

Evaluation of Commonwealth Secretariat support to Member Countries on Legislative Drafting

January 2015



The Commonwealth

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and Legal & Drafting Services Ltd (LDS), Saint Lucia.

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Acronyms

AG	Attorney General's Office
CARICOM	Caribbean Community and Common Market
CFTC	Commonwealth Fund for Technical Cooperation
CIDA	Canadian International Development Agency
CLDF	Commonwealth Legislative Drafting Facility (CARICOM)
CLIC	Caribbean Law Institute Centre (University of the West Indies)
CLM	Commonwealth Law Ministers
CLMM	Commonwealth Law Ministers' Meeting
COL	Commonwealth of Learning
CSME	CARICOM Single Market and Economy
DFID	Department for International Development
FCO	Foreign and Commonwealth Office
GIDD	Governance and Institutional Development Division
GNR	Governance and Natural Resources
IMF	International Monetary Fund
LCAD	Legal and Constitutional Affairs Division
LD	Legislative Drafting
MC	Member Country
MoU	Memorandum of Understanding
OECS	Organisation of Eastern Caribbean States
OGC	Office of the General Counsel (CARICOM)
OT	Overseas Territory
PAI	Public Administration International
PC	Parliamentary Counsel
PDLP	Professional Diploma in Legislative Drafting
PF	Pacific Forum
PSD	Public Sector Development
REC	Regional Economic Community
RLRC	Regional Law Revision Centre (Anguilla)
ROL	Rule of Law Division
RPG	Regional Programmes Group
SIDS	Small Island Developing States
SOCLMM	Senior Officers of Commonwealth Law Ministries Meetings
SP 2004	Strategic Plan 2004/5 – 2007/8

SP 2008	Strategic Plan 2008/9 – 2011/12 Revised
SP 2013	Strategic Plan 2013/14 – 2016/17
SPED	Strategic Planning and Evaluation Division
TA	Technical Assistance
TAU	Technical Assistance Unit
TCSRG	Technical Cooperation and Strategic Response Group
ToRs	Terms of Reference
ToT	Training of Trainers
UN	United Nations
UNDP	United Nations Development Programme
UPNG	University of Papua New Guinea
USP	University of the South Pacific
UWI	University of the West Indies
WTO	World Trade Organisation

Executive Summary

Introduction

The Commonwealth Secretariat has commissioned this independent evaluation to assess the relevance, efficiency, effectiveness, sustainability and impact of the legislative drafting support provided by the Secretariat between 2006 and 2013. The Commonwealth Secretariat contracted Public Administration International (PAI), UK, which worked in partnership with Legal and Drafting Services Ltd., Saint Lucia, to undertake the evaluation study. This Report constitutes the evaluators' Final Report.

Approach

In responding to the Terms of Reference, the evaluators used a framework based on the evaluation framework for development assistance set out by the Development Administration Committee (DAC) of the Organisation for Economic Co-operation and Development (OECD). The approach to the evaluation and the methods used included meetings with key Commonwealth Secretariat staff, review of documents provided by the Commonwealth Secretariat, questionnaire surveys and phone/skype interviews of beneficiaries of the support, and field visits to five selected countries (in Africa and the Caribbean) to hold face-to-face interviews.

Background

The Secretariat has provided support for legislative drafting for four decades since 1974. Its support started in response to the recommendations of the Commonwealth Law Ministers' Meeting (CLMM) held in London in 1973. Since 1973, the mode of delivery has varied. At the beginning training support comprised regional courses held for drafters in each region. Later, training was delivered through international programmes in Kenya and Zimbabwe open to drafters from any Commonwealth country. Since 1995 distance methods have been introduced and this is a feature of current training support. The duration of courses and the resulting certification has

varied from courses lasting a few days, at the end of which participants receive a certificate of attendance, to year-long programmes culminating in the award of a Masters Degree in Legislative Drafting.

The Secretariat's support has been needed because many of the member countries of the Commonwealth have a long-standing problem of a shortage of skilled drafters, and difficulties in recruiting and retaining drafters. This is true primarily of the small states, which constitute more than 50% of its membership. This problem is more and more keenly felt with the growing need for legislation to implement international obligations and to give effect to national policies in increasingly complex societies.

Legislative drafting support is important for the Commonwealth Secretariat because the efficient preparation of effective legislation is important contributor to the rule of law, and the rule of law is necessary to promote democratic and accountable governance. These are important objectives for the Commonwealth Secretariat. Democracy is one of the two pillars on which all the Secretariat's work is founded. It is a core value and a mandate of the heads of its member countries under the agreed Strategic Plans.

The Commonwealth Secretariat is in a unique position to support legislative drafting in Commonwealth countries. As the principal inter-governmental agency of an organisation which has a common language, shared history and traditions and similar administrative and legal systems, it has comparative advantages that it can exploit to provide, or facilitate the provision of, support in legislative drafting to its member countries.

Support

Against this background of the challenges in legislative drafting in the Commonwealth, and in view of the Secretariat's mandate and comparative advantages, the Secretariat, with funding primarily from the Commonwealth

Fund for Technical Co-operation (CFTC), has provided three main types of support, primarily in the African and Caribbean regions, but also in the Pacific:

- Technical assistance in the form of CFTC experts
- Training and mentoring assistance
- Policy development, networking and knowledge sharing

It has also provided other activities that enabled the above types of support:

- Preparing drafting and training tools
- Forming partnerships

Findings

Relevance. The evaluators found that the support is relevant. It targets the current need of Commonwealth member countries for assistance to enable legislative drafting offices to meet the legislative agenda of their governments. The detailed activities of training and technical support for legislative drafting can help to address critical deficiencies in skills, improve management processes and develop legislative tools such as manuals, guidelines and templates. The objectives of the support, to build capacity and improve the operations of drafting offices, are generally consistent with the priorities of the Commonwealth Secretariat. However, the detailed activities through which the objectives were to be achieved were in some respects at variance with its policies. For example, some programmes 'filled gaps' instead of 'closing gaps'. It is also consistent with the priorities of the member countries, although the detailed activities through which the objectives were to be met were in some respects at variance with their political realities and so not consistent with the intended impact of the support.

Effectiveness and efficiency. The evaluation study also found that the planned outputs of the various projects were generally achieved, were implemented effectively in terms of quality, and efficiently in terms of cost and time and having regard to alternative methods e.g. delivery by other organisations. With the benefit of hindsight, the evaluators have identified some factors that constrained

the effectiveness of support despite careful planning and the diligent work of Secretariat staff. These constraining factors included: an ad hoc and fragmentary approach to support; some counter-productive support; the absence of counterpart support on the part of the member country or regional body; the failure to adapt support fully to the context; and some weaknesses in day-to-day management and control mechanisms.

Impact. As to impact, the evaluation study identified the following as the expected impact of the support:

'Drafting offices are better able to play their role in facilitating more effectively the administration and delivery of the rule of law through enhanced legal drafting capacity and improved operational effectiveness.'

The review found that the support produced this impact in the short term. Long term sustainability was achieved to a limited extent. The reasons for this are that (a) Governments and agencies have not always taken measures that are critical for the support by the Commonwealth Secretariat to have sustainable impact and (b) Commonwealth Secretariat support was not part of a long-term plan of action.

The evaluators found that there are some lessons to be learned from the support. The primary ones are (a) it is not enough to focus on training alone. For sustainability, different strategies must be used which include institutional strengthening, recruitment and retention of drafters and capacity building; (b) counterpart measures by governments are critical for support by the Commonwealth Secretariat to have sustainable impact.

Recommendations

The evaluation study makes several recommendations for changes to the provision of support. The main thrust of those recommendations is that further strategic planning should be incorporated into the process to improve the impact and sustainability of the legislative drafting support.

1. Introduction

The Commonwealth Secretariat has commissioned this independent evaluation to assess the relevance, efficiency, effectiveness, sustainability and impact of the legislative drafting support provided by the Secretariat between 2006 and 2013. The purpose was to define the focus and form of future assistance and to recommend strategic and operational changes that may be required by the Secretariat to make support more focused, relevant and sustainable in accordance with the current Strategic Plan (2013/14 to 2016/17), and in line with the views expressed by Commonwealth Law Ministers at their meeting in Sydney in 2011.

