter” in a drafting project. Each received a short memo explaining that urgent legislation was required and generally what it was meant to achieve. The “drafter’s” task was to understand what he or she needed to know in order to produce an acceptable draft and obtain the answers from the instructing officer (whose memo contained more information than the “drafter’s”). An example of this type of exercise appears in the Appendix to this article.

The final assignment was in four parts: students were first asked to provide drafting instructions to deal with an issue that was sketched out in little detail. Each student then received another student’s drafting instructions and was asked to produce a first draft of a Bill based on the instructions received.<sup>16</sup> For the third step the students all received a draft Bill from the course instructor and were required to list the questions they would need to ask in order to advance the file. This was designed to test the students’ analytical skills. It also tested their ability to obtain the answers they needed, to work in teams and to manage their time.

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<sup>15</sup> This was to avoid unduly disadvantaging students whose outside commitments precluded their attending a particular class. Although of course the rules at the King’s Inns would have permitted a student who was unable to attend class on the day on which the in-class assessment was taking place to do instead an equivalent assignment on another day, the weighting was sufficiently light that a student who was unable to attend would not jeopardise their successful completion of the course even if they did not “make up” the test.

<sup>16</sup> Many students found it surprisingly difficult to follow the instructions rather than draft a Bill based on the student’s own view of what the legislation should look like – a valuable lesson for drafters to learn!

In addition to the written questions, there was a role play in which the students played the role of drafters and the course instructor was their instructing officer. The students met for 15 minutes at the beginning of class, during which they were required to decide, as a group, which questions to ask and how to use their approximately 60 minutes with their instructing officer to maximum benefit. The final step was to produce a polished draft Bill based on the earlier draft and the information garnered from the “meeting”. This final assignment simulated most of the elements of a drafting file: and contained the added bonus of would-be legislative counsel “walking a mile in the shoes” of their instructing officers, who often must produce drafting instructions with little knowledge or time to acquire the knowledge, and the sketchiest of explanations from those who expect them to instruct.

### **Final Thoughts**

Although the drafting profession must surely be one of civilisation’s oldest, the science of drafter training is still, in many ways, at an embryonic stage. There are conferences and (in some jurisdictions) in-house training, but there are few formal academic programmes to train legislative counsel.

It is against that background that I have tried to sketch out Ireland’s experience in developing a training programme for legislative counsel in an academic setting. I do not pretend that the King’s Inns’ model is necessarily the ideal one to follow, but I do hope that this outline of its development and features will help others to recognise that initiating drafter training programmes need not require a commitment of time and resources beyond the reach of all but the largest and wealthiest of bodies. Very useful programmes can be developed and offered in a short time, with a small cadre of staff, on reasonable budgets. These new programmes are badly needed. Too many governments are undersupplied with skilled drafting professionals, and the traditional methods of in-house training and development simply will not produce enough legislative counsel to close that gap.

### **Appendix – Examples of Exercises**

Given that the purpose of the programme was to, over a very short period, expose participants to as much of the legislative drafting world as possible, the examples and exercises, as well as the assignments, were chosen to resonate with the students.

The first time the programme was offered, the students’ “grammar antennae” became very attuned very quickly. They often brought “interesting” examples of infelicitous drafting to class.

When the dress code for their invitation to dine at King’s Inns was presented to them, they immediately noted the non-gender specific “no stilettos” rule where it might be expected to be gender-specific in any event but even more so when the other rules marked the sex of the persons to which they were addressed. The idea that clear drafting could help avoid absurdity in the text was clearly one that they had absorbed.

Because of the intensive nature of the course, exercises and assignments often did double duty. Although I did not use an exercise that was stated to be assessing one skill for the formal assessment of another, I did choose the materials for the exercises so that they piqued curiosity about other matters for which there was not sufficient class time.

### **1. Attention to detail and time management exercise**

An exercise that seeks to test a student's attention to detail and time management (such as the one below) could present any kind of text. I chose an older legislative text from the jurisdiction, not only in order for the students to become familiar with the ways in which particular provisions are drafted but also to see how some aspects of the older style of drafting invited ambiguity or created other barriers to clear understanding.

**Here is an excerpt from a statute. Please find (and correct) as many errors as you can within the next 75 minutes.**

Interpretation.

1.—In this Act—

"the Commission" means the Irish land Commission;

"Lay Commissioner" means a Commissioner of the Commission other than the Judicial Commissioner;

"the Minister" means the Minister for Agriculture and Food;

"smallholder" means a person being the occupier of a holding which in the opinion of the Minister is not an economic holding.

Dissolution of Commission.

2.—(1) The Commission is hereby dissolved.

(2) All powers conferred on the Commission by the Land Purchase Acts to purchase or acquire land (except by exchange of holdings) or to resume holdings, parcel or tenancies shall cease to be exerciseable.

Jurisdiction of Judicial Commissioner an Appeal Tribunal.