The Commonwealth Secretariat contracted Public Administration International (PAI), UK, which worked in partnership with Legal and Drafting Services Ltd. (LDS), Saint Lucia, to undertake the evaluation study. The evaluation was carried out from April to December 2014 by a small team comprising experts in monitoring and evaluation, legislative drafting and training and capacity building in legislative drafting in Africa, Asia and the Caribbean, and project management internationally. An Initial Report and a Draft Report have been submitted to report on the progress of the evaluation.

This Report constitutes the evaluators' Final Report. The rest of this section describes briefly the background of the Secretariat's legislative drafting support (1.1) and sets out the scope (1.2) and the focus (1.3) of the evaluation.

The rest of the report explains the methodology and approach used (2.0), discusses the context of the support in the section on legislative drafting in the Commonwealth (3.0), describes the Commonwealth Secretariat legislative drafting support from 2006 to 2013 (4.0), presents findings and conclusions (5.0), outlines constraints and weaknesses (6.0), sets out lessons learned (7.0) and makes recommendations for future support (8.0).

1.1 Background

The Commonwealth Secretariat's support to legislative drafting was developed in response to the recommendations of the Commonwealth Law Ministers' Meeting (CLMM) held in London in 1973. Subsequently, the Secretariat commissioned a study to assess the needs of Commonwealth member countries. The recommendations from the study were discussed at a seminar held in London in 1974 and it was agreed that the Commonwealth Secretariat would support legislative drafting in Commonwealth member countries. The Commonwealth Secretariat provided support primarily through training. Since 1973, the mode of delivery, duration and certification of the training support has varied.

Mode of delivery. Between 1974 and 1975, support consisted of a number of regional training courses lasting four to six months, organised by the former Legal and Constitutional Affairs Division (LCAD) of the Secretariat, with funding from CFTC. Regional training programmes were held in Kingston, Jamaica for the Caribbean region; Accra, Ghana for the West Africa Region; Nairobi, Kenya for the East and Central Africa region, and New Delhi, India for the Asia region and, a few years later, in Fiji for the Pacific Region.

In the 1980s, an international approach replaced this regional approach to delivery of support. Courses were delivered at two locations and were open to all regions: Nairobi, Kenya (1980) and Harare, Zimbabwe (1983). In 1986 the Secretariat continued the international approach through an institutionalised programme at the University of the West Indies (UWI) in Barbados. The UWI took over the legislative drafting training programme in 1992.

In 1995 training by distance methods was introduced. The Commonwealth Secretariat and the Commonwealth of Learning (COL) jointly initiated a distance learning programme for training legislative drafters. The programme was piloted between 1996 and 1998, and managed by RIPA International (formerly the International Division of the Royal Institute

of Public Administration) in London. It was later discontinued due to funding constraints. However, the COL developed a regional hub scheme for licensing institutions to offer training for legislative drafters within regions based on the Distance Training Course material. Four licensing agreements were signed with the University of the South Pacific; Vista University in South Africa; the University of Papua New Guinea; and the University of the West Indies.

Duration and Certification. Until 1986, the courses delivered were short term, lasting four to six months and leading to a Certificate. The Barbados programme which started in 1986 offered a Certificate course, and had two additional programmes, one of one academic year's duration, leading to an Advanced Diploma, and the other of 15 months' duration, resulting in an LLM. The Certificate course was discontinued in 1993.

Technical Assistance. Training was complemented by the short-term deployment of legislative drafters in drafting offices of mainly small developing island member countries. This service was discontinued at the end of 1993 and later recommenced.

The evaluators are not able to comment on the technical assistance provided between 1993 and 2006 as no information was available for this period.

1.2 Scope

The evaluation period covers the Secretariat's support to member countries on legislative drafting during 2006-2013. It comprises a review of support provided for placing long-term experts in legislative drafting and law revision in selected member countries, for legislative drafting training, seminars and workshops and networking meetings for heads of legislative drafting. Based on the evaluation findings, the study is to propose both strategic and operational changes that will enable the Secretariat to better deliver its mandate.

The Terms of Reference state that the evaluation is to address three main types of support:

- Long-term technical assistance (long-term drafters placed in selected countries)
- Long-term training in legislative drafting
- Short-term training in legislative drafting

However, during the course of the review, discussions were held about the definition of long-term training and short-term training with Commonwealth Secretariat staff in the Divisions closely involved in the study (the Strategic Planning and Evaluation Division (SPED), the Rule of Law Division (ROL), the Governance and Natural Resources Division (GNR) and the Technical Assistance Unit (TAU). It was agreed that the evaluation study should not seek to differentiate between short-term and long-term training, but instead to assess all support to legislative drafting training during the period in question.

1.3 Focus of the evaluation

The overall purpose of this evaluation is to assess the relevance, effectiveness efficiency, sustainability and impact of the legislative drafting support provided by the Commonwealth Secretariat between 2006 and 2013. The aim is to define the focus and form that future assistance should take, and to recommend strategic and operational changes that may be required by the Secretariat to make support more focused in accordance with the Strategic Plan and in line with the views expressed by Commonwealth Law Ministers at their meeting in Sydney in 2011.

As specified in the terms of reference (ToRs), the evaluation:

- Reviews the relevance of support provided to member countries over the period being evaluated and undertakes an assessment of the likely demand over the coming years.
- Assesses the effectiveness of regional and in-country training programmes and support mechanisms on legislative drafting to determine their quality, impact and sustainability.

- Assesses the overall effectiveness and impact of the legislative drafting assistance provided to member governments in meeting their requirements.
- Assesses the efficiency of the Secretariat's support in legislative drafting, including resource allocation and management approaches, internal mechanisms for delivery and implementation strategies.
- Assesses the 'comparative advantage' and 'added value' of the Secretariat's work in legislative drafting.
- Identifies lessons learned (or not learned) in the design and delivery of the legislative drafting programmes in member countries and recommends strategic and operational changes that may be required to make the future support on legislative drafting more focussed, relevant and sustainable.

2. Methodology and Approach

2.1 Evaluation framework

In responding to the Terms of Reference, the evaluators used the framework described in Annex 2 (a), which is based on the evaluation framework for development assistance set out by the Development Administration Committee (DAC) of the Organisation for Economic Co-operation and Development (OECD) and examined the relevance, efficiency, effectiveness, sustainability and impact of the Commonwealth Secretariat's support to legislative drafting in Commonwealth countries during the period 2006 to 2013..

The evaluators used the following methods for information collection, analysis and feedback during the study:

- Reviewed all pertinent records and data related to the legislative drafting work of the Secretariat.
- Interviewed relevant Secretariat staff engaged in the delivery of legislative drafting activities of the Secretariat.
- Interviewed selected stakeholders - governments, programme partners, collaborating institutions, and project beneficiaries - through field visits and electronically/ by telephone/skype.
- Surveyed legislative drafting training programme participants, heads of legislative drafting/attorneys general and other key officials and CFTC-funded long-term legal drafters.

2.2 Approach and phases in data collection

The evaluation report is based on an assessment of key questions designed to assess the evaluation criteria in the Terms of Reference and an assessment of the Secretariat's internal mechanisms and delivery modes for providing support to member countries for legislative drafting. Please see Annex 2 (a) for the list of key questions addressed during the evaluation.

The evaluation questions focused on:

- Relevance and alignment of the legislative drafting support to national development priorities and the strategic objectives for good governance contained in the Commonwealth Secretariat's Strategic Plan
- Efficiency, effectiveness and functionality of the institutional framework and project management arrangements for legislative drafting both at the Commonwealth Secretariat and at country/regional level in Commonwealth countries
- Impact of legislative drafting support in terms of its contribution to the overall objectives and national priorities in member countries
- Sustainability in terms of the continuation of the benefits of legislative drafting in the medium to long term in member countries, including staff retention and national capacity for legislative drafting.

The evaluation included documentary reviews, telephone/skype interviews, questionnaire surveys and field visits to selected Commonwealth countries. Four different questionnaires were designed. They were for:

- Government officials (for example, in attorney general's offices, ministries of justice, etc.). These officials included those people who have attended meetings of heads of legislative drafting
- Participants in legislative drafting courses, including the Ghana course, the on-line course run by Athabasca University, Canada, and other short courses, workshops and seminars (two different versions of the questionnaire)
- CFTC funded long-term legal drafters.

Samples of these questionnaires are attached at Annexes 2 (b), (c), (d) and (e).