3.—(1) The jurisdictions vested in the office of Judicial Commissioner and in the Appeal Tribunal are hereby vested in the High Courts and shall be exercised by the President of the High Court or, where he or she so directs, by an ordinary judge of the High Court assigned in that behalf.

(2) Proceedings pending before the Judicial Commissioner or the Appeal Tribunal shall be continued before the High Court pursuant to *subsection (1)* and every appeals pending from a decision of the Judicial Commissioner or the Appeal Tribunal shall be continued as if the decisin had been gave by the High Court.

Transfer to Minister of certain functions of Commission or Lay Commissioners.

**4.**—Any power or duty vested by law in the Commission or the Lay Commissioners shall, so far as not inconsistent with this Act, be exercised by the Minister or by an officer of the Minister for the time being authorised, whether specifically or by reference to a class of such officers, in that behalf by the Minister.

Transfer of property to Minister or Central Fisheries Board.

**5.**—(1) All land and other property which, immediately before the commencement of this Act, stood vested in or reserved to the Commission shall on such commencement, without any conveyance, assignment or transfer:

(a) as to land and other property (except fishing rights and fisheries) stand vested in the Minister, and

(b) as to fishing rights and fisheries, stand vested in or reserved to the Central Fisheries Board,

for all the state for interest of the Commission subject, so far as not modified by virtue of this Act, to all trusts and equities, covenants, conditions and restrictions effecting the property.

(2) Any fishing rights and fisheries which but for this Act would on a sale to the Commission under the Land Purchase Acts have been required to be vested in or reserved to the Commission shall be vested in the Central Fisheries Board and any other sporting rights shall be devested in the Minister;

Transfer of records.

**6.**—(1) All records, deeds and other documents which immediately before the commencement of this Act are lodged with the Commission, or which but for this Act would have been required to be so lodged, shall be transferred to and lodged with the Minister who shall make such arrangements as he or she thinks proper for the custody thereof.

(2) Any right to inspect, or have delivery or obtain copies of, any of the records shall be exercisable against the person having the custody thereof by virtue of this section to the like extent and in the like manner as it would have been exercisable against the person who would but for this section have had the custody thereof.

Revocation of vesting orders.

**7.**—(1) The Minister may, subject to this section, by order revoke any vesting order under the Land Purchase Acts vesting specified land (in this section referred to as "the relevant land") in the Commission or any declaration by the Commission having the effect of such a vesting order, in any case where the Commission has not entered into actual possession of the relevant land.

(2) In the commencement of an order under this section the following provisions shall apply:

(a) the title of the person from whom the relevant land was acquired to the land immediately before its requisition shall, without any conveyance, assignment or transfer, revert to that person or, if that person has died since the making of the vesting order or declaration, to that person's personal representative,

(b) any declaration under the Land Purchase Acts of an appointed day in respect of the relevant land shall be deemed to be cancelled;

(c) all claims and charges which on the vesting of the relevant land attached to the purchase moneys shall reattach to the land.

(d) any sum set aside on the redemption of land bonds issued as a result of the making of the vesting order or declaration the subject of the order and any interests that has accumulated on such bonds by way of dividends together with any deposit interests that has accumulated on such dividends and on any such sum before such commencement shall be paid to the Minister or the Minister for Finance as appropriate.

(3) The Minister may cover from person referred to in *subsection (2) (a)* (or, as the case may be, from his or her personal representative) any moneys expended by the Commission on the redemption of any annuity under the Land Purchase Acts or other sums which before the commencement of this Act would have been payable out of the relevant land, and for this purpose shall have the same powers of recovery as he or she has in relation to the recovery of arrears of annuities under those Acts.

(4) Notice of every proposed order under this section shall be published in *Iris Oifigiúil* and in at least one newspaper published and circulating in the country in which the land is situated or, if there is no such newspaper, in a daily newspaper published in the State and circulating in that county.

(5) The Minister may by order revoke or amend an order under this section but no such order shall operate to restrict the title which by virtue of this section reverts as provided by *subsection (2)*.

Disposal of certain land acquired under the Land Purchase Acts.

**8.—**(1) The Minister, with the consent of the Minister for Finance, may, subject to this section, sell, or lease for a term of five years or more, any land and sell any other property vested in the Minister under this Act

(2) (a) In exercising his or her power to sell or lease land under *subsection (1)* the Minister shall, so far as reasonable practiceable, have regard to—

- (i) the desire of any smallholder whose holding is situated in the neighbourhood of the land to require an interest in the land, and
- (ii) subject thereto, the desire of any former owner from whom the land had been compulsorily acquired, or of his or her personal representative, to purchase the land, but, in any event, the Minister shall, when disposing of land in accordance with this

section, have regard to the objectives and purposes of the former Commission.

- (b) For the purpose of this subsection "neighborhood" includes any places which the Minister is satisfied is not more than five miles from the nearest point of the relevant holding.