The evaluation was carried out in four phases: Phase I, Inception Phase; Phase II, Country Level Consultations; Phase III, Interviews with Commonwealth Secretariat Staff and Further Information Gathering through Questionnaire Surveys and Document Review; Phase IV, Synthesis and Reporting.

Activities carried out in Phase I included:

- Briefing meeting and initial interviews with staff of the Commonwealth Secretariat (please see Annex 3 for the list of staff met)
- Review and analysis of documents for Commonwealth Secretariat legislative drafting support (please see Annex 4 for the list of documents consulted)
- Identification of interview questions for electronic surveys.

Phase II activities consisted of:

- Design and issue of questionnaires for senior officials, legal drafters funded by the Commonwealth Secretariat and former course participants in legislative drafting courses
- Field visits to conduct face-to-face interviews with senior officials, legal drafters and former participants in the Ghana School of Law Legislative Drafting course. These were to Belize, Ghana, Guyana, Jamaica and Kenya (please see Annex 3 for the list of people interviewed during the field visits). The selection of two regions, Africa and the Caribbean, was made at the initial briefing meeting with the Strategic Planning and Evaluation Division. Emphasis was placed on the importance of visiting Ghana (because of three-month course run there), Guyana (because a number of CFTC-funded long-term drafters and a law revision expert were based at the CARICOM Secretariat in Guyana) and Kenya (as CFTC-funded drafters were in Kenya assisting with the high volume of drafting required as a result of the new constitution). The final selection of countries to be visited was made after initial discussions with Commonwealth Secretariat staff
- Follow up meetings with Commonwealth Secretariat staff
- Telephone/skype discussions with stakeholders (please see Annex 3 for the list of people consulted by telephone/skype).

Phase III involved follow-up meetings with staff in the former GIDD and TCSR (those staff are now in TAU) and in the former LCAD (now ROL) to check the evaluators' understanding of a number of issues and to gather more factual information. The evaluators also reviewed a substantial number of additional documents provided following the Seminar (held at the Commonwealth Secretariat at the end of August) at which the first draft Final Report was discussed.

In Phase IV, the evaluators finalised the analysis of questionnaires, synthesised the information and re-drafted this Final Report.

2.3 Data and evidence analysis

As indicated in 2.2, the evaluation team designed four separate questionnaires, which were sent out by email. In cases where emails were undeliverable, they were sent a second time to reduce the scope for errors in entering the email addresses. Where responses were not received by the specified deadline, reminders were sent to all addressees, giving them a second chance to complete the questionnaire. This boosted the number of returned questionnaires. All respondents were thanked for sending in their replies. Below is a breakdown of the number of responses and from which category of respondent questionnaires were received.

Data and evidence analysis table

Questionnaires	Category of respondents				
	Cat 1	Cat 2	Cat 3	Cat 4	Cat 5
Number of questionnaires sent	91	124	5	108	9
Number of questionnaires completed	22	52	2	35	6
% response rate	24%	42%	40%	32%	67%
Number of questionnaires non-deliverable	9	13	0	9	0
% non-deliverable	10%	10%	0%	8%	0%

Key:

Category 1 = Government officials, e.g. attorneys-general, ministries of justice, heads of legislative drafting

Category 2 = Participants in the Ghana Legislative Drafting Course

Category 3 = Participants in the online Athabasca University Course

Category 4 = Participants in other legislative drafting courses, seminars and workshops funded by ROL

Category 5 = Long-term CFTC funded drafters

2.4 Limitations

Inevitably there were certain limitations to the evaluation study, which are set out below:

- There was no baseline on the state of legislative drafting in Commonwealth member countries, which meant that the analysis of improvements in the quality of legislation is based on evidence collected from the questionnaires and interviews with stakeholders
- There was a limited budget for undertaking the country visits, so only five countries were visited - Belize, Guyana (to the CARICOM Secretariat), Jamaica, Ghana and Kenya. This is a small sample which cannot represent the more widely varied experience in Commonwealth countries. Having said that, the evaluators understand that it is Commonwealth Secretariat practice to cover two regions when conducting evaluations of this sort, and the two selected for this study, Africa and the Caribbean, are regions where there is a great need for legislative drafting capacity building
- There were some gaps in documentation on short courses. For example, there were no participants' lists available for the Pacific Legislative Drafters' Technical Forum held in Fiji in 2012 or the four-week Legislative Drafting course run in Samoa in 2009
- Not all previous beneficiaries could be contacted. There was limited time to hold extensive interviews in the country visits (although relevant and valuable information was gathered during these face-to-face meetings). The level of responses to questionnaires received was limited as questionnaires were only sent to those respondents whose email addresses were available and up-to-date
- The number of consultancy days available was limited, particularly in the light of the very substantial amount of documentation to review. Despite this, the evaluators conducted a thorough review of the documents provided by the Commonwealth Secretariat.

3. Legislative Drafting in the Commonwealth

3.1 Overview

More than half of the member States of the Commonwealth are classified as small states. Many of them do not have sufficient skilled legislative drafters to undertake their legislative agendas. Often there are one or two drafters with little or no drafting training. Sometimes there are no dedicated drafters and officers are required to do general duties of chambers, including litigation, in addition to drafting. Some countries have trained staff over the years, but have not been able to keep them or replace them with skilled staff. The problem of shortage, recruitment and retention of drafters has been on-going in the Commonwealth for several decades. In fact, the CLMM 2008 described it as a perennial problem.

These problems faced by drafting offices are closely linked to the challenges faced by drafters in these countries. In poorly staffed offices, a great burden is placed on them to achieve heavy legislative agendas caused by the country's growing international obligations and increasingly complex and changing social, economic and political conditions. Drafters sometimes have inadequate training, little or no supervision and mentoring, and work in drafting offices that generally lack important legislative drafting tools to operate efficiently and effectively. Their difficulties are compounded by the fact that client Ministries lack the capacity to develop and give adequate drafting instructions to guide the drafting of legislation. Drafters are often poorly paid and, without high level posts in the drafting office, the possibility for advancement within the office is slim, sometimes non-existent.

In jurisdictions in the more advanced economies: Australia and its States, Canada and its Provinces, New Zealand, and the three jurisdictions making up the UK (England and Wales, Scotland and Northern Ireland) there are well structured offices with the capacity to work efficiently and effectively and at high standards

to meet their legislative agenda. Training is done primarily on the job. Lawyers are recruited for the purpose from other branches of the public service, from the academic world and from private practice, and the pay and conditions of service are good. This enables a selection to be made according to ability and, assuming there is budgetary provision for them, there is not a problem in recruiting suitable officers.

3.2 Emerging trends and challenges

Increased need for legislation. The need for legislation has been growing in recent years. There is increasing complexity in society and increasing requirements for jurisdictions to enact legislation to comply with international obligations, particularly in such areas as the protection of the environment, measures to counteract terrorism, regulation of aspects of public health, human tissues and organs, and cybercrime. In fact international organisations such as the IMF and the WHO insist that relevant legislation is in place before funding can be arranged. This has all led to the need for a greater volume of legislation than has been required in the past.

But legislation is created not only at a national level. In Africa the largest Commonwealth jurisdictions in terms of population: Nigeria, South Africa, Kenya and Tanzania, all operate, to a greater or lesser extent, a federal system of government with devolved power to legislate. This means that, quite apart from the national (or "federal") legislatures, there are in Nigeria 36 States, in South Africa 9 Provinces, and in Kenya 47 Counties (with two legislatures in Tanzania, one each for the Union and Zanzibar), every one of which needs drafting capacity for its own legislation.

There is also a growing tendency in some Commonwealth countries towards updating constitutions that encourage the originating

of Bills for legislation from within Parliament itself¹. This modifies the prevailing practice in jurisdictions following the Westminster model, where Parliaments operate primarily as examination chambers for Bills originating almost entirely in government departments. This shift has led to the need for legislative drafters to be attached to Parliaments as well as to central and regional governments. Nigeria has been an exponent of this system at all levels since the 1990s and Kenya too, after recent (2010) constitutional changes, is moving in this direction².

Further, following the pattern of the UK, there has been a tendency to create government agencies, particularly in the areas of public finance (revenue authorities exist in most Commonwealth African jurisdictions). While these do not themselves normally have the authority to finally draft or to promote their own Bills, there is seen to be increasing need for in-house legislative drafters to prepare drafts of original and amending legislation before they are passed to the central drafting department.