(3) Notice of every extended sale or leasing of land by the Minister, whether by tender, public auction or by private treaty, under this section shall be published in *Iris Oifigiúil*, and in at least one newspaper published and circulating in the county in which the land is situated or, if there is no such newspaper, in a daily newspaper published in the State and circulating in that country.

Conversion to Lay Commissioner.

**9.**—(1) The Minister, with the concurrence of Minister for Finance, may, out of moneys provided by the Oireachtas, provide such compensation to or in respect of a Lay Commissioner ceasing to hold office by reason of *section 2* of this Act as the Minister considers reasonable.

(2) This section shall have effect notwithstanding any other enactment.

Sealing of certain documents.

**10.**—If, for the purpose of the exercise of any powers or duties of the Commission transferred to the Minister by this Act, or of any powers or duties conferred on the Commission by the Land Purchase Acts, a document is required to be sealed, the document shall be sealed with the seal of the Minister.

Transitional provisions.

**11.**—(1) In the construction and for the purposes of any enactment or any instrument thereunder or of any judgement, decree, order, award, deed, contract or other document past or made before the transfer by virtue of this Act from the Commission to the Minister of any functions, so far as may be necessary for the purpose of such transfer, the title of the Minister shall be substituted for that of the Commission.

(2) Anything commenced by or under the direction of the Commission in relation to a function referred to in *subsection (1)* may be carried on and completed by or under the direction of the Minister.

(3) Where, immediately before the commencement of this Act, any legal proceeding is pending in which the Commission is a party the Minister shall be substituted in the proceeding for the Commission and the proceeding shall not abate by reason only of such substitution.

Regulations.

**12.**—(1) The Minister may make regulations in relation to all or any of the following matters—

(a) the modification or adaptation of any provision of the Land Purchase Acts;

- (b) the performance of any functions transferred to the Minister by this Act;
- (c) the transfer of any property, rights and liabilities and the closing of any accounts, where any such transfer is in the opinion of the Minister necessary by reason of any provision of this Act.

(2) Every regulation made under this section shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next subsequent 21 days on which that House has sat after the regulations is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

Expenses.

**13.**—The expences occurred by the Minister in the administration of this Act shall, to such content as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

Short title, construction and commencement.

**14.**—(1) This Act may be cited as the Irish Land Commission (Dissolution) Act, 1992.

(2) This Act shall be construed as one with the Land Purchase Acts and may be cited with those Acts.

(3) This Act shall come into operation on such day as the Minister may by order appoint.

## ***2. Questioning and Listening Skills Exercise***

Some of the ideas for drafting exercises were drawn from proposed or existing legislation in other jurisdictions. The Canadian World Autism Awareness Day Bill that was, in the scenario for the exercise, the “inspiration” for the fictitious Minister’s idea for the legislation to be drafted, was at the time a private member’s Bill (Bill S-206), which became Chapter 21 of the Statutes of Canada 2012.

The exercise is about questioning and listening: the “drafter” must, in a short period, figure out what he or she needs to know and get the answers by questioning the “instructing officer”. But both the students are in addition learning about a situation that often occurs in the drafting world: where a superficially-similar legislative instrument from another place is presented to policy official and drafter alike, with the suggestion that it shouldn’t take long to “adapt” the other legislation to deal with the subject-matter of the legislative instrument required. Students quickly seized the point that the Canadian legislation was about raising awareness of a disease, whereas the “required” legislative instrument in “Hiberia” was about much more.

*a – Drafter memo*

***Listening and Questioning Skills Exercise***

You are a drafter in the Office of Parliamentary Counsel of Hiberia. Please read this before your meeting with your instructing officer in 10 minutes.

The Chief Parliamentary Counsel has asked that you prepare a Bill as soon as possible to honour Hiberians with Kirko disease because World Kirko Disease Day is coming up soon on 1 June (as declared by the UN). She drops this proposed legislation from Canada on your desk and asks you to meet with the official to ask questions so that you can prepare a first draft. Apparently the Minister of Health thinks it would be nice, in honour of World Kirko Day, to make sure that all treatments for kirko disease are free to patients.

Prepare the questions you will need to ask in order to organise yourself to produce a first draft.

Preamble

Whereas autism spectrum disorders affect at least 1 in 165 families in Canada;

Whereas Canada has a health care system and social safety net to prevent illness and serve citizens;

Whereas the number of Canadians diagnosed with autism spectrum disorders has grown by 150% in the last six years;

Whereas Canadian families affected by autism spectrum disorders have unequal access to services across the country;

Whereas worldwide the number of diagnoses of autism spectrum disorders is growing;

Whereas autism affects more children worldwide than pediatric cancer, diabetes and AIDS combined;

Whereas a greater awareness of the importance of early diagnosis and treatment for people with autism is required to engage more Canadians in helping their fellow citizens;

Whereas early intervention in the treatment of autism spectrum disorders can have promising results and help people engage with and contribute to society;

Whereas there is no known cause or cure for autism spectrum disorders;

Whereas Canada has no national strategy to address autism spectrum disorders;