Continued need for training support. There is a continuing failure to allocate sufficient resources to attract drafters, engage a sufficient number of them, and retain senior ones who can pass on their knowledge to junior drafters. This causes dependence on external training and for support for that training. Countries are generally still reluctant to give the appropriate priority to drafting in keeping with its importance, and do not recognise that the drafting office has primary responsibility for training and must be well structured for this purpose. Severe financial constraints are also a contributing factor in some cases. It is noted, however, that even a well-structured drafting office may need assistance with training, for example, for continuing professional development of its qualified drafters.

Limited availability of interested people. New entrants to the legal profession continue to be unaware of, or have a poor regard for, a career in drafting. Instead of the public service, the most capable drafters are more attracted to jobs in private practice, with state corporations, international organisations or other Commonwealth jurisdictions with better structured offices and better terms and conditions.

Increased possibility of partnerships for legislative drafting support. More development agencies are interested in providing legislative drafting support to Commonwealth member countries. There is a growing recognition of the link between legislative drafting and the rule of law and governance.

Rise of importance of consultant drafting in small states. Consultant drafters play a key role in assisting with the preparation of legislation that cannot be done by the national drafting office - for example, legislation that is complicated, time consuming, unanticipated or time-bound. Such legislation presents a challenge because the drafting office does not have the right level of drafting skills, or cannot devote resources to it without severely hampering the achievement of its legislative agenda. Consultant drafting is also important because in some countries it currently represents the only opportunity for career advancement when the national drafting office is not well structured.

1 This is because the process is perceived (not necessarily accurately) as being more "democratic", in that legislation originating in this way is seen to come directly from the peoples' representatives.

2 There is evidence from course participants from Botswana that changes to their constitution too are being urged.

4. Commonwealth Secretariat Legislative Drafting Support 2006 – 2013

4.1 Objectives of the support

The legislative drafting support from 2006 to 2013 was part of the Secretariat's *Rule of Law Programme* agreed under the 2004/5–2007/8 Strategic Plan ('SP 2004'), and which was continued under Strategic Plan 2008/9 – 2011/12 ('SP 2008'). Since 2013, the Secretariat has deepened its results-based management approach. The Strategic Plan 2013/14 – 2016/17 ('SP 2013') reflects this change. Instead of setting out a framework of programmes one of which is Rule of Law, it identifies strategic outcomes. Under this Plan, rule of law remains an over-arching goal to be achieved through six strategic outcomes. Legislative drafting falls under strategic outcome 2: more effective, efficient and equitable public governance.

Under all Strategic Plans therefore, the legislative drafting support was and is expected to contribute to strengthening the rule of law in order to promote democratic and accountable governance. It is also to assist member countries to align national law with international legal frameworks. The strategy of the legislative drafting support was to build legislative drafting capacity, and improve efficiency and effectiveness of drafting offices. It would therefore also contribute to the Public Sector Development objective of building capacity and promoting efficiency and effectiveness of national and regional public sector institutions. In 2013, these objectives were reaffirmed as intermediate outcomes 2.4 (*national institutions effectively facilitating the rule of law*) and 2.6 (improved public administration) of SP 2013 Plan.

The Secretariat also established certain cross-cutting priorities in the Strategic Plans, which were to be mainstreamed in all the Secretariat's activities, namely: gender, youth and human rights. For legislative drafting support, this means that it was expected to not perpetuate or reverse unequal benefits to men, women

and youth. It was also expected to promote, where possible, key principles that represent international human rights standards and norms under international treaties and other documents, for example, equality and equity, accountability, empowerment and participation.

Support to small states to build their resilience and competitiveness was a high priority for the Secretariat during the period (as it is now), and an overriding objective where possible in its activities, including its legislative drafting support. The Secretariat committed to encouraging and promoting regional approaches in addressing small states issues and promoting partnerships with selected institutions that are beneficial to small states.

4.2 Nature of support

To achieve the above objectives, the Commonwealth Secretariat provided three primary types of support:

- Technical assistance in the form of CFTC experts (4.2.1)
- Training and mentoring assistance (4.2.2)
- Policy development, networking and knowledge sharing (4.2.3)

There were also other activities by the Secretariat that enabled these primary types of support:

- Preparing drafting and training tools (4.2.4)
- Forming partnerships (4.2.5)

4.2.1 Technical assistance in the form of CFTC experts

During the period the Secretariat ran eleven programmes placing CFTC drafters in: Belize, Botswana, CARICOM Secretariat in Guyana, Jamaica, Kenya, Montserrat, Seychelles and Swaziland.

There were three CARICOM programmes:

- **CAR079** providing two legislative drafters from July 2008 to December 2011
- **CAR080** providing one law revision expert from 2008 to 2011 and The Legislative Drafting Mentoring Programme run from July 2008 to October 2011
- **CAR0570** providing three drafters and one law revision expert to the Office of the General Counsel (OGC), CARICOM from January 2012 to January 2016 and offering up to four scholarships per year to legal personnel in drafting offices to pursue the Athabasca University, Canada, Distance-Learning Legislative Drafting Course (please see 4.2.5).

The CARICOM legislative drafting experts were to provide additional drafting capacity and contribute to skills development through the following activities:

- i. draft legislation for the countries of CARICOM and mentor in-house drafters of national drafting offices
- ii. draft model and treaty implementation legislation for the CARICOM Secretariat
- iii. be tutors for students enrolled in the Legislative Drafting Diploma course at Athabasca University.

The CARICOM law revision expert's role was to assist the countries of CARICOM, with the collaboration of the Anguilla Regional Law Revision Centre (RLRC), to revise and consolidate their laws by setting up law revision offices, facilitating and providing training in law revision, directing the revision and consolidation process and facilitating publishing by the RLRC.

The CARICOM experts were all based at the CARICOM Secretariat in Guyana. However, part of the direct assistance was delivered in-country. The experts spent one to two weeks in-country in Montserrat, Grenada, St. Kitts and Nevis, Antigua and Barbuda, St. Lucia and St. Vincent and the Grenadines. They undertook a needs assessment in the first visit and did drafting and mentoring in other visits. One expert spent two months in Belize drafting and mentoring before being posted to Guyana.

Under the Legislative Drafting Mentoring Programme the CARICOM experts were to provide a twelve-week mentorship programme to people who had completed the University of Guyana short course (please see 4.2.2).

In addition, there were eight programmes providing CFTC drafters to Belize, Botswana, Jamaica, Kenya, Montserrat, Seychelles, and Swaziland:

- **BE10442** provided one legislative drafter to Belize for two years from July 2012 to January 2014. The objective was to enhance the legislative drafting capacity in the Attorney General's Ministry so as to address the backlog of legislation, prepare new legislation, develop and deliver a comprehensive training and mentoring programme for in-house junior drafters, train line ministries in preparing drafting instructions, prepare a reference handbook outlining drafting protocol and administrative processes in the legislative drafting unit, assist in the restructuring and management of the legislative drafting unit.
- **BOT0441** provided one legislative drafter to Botswana in phases over a period of two years from July 2011 to July 2013. The objective was to enhance the capacity of the Government to formulate and implement a sentencing policy for Botswana which incorporated alternatives to imprisonment. This was to be achieved by capacity building, policy development, preparation of draft legislation, and establishing mechanisms to monitor the implementation of the new policy and legislation.
- **CAR0570 – Jamaica** provided one legislative drafter to Jamaica for a period of six months from July 2013 to January 2014. The objective was to enhance the capacity of the Government to prepare urgent pieces of legislation which were time-bound structural benchmarks under Jamaica's new Extended Fund Facility with the IMF, including an Omnibus Tax Incentive Act, a Charities Act and an Omnibus Banking Act.