Whereas 192 United Nations representatives agreed that World Autism Awareness Day would draw the attention of people across the globe to this neurological disorder that is affecting an increasing number of families;

Whereas in 2007 the United Nations General Assembly designated April 2, from 2008 on, as World Autism Awareness Day;

Whereas Canada is a signatory to the United Nations Convention on the Rights of the Child and the United Nations Convention on the Rights of Persons with Disabilities, which maintain that children with disabilities should enjoy a full and decent life in conditions that ensure dignity, promote self-reliance and facilitate their active participation in the community, while also enjoying all human rights and fundamental freedoms on an equal basis with other children;

And whereas Canada is a member of the United Nations and supports the work of this vital international organization;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

#### SHORT TITLE

Short title                    **1.** This Act may be cited as the *World Autism Awareness Day Act*.

#### WORLD AUTISM AWARENESS DAY

World Autism                **2.** Throughout Canada, in each and every year, the second day of April shall be known as "World Autism Awareness Day".

Awareness  
Day

*b- Instructor memo*

***Listening and Questioning Skills Exercise***

You are an officer in the Department of Health of Hiberia. Please read this before your meeting with Parliamentary Counsel in 10 minutes.

Your Minister has asked that a Bill be prepared as soon as possible to honour Hiberians with Kirko disease because World Kirko Disease Day is coming up soon on 1 June (as declared by the UN). He drops this proposed legislation from Canada on your desk and asks you to meet with Parliamentary Counsel to prepare a first draft. He also mentions that it would be nice, in honour of World Kirko Day, to make sure that all treatments for kirko disease are free to patients.

Parliamentary Counsel will be asking you some questions so you do some quick research before your meeting and find out that

- Kirko disease affects 1 out of every 250 people in Hiberia
- Children with kirko disease need to go to special schools, or else need to have some educational support
- Kirko disease is a neurological disease that is not dangerous but makes it harder for people to read
- Kirko disease is treated with physiotherapy, massage, song therapy and sometimes strong experimental medications to smooth out neurological impulses

Preamble                      Whereas autism spectrum disorders affect at least 1 in 165 families in Canada;

Whereas Canada has a health care system and social safety net to prevent illness and serve citizens;

Whereas the number of Canadians diagnosed with autism spectrum disorders has grown by 150% in the last six years;

Whereas Canadian families affected by autism spectrum disorders have unequal access to services across the country;

Whereas worldwide the number of diagnoses of autism spectrum

disorders is growing;

Whereas autism affects more children worldwide than pediatric cancer, diabetes and AIDS combined;

Whereas a greater awareness of the importance of early diagnosis and treatment for people with autism is required to engage more Canadians in helping their fellow citizens;

Whereas early intervention in the treatment of autism spectrum disorders can have promising results and help people engage with and contribute to society;

Whereas there is no known cause or cure for autism spectrum disorders;

Whereas Canada has no national strategy to address autism spectrum disorders;

Whereas 192 United Nations representatives agreed that World Autism Awareness Day would draw the attention of people across the globe to this neurological disorder that is affecting an increasing number of families;

Whereas in 2007 the United Nations General Assembly designated April 2, from 2008 on, as World Autism Awareness Day;

Whereas Canada is a signatory to the United Nations Convention on the Rights of the Child and the United Nations Convention on the Rights of Persons with Disabilities, which maintain that children with disabilities should enjoy a full and decent life in conditions that ensure dignity, promote self-reliance and facilitate their active participation in the community, while also enjoying all human rights and fundamental freedoms on an equal basis with other children;

And whereas Canada is a member of the United Nations and supports the work of this vital international organization;

Now, therefore, Her Majesty, by and with the advice and consent of the

Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

Short title

**1.** This Act may be cited as the *World Autism Awareness Day Act*.

WORLD AUTISM AWARENESS DAY

World  
Autism  
Awareness  
Day

**2.** Throughout Canada, in each and every year, the second day of April shall be known as "World Autism Awareness Day".

# The Winds of Open Education: A New Era in the Training and Professional Development of Legislative Counsel

Dale Dewhurst,<sup>1</sup> John Mark Keyes<sup>2</sup> and Archie Zariski<sup>3</sup>



## Abstract

*This paper examines the practical, pedagogical and technical considerations encountered in updating the Commonwealth of Learning legislative drafting distance education training program and adapting it to be offered as open educational resources (OER). The concept of OER is explained as freely available teaching materials that may be used by educational institutions, educators, organizations and individuals for educational and development purposes. The paper also describes the opportunities afforded by such online resources for ongoing comment, revision, and adaptation in accordance with the needs of the academic and professional communities of users and local practices.<sup>4</sup>*

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## Introduction

This paper describes an experimental project to develop an open educational resource (OER) on legislative drafting. This project was intended to benefit legislative drafting offices and legislative counsel, primarily from Commonwealth countries where the preparation of legislation is based upon the parliamentary model of legislative drafting. Below we describe, analyze and reflect on this experiment in professional education for the 21st century.

## Open Educational Resources (OER)

OER has been described as:

any educational resources (including curriculum maps, course materials, textbooks, streaming videos, multimedia applications, podcasts, and any other materials that have been designed for use in teaching and learning) that are openly available for use by educators and students, without an accompanying need to pay royalties or licence fees.

...

While its educational value lies in the idea of using resources as an integral method of communication of curriculum in educational courses (i.e. resource-based learning), its transformative power lies in the ease with which such resources, when digitized, can be shared via the Internet. Importantly, there is only one key differentiator between an OER and any other educational resource: its licence. Thus, an OER is simply an educational resource that incorporates a licence that facilitates reuse, and potentially adaptation, without first requiring permission from the copyright holder.<sup>5</sup>

OER is not yet a significant factor in professional education, training, and continuing professional development. There are some exceptions: teacher education and training, where projects in Africa are well advanced,<sup>6</sup> health education,<sup>7</sup> engineering<sup>8</sup> and, to a limited extent, legal education.<sup>9</sup> Integrating OER in professional contexts may have advantages in relation to some key challenges facing OER generally: sustainability, and adaptable reuse with continuing development.<sup>10</sup> Communities of professional practice may provide the

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5 WikiEducator, 2013, "Welcome to WikiEducator", available at [http://wikieducator.org/Main\\_Page](http://wikieducator.org/Main_Page)

6 "ACEMaths teacher education project." OER Africa, available at [www.oerafrica.org/acemaths](http://www.oerafrica.org/acemaths); Teacher education in sub-Saharan Africa, available at [www.tessafrica.net](http://www.tessafrica.net); I. Sapire and Y. Reed, "Collaborative design and use of open educational resources: A case study of a mathematics teacher education project in South Africa." (2011), *Distance Education*, 32(2), 195-211, available at <http://dx.doi.org/10.1080/01587919.2011.584847>.

7 Health education assets library. University of Utah, available at <http://library.med.utah.edu/heal/>.

8 "Stanford engineering everywhere." Stanford University, available at <http://see.stanford.edu/>

9 J. Priddle, P. Maharg, P. McKellar, and D. Lysaght (2010), "Simshare: Open educational resources in simulation learning." UK Centre for Legal Education, available at <http://www.ukcle.ac.uk/projects/past-projects/simshare/>.

10 Wolfenden, F. "The TESSA OER experience: Building sustainable models of production and user implementation." (2008), *Journal of Interactive Media in Education*, available at

required motivational, practical and professional support to make OER viable and sustainable in the long term. Conversely OER may contribute to the sustainability and development of the professional community.

### **Legislative Drafting Training**

Although the work of legislative counsel has been recognized as a distinct type of legal practice in the 19th century, this specialty has been largely ignored in traditional legal education. In most common law jurisdictions legal education is primarily conducted through examining cases rather than studying legislation. This focus has resulted in a general lack of attention in law schools to the interpretation and preparation of statute law.<sup>11</sup> It has only been in the last quarter of the 20<sup>th</sup> century that education and training for legislative counsel has been undertaken in an organized way. Prior to this the apprentice method prevailed in most jurisdictions through which novices were inducted by experienced hands into the practice of preparing legislation according to British legal and parliamentary norms.

The need for more formalized training was expressed to Commonwealth authorities in the late 20<sup>th</sup> century, particularly by smaller jurisdictions. As a result, the Commonwealth adopted a policy for providing them legislative assistance. In addition to direct technical support through seconded personnel to assist local legislative counsel, a plan for training was created. It initially took the form of regional courses held in various parts of the world using common educational materials.<sup>12</sup> Recognizing the difficulty of relocating staff for training purposes, along with the attendant cost, the Commonwealth also commissioned the production of distance training materials, which became available digitally on disks. These materials were administered by the Commonwealth of Learning (COL), and licenced to a number of universities for use in certificate and diploma programs. In 2008 Athabasca University (AU) launched its Post-Baccalaureate Diploma in Legislative Drafting based on the COL materials.

As well, there have been a few other university-based programs that have offered education and training on a residential basis.<sup>13</sup> However, these programs have not been sufficient to meet the demand by many governments for competent staff in this area. They have met three significant obstacles:

- first, the direct costs to governments of supporting residential study of employees in another country;

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<http://jime.open.ac.uk/2008/03>; F. Wolfenden, A. Buckler, and K. Keraro, "OER adaptation and reuse across cultural contexts in sub Saharan Africa: Lessons from TESSA (Teacher education in Sub Saharan Africa)" (2012), *Journal of Interactive Media in Education*, available at <http://www-jime.open.ac.uk/jime/article/view/2012-03>.

<sup>11</sup> Dale Dewhurst, Lionel Levert, and Archie Zariski, "Producing Legislative Counsel: Ways and Means" (2012), 33 *Statute Law Review* 339.

<sup>12</sup> *Ibid.*

<sup>13</sup> For example, at the University of Ottawa and the University of Edinburgh.