- **JAM0443** provided one legislative drafter to Jamaica for two years from January 2012. The objective was to enhance the capacity of the Government to develop effective legislation in a timely manner, particularly criminal and anti-corruption legislation. This was to be achieved by preparing draft legislation, mentoring and training in-house legislative staff and legal personnel in line ministries and preparing a manual for drafters and written guidelines for line ministry officials.
- **KEN0354** provided up to three³ legislative drafters to Kenya during 2011 to January 2015. The objective was to strengthen the capacity of the Attorney General's Office and the Kenya Law Reform Commission by drafting the legislation required to implement the provisions of the new constitution of the Republic of Kenya. This was to be achieved by drafting some of the legislation required in the 49 subject areas – including the independent preparation of politically sensitive legislation – building capacity for the Government to complete the drafting and assisting in the establishment of a legislative drafting course at the Kenya Law School.
- **MTS034** providing one legislative drafter to Montserrat from 1 January 2011 to January 2013. The objective was to strengthen the drafting capacity of the Government to clear the backlog of outstanding legislation – particularly relating to the Government's Sustainable Development Plan and legislation to comply with international obligations and treaties including the core UN conventions relating to Human Rights and other ILO Conventions – and draft other legislation as directed by the AG.
- **SEY0495** provided one legislative drafter to Seychelles from 1 January 2012 to January 2014. The objective was to strengthen the drafting capacity of the Government to prepare legislation that was necessary because of (a) the International Monetary Fund reform programme, (b) a new constitutional amendment bill, and (c) the potential membership of the World Trade Organisation; building capacity in legislative drafting and the preparation of drafting instructions; and prepare drafting guidelines.
- **SWA069 & SWZ0776** provided two legislative drafters to Swaziland for two years from August/September 2007, an extended term of one of those drafters for one year from September 2009 (on a cost sharing basis), two drafters for one year from January 2011, an extended term for one of those drafters for a period of one year to February 2013. The mandate of these drafters was to draft legislation to set up institutions required by the new Constitution of 2006 and update other laws that are required for the operation of Government, the legislature and the judiciary; and to mentor drafters within the office of the Attorney General. In 2013 an expert was placed in the office of the Clerk of Parliament for a period of two months to assist the Clerk of Parliament with legislative drafting capacity to review, amend and redraft Bills prepared by previous experts as instructed by Parliamentary Portfolio Committees.

4.2.2 Training and mentoring assistance

All the CFTC legislative drafting experts had mentoring duties as indicated above. In addition, the Commonwealth Secretariat provided support for the following training:

The Athabasca Post Graduate Diploma in Legislative Drafting programme for the Caribbean region. This is a 1.5 to 2.5 year distance learning course for Caribbean students and the support started in 2013. It is organised under a Memorandum of Understanding signed in 2012 by Athabasca University in Alberta, Canada, the CARICOM Secretariat and the Commonwealth Secretariat. Its objective is to build capacity of drafting offices in the Commonwealth Caribbean by allowing up to four nominees a year to be funded by the Commonwealth Secretariat to pursue the Athabasca Post Baccalaureate Diploma in Legislative Drafting and undergo placement in the Office of the General Counsel of the CARICOM Secretariat. This commitment by the Commonwealth Secretariat is part of project

3 A fourth was forced to resign 6 months after the commencement for personal reasons. One of the three was away for health reasons for at least six months from Nov 2012 to May 2013.

CAR0570 discussed above. This project is currently expected to end in January 2016.

The course is administered by the Athabasca University. CARICOM Secretariat assesses the suitability of candidates and supervises the work during their placement during the final course module of the Diploma. There are two Programme Co-Directors with post graduate qualifications in law, and experience in law and philosophy, alternative dispute resolution and teaching law, though not legislative drafting. The CFTC experts at the CARICOM Secretariat are designated tutors.

The course is an adaptation of the course prepared jointly by the Commonwealth of Learning and the Commonwealth Secretariat to provide effective training in legislative drafting without requiring governments to incur the cost of sending trainees overseas and losing their services. It comprises five 6-month courses that focus on the elements of drafting. They are not specifically tailored to the Caribbean and do not deal with Caribbean constitutional and administrative law principles.

There are no lectures. The courses are delivered by 'individualised study mode' in a 'self directed learning environment.' The students have the assistance of remote tutors and have to spend up to four weeks at CARICOM during the final module of the course to gain practical experience on real drafting exercises.

The Commonwealth Secretariat provides a total of £3,230 per student for the course. This amount also covers costs such as travel and subsistence during the final module of the Diploma. Nominees must be from legislative drafting offices, but there is no stipulated minimum service requirement. They must sign commitment bonds to their respective offices for a minimum of one year following the completion of the Diploma.

Ghana Legislative Drafting Course for the Africa region, 2006-2013. This twelve-week course is the Commonwealth Secretariat's regional training programme on legislative drafting for African States. It was delivered in collaboration with the Government of Ghana through the Ministry of Justice, in partnership with the Ghana School of Law in Accra. Its

objective is to build the capacity of legislative drafters working in legislative drafting offices in the eighteen African Commonwealth jurisdictions. It was originally planned for three years, but was extended twice, for two years in each case, after a review requested by the Heads of Legislative Drafting Offices of Africa. The extensions were aimed at ensuring a critical mass of people was trained and to ensure the continuation of the programme while preparations were being made for its institutionalisation (transfer from Ministry of Justice to the Law School).

The Ghana School of Law administers the course, including the funds for the programme. It has not been institutionalised in the sense of being formally integrated as part of the curriculum offered by the School although the School does offer graduate certificates to course participants that meet its requirements. There is a full-time Programme Director with extensive legislative drafting and teaching experience. He is assisted by two former Heads of Legislative Drafting in Ghana, and a lecturer at the Ghana School of Law.

The course was an adaptation of the short course prepared following a CLMM 2002 mandate, under the auspices of the Commonwealth Secretariat, by an international project advisory group of expert trainers. It was written by the late Professor Keith Patchett, a legislative drafting trainer from the UK, and adapted for Africa in consultation with member countries in Africa. It is comprehensive, intended to provide initial formal training. In addition to the elements of drafting itself, it includes training on the relationship with client Ministries, obtaining instructions, the stages of the legislative process in Parliament, the components of specific kinds of legislation (financial, licensing statutory authorities, treaty implementing), and relevant aspects of constitutional and administrative law. To ensure quality, there was on-going internal consultation between GIDD and LCAD, regular meetings with counterparts in Ghana and feedback from participants and Heads of Legislative Drafting.

The course comprises lectures, three drafting assignments each week, and uses course materials relevant to the African region - manuals, handouts and background material.

There was originally no formal provision for one-to-one tutorials, although participants were encouraged to raise matters that they did not understand or that in some other way concerned them during the discussion groups. Later this policy was modified to give at least some of these kinds of tutorials to each of the participants.

The Commonwealth Secretariat funds the fees of the Programme Director, the cost of organisation and co-ordination, accommodation and subsistence (occasionally air travel too) for one participant from each Commonwealth African member country, stationery costs and other miscellaneous items. The respective drafting office has to fund round trip travel and incidental costs of the participants that are not met by CFTC funds. CFTC funds also cover the cost of Commonwealth Secretariat staff travel. The actual running costs are higher than the CFTC funds. The difference is met by privately funded participants who pay tuition fees of about £1,560 (2009).

The Commonwealth Secretariat does not (and cannot) impose a bonding requirement that participants must work with a particular government in drafting for a certain period after completing the course. It requires simply that participants be from a legislative drafting office, preferably with at least six months' experience, and that they go back to it. However biennial meetings of the Heads of Legislative Drafting Offices in Africa have encouraged the putting in place of systems that ensure retention of trained drafters. Participants originally received a certificate of attendance, but in later years in addition to the certificate of attendance a post-graduate diploma was awarded to candidates who successfully passed the required written exams.

University of Guyana Legislative Drafting Course, 2007 to 2008. This twelve-week programme was run by GIDD, in collaboration with the University of Guyana, Georgetown, Guyana. It was based on the short course that was prepared for the Commonwealth Secretariat by the late Keith Patchett following a CLMM 2002 mandate, and which was adopted at the 2003 Commonwealth Secretariat Workshop on Curriculum Development for Training of Legislative Drafters held in Barbados. Provision

was made for mentoring at the completion of the programme. Further details on the administration, mode of delivery, trainers, content, funding and conditions of training are not available at the time of preparing this report.

In-house Advanced Legislative Drafting Course for Samoa, Pacific region, 20 July – 14 August 2009. This four-week course offered for the drafters of the Office of the Attorney General, Apia, Samoa was run by a consultant engaged by the Commonwealth Secretariat, with administrative assistance by the Secretariat and the Office of the Attorney General of Samoa.