- second, the indirect costs of losing the services of a member of a drafting office for a substantial period of time;
- third, the permanent loss of employees who choose to pursue a drafting career in the country where they received their training rather than returning to their original position.

Legislative counsel work to promote the integrity of written law and to achieve government aims and objectives through the drafting of effective legislation. As a professional group they are rather like civil engineers who play an essential role in the life of a nation, but who are rarely in the spotlight. While the work of legislative counsel is important for maintaining the rule of law and establishing good social governance, there is nothing in principle about the nature of their work that would preclude their professional development through the use of OER.

### **Project Overview**

To respond to the continuing need to train competent legislative counsel, the COL decided to transform the training materials into OER that would be accessible anywhere, at any time, by anyone. Athabasca University partnered with the COL to achieve this goal. The legislative drafting OER, when finalized, will be publicly available on servers maintained by the Commonwealth of Learning. When released, links on multiple websites will direct users to the specific web locations where the materials may be accessed and downloaded. As noted above, the Commonwealth Secretariat and the COL previously commissioned the creation of training materials for legislative counsel; the most recent version of the materials was released in 2003. By 2012 the materials needed updating and this project to revise and transform them into OER was initiated by COL and AU for the purposes of:

- enhancing the sustainability of the training materials;
- facilitating reuse and continuing development of the materials;
- attracting practical and professional support to make the OER useful and sustainable in the long term; and,
- contributing to a thriving professional legislative drafting community.

The primary objectives of the project were twofold: (1) to prepare updates to the legislative drafting materials to make the materials current and accessible as OER; and (2) to observe and analyze the *process* itself to gain insight into how OER might become a more significant factor in professional education, training, and continuing professional development. The analysis below discusses our observations on the following elements of the process:

- adapting the existing legislative drafting materials to become accessible, reusable OER for professional practitioners and institutional educators;

- adding various e-learning and mobile learning technologies to improve the accessibility and adaptability of the materials;
- providing facilities for development and customization by users who wish to tailor the materials for local or particular usage; and
- implementing mechanisms to enhance professional access to the materials and to promote adoption of the materials as a valuable learning and reference resource.

This project was designed to increase the value of the available teaching resources to the relevant professional community of practice (legislative counsel and legislative drafting offices) by making them into accessible and reusable OER. The Project Team consisted of the authors and Peter J. Pagano, Chief Legislative Counsel of Alberta and an instructor in the diploma program. It also included technical learning designers and technical experts from Athabasca University.<sup>14</sup>

### **Engaging the Professional Community**

A key objective of the OER project was to engage the professional community consisting of legislative counsel employed in government drafting offices, independent consultant legislative counsel, other lawyers who draft legislation, and legal academics who teach and research in this area. To achieve this objective, the Project Team assembled and consulted with an Advisory Group to bring a broader perspective to the revision given the multi-jurisdictional target-audience of the materials. The group was drawn from the professional community of legislative counsel.<sup>15</sup> Its review of the reorganization and adaptation of the materials for use in in-house courses and for self-study greatly aided the project.

One of the initial issues where the Advisory Group was able to provide assistance was in determining the proper target audience for the OER materials. In their previous format, the materials were designed to be licensed by COL to accredited academic institutions. Accordingly, they took on an academic professor-student format. However, when presented as OER materials, additional target audiences emerged:

- legislative counsel working in government drafting offices;
- individuals with legal training working in private law offices that provide legislative drafting services;
- individuals with legal training who are interested in legislative drafting with a view to joining such offices; and
- individuals with a general interest in legislative drafting.

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<sup>14</sup> Stephen Addison and Rodger Graham (AU learning designers), and Steve Swettenham and Hongxin Yan (AU technical experts).

<sup>15</sup> Estelle Appiah, Daniel Greenberg, Sandra Markman, Therese Perera, Peter Quiggin, and Bilika Simamba.

The Advisory group was particularly helpful in refining the target-audience (persons with legal training or governmental experience, principally but not exclusively in parliamentary jurisdictions) and in underscoring the practical value of the examples, activities and exercises as invaluable components of the materials. . It is hoped that this engagement of the community of legislative counsel will continue in the future so as to lead to continuous improvement and ongoing “co-development” of the materials over time.

Another fundamental challenge for the materials has been the diversity of drafting practices and contexts around the world. The question is whether the materials should embody best practices in Commonwealth jurisdictions or some other international common standard. Some of the possible focusses for their content as OER included:

- Commonwealth jurisdictions established on the British parliamentary model with centralized drafting;
- other jurisdictions established on this model; and
- jurisdictions established on some other model or having a differing constitutional framework.

Again, input from the Advisory Group was valuable. It was recognized that attempting to identify and discuss each axis in a multi-dimensional matrix would not be a feasible approach. While the creation of the materials and their ongoing development has shown that there is substantial agreement on many of the main elements of legislative drafting and the general approaches to be adopted, it would not be realistic to claim that the materials were in all respects applicable across all jurisdictions. This qualification also corresponds to a similar qualification contained in the original materials that there are also variations in practice among jurisdictions based on the British parliamentary model and that is essential to verify local practices.