The course covered topics that the beneficiary previously indicated would be particularly valuable to the participants and it was tailored for the Samoan context. It included civil law, criminal law and commercial law: repeal and amending provisions, savings and transitional provisions, interpretation acts, enabling powers, ultra vires, drafting in an international context, offences, evidential provisions, appeals, powers and duties, statutory bodies and tribunals, appropriation and taxation, borrowing and lending.

The course was delivered in the mornings to allow participants to undertake their drafting work in the afternoons. Participants had to complete about 30 drafting exercises. The course was funded by the Commonwealth Secretariat, which paid the consultant's fee. Training was offered to people with different levels of experience. Participants were presented with a certificate of completion.

University of London Institute of Advanced Legal Studies (IALS) for Africa and the Pacific region. LCAD facilitated attendance at this four-week course by legislative drafters from The Gambia, Namibia and Samoa in June/July 2011 and a member of the Attorney-General's Office of Mauritius in May 2012.

The course is administered by the Sir William Dale Centre for Legislative Studies, directed by the Academic Director of the Centre and Senior Lecturer of the University of London and taught by members of the drafting and academic professions. It covers legislative drafting and its legal and political context and is taught in intensive two-hour daily morning lectures and

1.5 hour afternoon exercises. The lectures are interactive and allow participants to share problems and identify best practices.

The Commonwealth Secretariat paid tuition, airfares and daily subsistence for the participants from The Gambia, Namibia and Samoa, while it paid only the airfare and subsistence for the participant from Mauritius. The evaluators received no information on whether conditions were attached to the training. The course is suitable for experienced and inexperienced drafters. Participants were presented with a certificate of attendance.

Caribbean Regional Legislative Drafting Seminar in Bridgetown, Barbados. August 2011. This three-day seminar was organised in conjunction with the CARICOM Secretariat and in collaboration with the British High Commission, Bridgetown and the European Commission. It was taught by seven resource people from the Caribbean: two CFTC experts based at CARICOM, the Acting General Counsel of the CARICOM Secretariat, Criminal Justice Advisor to the Eastern Caribbean, British High Commission, Bridgetown and senior legislative drafters from the Cayman Islands, Barbados and Bermuda. It comprised ten sessions, six of which were on legislative drafting and the remaining four on principles important for the legislative drafter.

The Commonwealth Secretariat paid the travel and accommodation costs of two CFTC experts based in CARICOM and one participant from eight Commonwealth CARICOM member states. The following ten countries were represented at the seminar: Suriname, Grenada, St Lucia, Dominica, Antigua and Barbuda, Jamaica, Montserrat, Bahamas, Anguilla, Belize, Trinidad and Tobago, Barbados. The evaluators received no information on whether conditions were attached to training. No experience requirements were indicated. Trained and untrained drafters attended.

Second Caribbean Regional Legislative Drafting Seminar, Port of Spain, Trinidad and Tobago, February 2013. This three-day course was organised in conjunction with the Chief Parliamentary Counsel of Trinidad and Tobago and led by CARICOM CFTC legislative drafting experts. It was taught by four resource people from the Caribbean: three CFTC experts based

at CARICOM and the Chief Parliamentary Counsel of Trinidad and Tobago. The fourth CARICOM CFTC expert was also in attendance.

The seminar was designed by one of the CFTC experts and aimed at beginners and intermediate drafters. It included sessions on law revision in addition to limited legislative drafting principles and placed more emphasis on practical drafting exercises. Funding was provided by the Commonwealth Secretariat. The evaluators received no information on whether conditions were attached to training. The following thirteen countries were represented at the seminar: Anguilla, Bahamas, Belize, Bermuda, British Virgin Islands, Dominica, Grenada, Guyana, Jamaica, Montserrat, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago in addition to four CFTC experts from CARICOM.

In-house Training for Brunei Legislative Drafters, 28 – 31 October 2013. This four-day in-house course was taught by a Commonwealth Secretariat drafting consultant with over 30 years' experience as a drafting practitioner and lecturer in legislative drafting. It was designed by the consultant around the areas identified by the Attorney General's Chambers of Brunei Darussalam (AGC): familiarisation with modern plain language drafting, and with some of the topics in legislative drafting that tend to cause difficulties: in particular savings and transitional provisions, and retrospective commencement. It comprised five lectures and two exercises.

The Secretariat and the AGC shared the costs of the seminar. The Secretariat paid the professional fees and daily subsistence allowance of the expert, whilst the AGC paid the costs of his airfare and accommodation in Bandar Seri Begawan. The course was offered to AGC drafters only and was suitable for beginners and people with intermediate experience.

Resource Person to teach the module 'International Instruments', November 2013. The Secretariat funded the cost of this resource person for the Diploma course in Legislative Drafting run by the Institute of Legal Practice and Development (ILPD) in Rwanda.

4.2.3 Policy development, networking and knowledge sharing

Policy development, networking and knowledge sharing is achieved through various established periodic meetings and forums supported by the Commonwealth Secretariat. Below the evaluators set out the meetings that focussed on policy development, networking and knowledge sharing in legislative drafting. This includes a brief statement of their purpose relative to legislative drafting and later, in the findings and conclusions section (Section 5), consideration is given to the efficiency and effectiveness of the meetings and forums (5.2.4) and their impact and sustainability (5.3).

- **Commonwealth Law Ministers Meetings (CLMM)** preceded by the **Senior Officials of Commonwealth Law Ministries Meetings (SOCLMM)**. The Secretariat hosts these meetings, in collaboration with the member country in which the meeting is held. No direct support is given to member countries to attend. Legislative drafting has featured on the agenda for these meetings, but they are for considering all legal matters. Meetings that considered legislative drafting were held in 2008 Edinburgh, Scotland, and in 2011 in Sydney, Australia. The Edinburgh meeting considered the perennial problem of the shortage, recruitment and retention of legislative drafters. The meeting in Sydney considered the difficulties facing legislative drafting offices.
- **Heads of Legislative Drafters Meetings.** These are arranged by region. LCAD provided funding for meetings in:
 - **Asia:** Kuala Lumpur, Malaysia, 2008 - eight participants from seven countries⁴ in Asia and two representatives of the Commonwealth Secretariat discussed how the problem of the shortage of drafters could be addressed.
 - **Caribbean:** Grenada 2007 - fourteen participants from countries and relevant institutions in the Caribbean, together with six people from the Commonwealth Secretariat, attended this three-day meeting
- **Africa:** Cape Town, South Africa 2008, Mauritius 2010 and Windhoek, Namibia 2012 - an average of eighteen participants from Commonwealth African countries⁵ and three representatives from the Commonwealth Secretariat met in three two-day meetings in 2008, 2010 and 2012 respectively to evaluate the Ghana course and discuss other initiatives to build capacity in legislative drafting in the region and the role of regional and international institutions.
- **Pacific Working Group.** The Commonwealth Secretariat participated in this meeting, the purpose of which was to review the legislative drafting curriculum prepared under the auspices of the Commonwealth Secretariat in accordance with the mandate of the CLMM 2002 in Saint Vincent and the Grenadines. Participants included Attorneys and Solicitors General, parliamentary counsel, legislative drafters, legal educators and legal consultants from the Pacific, Australia and New Zealand.
- **Pacific Drafters Technical Forum.** The first Forum was held from 26 to 28 June 2007 in Port Vila, Vanuatu (with the Parliamentary Counsel's Office, New Zealand) the second from 13 to 15 October 2009 in Canberra, Australia (with the Attorney General's Department, Australia) and the third from 23 to 25 July 2012 in Fiji (with the Pacific Islands Forum Secretariat). The forum was to review and recommend improvements where necessary in the short term curriculum developed under the auspices of the Commonwealth Secretariat and reviewed in Barbados (2003) and Africa (2005); to provide participants with technical guidance on good legislative drafting

to evaluate a short course for the Caribbean developed on behalf of the Commonwealth Secretariat. They also discussed other initiatives to build capacity in legislative drafting in the region and the role of regional and international institutions.

4 Bangladesh, Brunei, India, Sri Lanka, Maldives, Singapore and Malaysia.

5 Botswana, Cameroon, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Sierra Leone, South Africa, Swaziland, Uganda, United Republic of Tanzania and Zambia.

practices; and develop a plan of action for a sustainable approach to legislative drafting in the Pacific region.

- **Commonwealth Association of Legal Counsel (CALC).** In August 2011, LCAD provided funding for the attendance of a number of participants at a CALC Regional Conference held in Sri Lanka.

4.2.4 Preparing drafting and training tools

In 2006 the Pacific Working Group on Legislative Drafting, including representatives of the Commonwealth Secretariat, met in Auckland to develop a short course in legislative drafting for the Pacific as mandated by CLMM, 2002, St Vincent and the Grenadines.

In 2008, a legislative drafting course was developed for the Pacific by a Commonwealth Secretariat consultant. In addition model guidelines on Process and Content of Legislation for Pacific States were developed.

4.2.5 Forming partnerships

For the purpose of the law revision element of the Caribbean support under CAR080 and CAR057, a Memorandum of Understanding was signed by the Commonwealth Secretariat, the CARICOM Secretariat and the Regional Law Revision Centre (RLRC) in Anguilla in July 2012 to exploit the expertise of CFTC experts, the networks of CARICOM and the revision services of the RLRC. The purpose was to provide CARICOM countries with a viable, cost-effective and comprehensive alternative to law revision and consolidation.

To facilitate the Athabasca Post Graduate Diploma in Legislative Drafting programme for the Caribbean region discussed above, a Memorandum of Understanding was signed by the Commonwealth Secretariat, the CARICOM Secretariat and Athabasca University. Through this Memorandum of Understanding, the cost of the programme is 30% less than the standard cost and it incorporates an internship with the CARICOM Secretariat to enable some Caribbean specific training.

4.3 Management and Control of Support

4.3.1 Management structure

Two Divisions of the Commonwealth Secretariat were involved in the management and delivery of the legislative drafting support:

- The Governance and Institutional Development Division (GIDD) - the lead Division responsible for technical assistance in the form of CFTC experts (through its Technical Co-Operation and Strategic Response Group TCRSG) and to represent the Commonwealth Secretariat in its role in the Ghana course, the University of Guyana course and the Athabasca course (through its Regional Programmes Group RPG).
- The Legal and Constitutional Affairs Division (LCAD) was responsible for training courses (other than the four above) and providing technical advice to GIDD in relation to CFTC experts. LCAD was responsible for making initial arrangements for the Ghana course, but during the implementation, GIDD became the main contact point as it was responsible for managing the CFTC funds used to partly fund the course, although selection of participants for the course was done jointly by GIDD and LCAD.

During the period under review, the LCAD comprised three sections: the Criminal Law Section, the Justice Section and the Law Development Section. The Justice Section's main responsibility was the judiciary and judicial processes. The Justice Section's staff of four – Head of Section, Legal Adviser, Legal Officer and Administrative Officer – worked on both the judiciary and judicial processes and legislative drafting.

During the period under review GIDD included the Technical Co-operation and Strategic Response Group (TCSRSG) established in 2007/2008. Although part of one division, their role was to supply gap-filling assistance, in collaboration with LCAD, and to provide the Secretariat with the necessary project development and management services for their programming – preparation, appraisal and supervision, monitoring and evaluation. Its staff had high-level project management skills and experience.

Under the most recent Strategic Plan, the TCSRГ is now the Technical Assistance Unit, an independent unit under the Office of the Secretary General.

4.3.2 Management approach and processes

The Commonwealth Secretariat began moving towards results-based management just before the beginning of the period under review, during implementation of the SP 2004. This results-based management is now fully implemented under the current Strategic Plan SP 2013.

Although the Secretariat has a mandate from member countries to provide support to legislative drafting, and that mandate was included under all three Strategic Plans, the Secretariat took a demand-driven approach to implementing this mandate. That is to say, it designed specific programmes in legislative drafting only upon the request by a member country or regional organisation.

Requests for assistance are sent to the Secretary General or the Deputy Secretary General (Economic and Social Development). Requests are then referred to the relevant Policy Division (in this case, Rule of Law) and to TAU and an initial review is conducted to assess whether the request fits in with the Commonwealth Secretariat's Strategic Plan and with the priorities of ROL. Requests must come through, or at least be endorsed by, the Principal Contact Point in the requesting country. If a request is made by a regional organisation, it must be endorsed by that organisation's chairperson and the relevant country/countries' Principal Contact Point must be notified.

If the initial decision is positive, the Director of ROL will provide approval in writing and will nominate a Policy Lead Adviser. The Head of TAU will then assign a Project Manager who may be the Head of TAU or one of TAU's Technical Advisers, depending on the Technical Advisers' experience and workload. If the initial decision is negative, the Head of TAU or the Deputy Secretary General (Economic and Social Development) will write to the requesting organisation letting them know that their request has not been approved and giving reasons for the decision. Where possible, advice is given on other possible sources of assistance.

Generally the project proposals are based on information concerning the state of affairs in-country provided by the requesting country. Sometimes the information is verified by the Commonwealth Secretariat through a needs assessment mission conducted by Secretariat staff.

4.3.3 Supervision and control

There were two levels of supervision of CFTC experts: supervision by the TCSRГ through the review of six-monthly reports prepared by the expert according to a TCSRГ template and in-country mid-term reviews on the one hand; and on the other, supervision by the head of the department in which the CFTC drafter was placed.

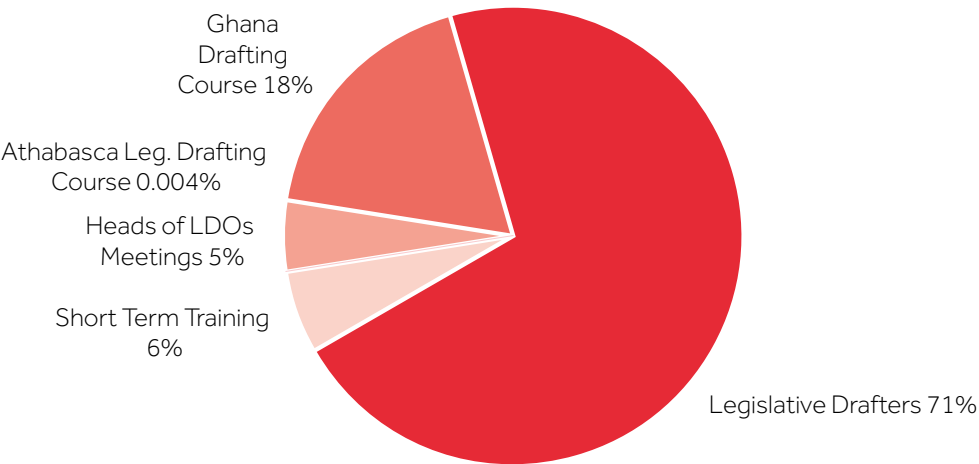
LCAD collaborated in supervision and control of CFTC experts by providing comments on the six-monthly reports to TCSRГ, by jointly undertaking in-country project review missions and contributing to ad hoc discussions regarding implementation issues.

4.4 Funding

The evaluators understand that all funding for legislative drafting support comes from the Commonwealth Fund for Technical Co-operation (CFTC) with the exception of support for meetings of Commonwealth Law Ministers. Funds for support to these meetings are provided from the Commonwealth Secretariat's budget. CFTC funds for supporting the placement of drafting experts in-country and for supporting participants attending the Ghana legislative drafting course and the Athabasca on-line course were managed by GIDD/TCSRГ and are now managed by TAU. CFTC funds for other short courses, seminars, workshops and meetings of Heads of Legislative Drafting were managed by LCAD, now ROL.