Therefore, the revised materials identified these underlying assumptions and showed respect for local practices wherever possible, while at the same time suggesting techniques and approaches that might be used as a basis for improvement. Two of the core assumptions were as follows:

- the materials are based upon the British parliamentary model (and users are cautioned to double check whether the statements in the materials are applicable to their jurisdiction); and
- the reader has either general legal training or a basic familiarity with government and legislation.

Legislative drafting is a dynamic, evolving discipline that raises innumerable questions often inviting passionate discussion among its practitioners. The materials attempt to reflect this dynamic quality while affirming the fundamentals on which there is overwhelming agreement. In proceeding with these assumptions, it was the hope of the Project Team that

users with more extensive legislative drafting backgrounds would appreciate the opportunity to review material with which they are familiar while also being challenged by more advanced material that meets their particular needs. It was also hoped that this would be the first step towards engaging the global community of legislative counsel in the ongoing development and use of the materials. The goal was to promote reuse of the materials by appealing to a variety of motivational factors as identified by Pegler<sup>16</sup> by being attentive to the technical elements of the OER, its currency and relevance to the prospective audience, and through engagement with potential users. However, in aiming at this target, a sensitive balance had to be maintained between, on the one hand, encouraging and facilitating involvement from online users and, on the other, preserving the academic and legal integrity of highly specialized material on legislative drafting skills.

In connection with the academic integrity of the materials, the original materials licensed by the COL to accredited academic institutions contained exercises for student practice as well as projects to be submitted for evaluation and credit. The exercises were revised to update them since they were based on social issues and attitudes that were current when the materials were first prepared, some of which are no longer appropriate (for example, exercises assuming particular gender roles). Some additional revision was also required to make them more workable on a stand-alone basis for students studying without access to academic support available to sort through difficulties that arose in completing the exercises.

To balance the need for maintaining the legal integrity of the materials with the desire to promote their reuse and adaptation to meet local needs, several factors were considered. It was determined that platforms and formats that are too rigid or “locked down” would deter ongoing use and adaptation; in addition, Adobe PDF files, which maintain the legislative layout of the materials, are not fully accessible on mobile learning platforms or by users with visual disabilities. However, free flowing wiki’s open to non-peer reviewed changes by any and every user would undermine the soundness of the materials and threaten their long term credibility.

Accordingly, these needs had to be paired with available software platforms; this involved “chunking” the materials into shorter blocks that would promote mobile access, user re-organization and accessibility for those using screen readers. At the same time tensions between these demands and requirements for the overall cohesion, indexing and accessibility of the materials had to be resolved. Although these decisions are still being finalized, the materials will be presented in a way that allows users to find discrete topics as well as viewing them within larger contexts and themes. The intent is to provide a comprehensive resource for training drafters which may also be used in stand-alone “chunks”. However, some of these challenges may well continue over time, and be resolved

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<sup>16</sup> C. Pegler, “Herzberg, hygiene and the motivation to reuse: Towards a three-factor theory to explain motivation to share and use OER” (2012), *Journal of Interactive Media in Education*, available at <http://www.jime.open.ac.uk/article/2012-04/html>.

on an ongoing basis through widespread consultation and involvement among the professional community of legislative counsel and the academic community.

### **Legal and Technical Issues**

This project was the first of its kind for the members of the Project Team, and therefore a learning experience with some unexpected challenges. Although the university staff members on the team were familiar with distance learning technologies associated with restricted access learning management systems (such as Moodle), they had less experience working in open access environments. Various online OER examples had to be consulted and then matched with the available human and technological resources; and the functionality of various OER platforms that worked for the presentation of less technical materials had to be evaluated for their adaptability to meet the more exacting demands of legislative drafting formats.

The nature of the teaching materials itself also presented a challenge, both technically and legally. One of the initial challenges was in determining what OER format and Creative Commons Licence<sup>17</sup> was desirable for the Commonwealth of Learning and Athabasca University and also most useful for end-users. When choosing a particular Creative Commons Licence, there are several options depending on: the end users' ability to create derivatives; their obligations to provide attributions to the original authors; whether their derivative work must be freely shared with subsequent users; and whether users can employ the materials in commercial or only non-commercial settings. Therefore, decisions had to be made regarding the blend of requirements for attribution and for ongoing users to share their modifications with other users and whether the materials could be used by future users for commercial or only non-commercial uses.

For example, a “share alike” requirement could mean that educational institutions using the materials to create courses for credit would have to share their evaluation components and model answers – clearly not a viable option. A non-commercial prohibition would mean that the materials could never be offered for credit unless the accrediting institution was prepared to do the work free of charge. As a final example, a prohibition against including external documents would mean that particular drafting offices or other end-users could not combine them with their own materials or other external materials for use in their own training initiatives. In the end, references to external documents were minimized and a decision was made to adopt a CC-BY (Creative Commons – By Attribution) license approach that meant additional users could distribute, remix, amend and supplement the materials as long as credit is given to the initial OER resources. Further, these uses could be commercial or non-commercial with no requirement to share the additionally developed materials, thereby making accredited offerings and in-house training adaptations possible.

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<sup>17</sup> Creative Commons, 2013, available at <http://creativecommons.org/licenses/>.

Copyright posed further questions to be resolved for the use of the materials in an online format. Some of the original supplementary course materials were subject to externally held copyright. Where the holders of the copyright had previously granted a limited duration copyright, a limited use copyright permission, or permission limited to print-based use, the answer was clear – these copyrights did not extend to use in an OER format. This entailed further determinations of whether hyperlinks could be made to the material on open-use websites (for example, governmental or legal information institute websites). In many cases, this was possible. When it was not, pedagogical decisions were made regarding the sufficiency of simply summarizing the work and providing citations for users to pursue on their own or, alternatively, replacing the original materials with publicly available documents that would still preserve the pedagogical and academic rigor of the materials.

### **Use, Enhancement, and Sustainability of the OER**

One of the uses foreseen for the legislative drafting OER is by educational institutions that may offer credentials for their study. A distinction can be drawn between the OER, which is the subject of this paper, and open courseware (OCW). The two have been distinguished as follows:

The term OER is largely synonymous with another term: Open CourseWare (OCW), although the latter may be used to refer to a specific, more structured subset of OER. An Open CourseWare is defined by the OCW Consortium as ‘a free and open digital publication of high quality university-level educational materials. These materials are organized as courses, and often include course planning materials and evaluation tools as well as thematic content’ [footnote omitted].<sup>18</sup>

The legislative drafting OER created in this project did not include course plans and evaluation instruments; copyright in them was retained by the Commonwealth of Learning. The OER materials could therefore be used for individual self-study by junior or aspiring legislative counsel, or for training sessions conducted in legislative drafting offices, but without the award of any associated academic credential. Therefore, there will be an ongoing need for institutions such as Athabasca University to continue to use and adapt the materials in credit granting courses and programs where they will be offered on an OCW platform or through other learning management systems based upon the particular institution’s preferences.

As for the OER materials, we envision ongoing enhancement and adaptation with input from the professional community of legislative counsel. It is hoped that such engagement

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<sup>18</sup> WikiEducator. (2013), “A basic guide to open educational resources: FAQ”, available at [http://wikieducator.org/A\\_Basic\\_Guide\\_for\\_OER/A\\_Basic\\_Guide\\_to\\_Open\\_Educational\\_Resources:\\_FAQ#What\\_are\\_Open\\_Educational\\_Resources\\_.28OER.29.3F](http://wikieducator.org/A_Basic_Guide_for_OER/A_Basic_Guide_to_Open_Educational_Resources:_FAQ#What_are_Open_Educational_Resources_.28OER.29.3F).

will contribute to their continued development and sustainability as valuable resources. Some ways in which this engagement may be facilitated are:

- providing a wiki or other mechanism for suggestion and comment on the materials;
- using social media discussion groups such as the CALC Members Group and the Legal Drafting Subgroup on LinkedIn;
- providing a facility for uploading adapted materials, or online links to materials, used in specific jurisdictions; and
- convening online conferences to discuss and debate issues raised by the materials.

The financial and staffing resources required for these additional initiatives will have to be considered on an ongoing basis. Additionally, decisions about the platform to be used to make the materials available will be an ongoing process to encourage ongoing contributions, to incorporate suggested improvements from the community of users, and to take advantage of the continually evolving functionality of online learning resources.

## **Conclusion**

The project described here has borne fruit, but has not been completed. In fact, its success lies in never coming to a close with the professional community of legislative counsel and those institutions which adopt the materials taking “ownership” of the OER and participating in its continuing enhancement and adaptation.

Some lessons we have learned from this project are:

- the skills and knowledge required of legislative counsel demand a broad and well-integrated understanding of a range of interconnected topics; like legislative texts themselves, study materials must be consistent and coherent; this is a challenge given the scope of the materials;
- the decision to offer professional training materials as OER entails many additional decisions regarding:
  - the exact nature of the OER licence categories that match the initial impetus to present the materials in an OER format,
  - compatibility between the OER platforms chosen and the technical skills that will be required for end users to easily access and adapt and supplement the materials;
- copyright in externally developed portions of the materials must be considered in light of the terms of the OER copyright categories;
- copyright issues are to some extent alleviated by the availability of materials on the Internet, particularly legislative materials, which can be hyperlinked rather than imported into the materials.

We hope that this project will contribute to the development and maintenance of a global professional legislative drafting community and perhaps also encourage other professional communities to explore the world of OER for education and training purposes. Although there are many challenges to surmount, the potential rewards are also substantial.

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