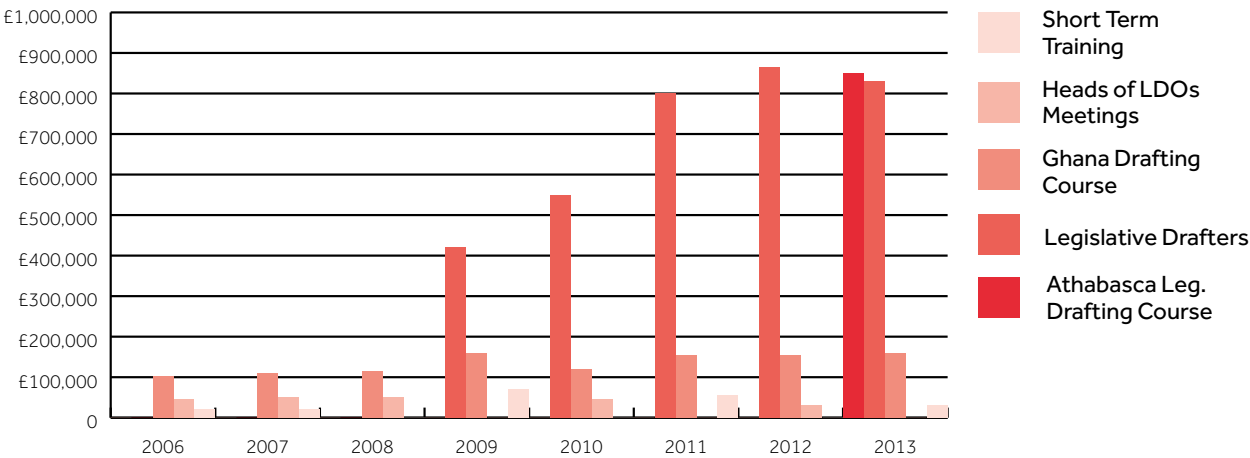
During the period 2006 to 2013, CFTC spent a total of £3,874,158 on legislative drafters, short-term training and meetings of Head of Legislative Drafting Offices, funding participants to attend the Ghana course and the online Athabasca course. Figure 1 shows shares for each of these programmes of the total expenditure.

Figure 1: Total expenditure over 2006–2013



Over the reporting period the overall expenditure on legislative drafting support has increased by almost eight times from £108,172 in 2006 to £849,129 in 2013. A major factor contributing to this increase is the funding for legislative drafters. Figure 2 shows the annual variations in expenditures on legislation drafting between 2006–2013. It should be noted that information on funding of legislative drafters was only available from 2009. The evaluators understand that TCSRG was created in 2009 and at that point a separate budget allocated to TCSRG. Prior to that, funds for technical assistance for legislative drafting were drawn from the overall GIDD budget.

Figure 2: Annual expenditures on legislative drafting



5. Evaluation Findings and Conclusions

5.1 Relevance of the Commonwealth Secretariat support

The evaluation reviewed the relevance of the support by inquiring into the following three issues:

- Do the objectives of the support target a need, and are the activities and outputs of the support consistent with the intended impact?
- Is the support consistent with the priorities and policies of the Commonwealth Secretariat?
- Is the support consistent with the priorities and policies of the member countries?

In each case, the team looked at the issue from the broad strategic level and at the level of the detailed activities and outputs.

5.1.1 Do the objectives of the support target a need and are the activities and outputs of the support consistent with the intended impact?

The broad objectives of the legislative drafting support targets current needs of Commonwealth member countries and the detailed activities of the support can provide essential outputs to fill critical gaps and deficiencies that give rise to these current needs.

As stated above, the overall objective of the legislative drafting support is to strengthen the rule of law in member countries in order to promote strong democracies and accountable governance. This is a current need because Commonwealth member countries are continuously challenged in maintaining strong democracies and ensuring accountability within government.

Another objective of the legislative drafting support is to assist member countries to align national law with international legal frameworks. This too addresses a current need. There are many international standards established by international agencies, which it is currently in the interests of member countries to implement - whether because the countries are members of the agency or are affected by decisions of the agency. Several of these standards involve requirements relating to the legal framework, placing a burden on member countries to harmonise their national legal frameworks with these international standards.

The Commonwealth Secretariat legislative drafting support sought to achieve these objectives through strengthening the member countries' legislative drafting capacity, drafting office operations and legislation output - training, technical assistance (long term experts) and through providing leadership for networking, information sharing and legislative drafting policy making. Such activities certainly target the two broad objectives above: the countries' legislative drafting capacity, operations and output relates directly to whether they are able to change the national legal frameworks as necessary to (a) implement and administer government policy in a manner that respects the rule of law; and (b) implement international standards that require law reform.

It should be noted that while all activities undertaken were relevant, more priority could have been given to institutional building activities to contribute to well-structured and well-equipped drafting offices. For example, developing effective legislative planning, legislation management and legislative drafting tools, including software, also make a significant contribution to a well-structured/well-equipped drafting office. Such initiatives were mandated by CLMM 2008 but were not given adequate attention during the period under review.

5.1.2 Is the support consistent with the priorities and policies of the Commonwealth Secretariat?

The objectives of the legislative drafting support are consistent with the priorities of the Commonwealth Secretariat. However, the detailed activities through which the objectives were to be achieved were in some respects at variance with its policies.

The legislative drafting support was undertaken under Strategic Plans, which were the result of a rigorous planning process to establish priorities for, and focus the work of, the Secretariat. Over the period, the plans were reviewed periodically and amended to respond to shifts in priorities or in ideas for improved ways of working to achieve the overarching goals for which the Secretariat was established: Democracy and Development. The legislative drafting support has therefore been undertaken as part of work programmes that reflect the Secretariat's updated priorities and focus.

As has already been noted, the goals of the Strategic Plan are the support of good governance, as evidenced by the following things: strong democracy, the rule of law, the promotion and protection of human rights, and respect for diversity. There can be little doubt that legislation is fundamental to the attainment of these goals.

In order for that legislation to be effective it needs to be drafted with clarity, conciseness and consistency in language, and as far as possible clarity and simplicity in structure. Any measures that go towards helping the drafting of legislation in this way must of necessity be relevant to achieving these goals.

Obviously, adequate training in the requisite skills must play a part in this process. Short term facilitation of skilled expatriate drafters to work directly for jurisdictions needing support is also important and relevant.

However, activities and outputs are not altogether consistent with the policies of the Secretariat. Its mandate is to assist member countries to find a long-term (sustainable) solution to the shortage of legislative drafters by providing relevant support in the short term. However, in some ways the support by

Secretariat is *becoming* the long term solution, not just backstopping while a sustainable solution is devised and implemented. As is indicated in 5.3.3 below, the impact of the support has generally been short term, leading, for example in Ghana, to repeated requests for the continuation of support on the basis that the impact will not continue once the support is removed. In the Caribbean, the CARICOM Secretariat did not recruit a drafter for the Office of the General Counsel once the drafting experts had been assigned there by the Commonwealth Secretariat. The drafting experts there and in other places, for example in Montserrat, were given general duties of the office not contemplated by the terms of reference, notably some role in litigation.

5.1.3 Is the support consistent with the priorities and policies of the Commonwealth member countries?

The legislative drafting support is consistent with the priorities of the member countries. However, the detailed activities through which the objectives were to be achieved were in some respects at variance with their political realities and so were not consistent with the intended impact of the support.

To the extent that the support conforms to the Strategic Plans of the Secretariat, it satisfies some of the priorities of member countries, as the Strategic Plans reflect their shared priorities. In general, individual country priorities relate to economic and social development. The ability to draft legislation is key to putting in place the legal rules required as part of the formulation and implementation of economic and social policies. These legal rules promote the rule of law and good governance, which contributes to the successful implementation of such policies.

While the support is relevant to member countries' priorities, this is not always true of the activities and outputs through which the activities were to be achieved. Activities addressed the capabilities and output of the offices by focussing on the human resources: more trained drafters; more experts drafting as a backstopping measure. However, especially in small member countries where policy relating

to the size of drafting offices and terms and conditions of its drafters is directly affected by the countries' limited resources, high turnover of drafting staff is difficult to eliminate. Over time, trained drafters move on, negatively impacting the capability of the office and the backlog of work returns. Given this political reality, support would have a more sustainable impact if greater emphasis had been placed on activities relating to the physical resources of the drafting office: effective legislative planning, legislation management and legislative drafting tools. A well-structured drafting office is less affected by changes in staff and better able to cope if key staff move on.

5.1.4 Comparative advantage – other support and programmes

The Commonwealth Secretariat has comparative advantages that put the organisation in a unique position to provide support in legislative drafting to its member countries, namely:

- As the principal inter-governmental agency of the Commonwealth and a values-based organisation:
 - It has a strong advocacy role on behalf of its members
 - It can use its good offices among its members to promote beneficial policies
 - It provides an informal and friendly setting for high level meetings to air concerns and to promote a better understanding among members of each others' positions and circumstances.
- As an organisation whose members comprise a diverse and varied cross-section of nations who have a common language, shared history and traditions and similar administrative and legal systems:
 - It can facilitate the sharing of experiences and knowledge of good practice and expertise, thereby promoting improved standards and capacity building
 - It brings a depth of experience and a diverse network of experts to the activities that it undertakes in support of its members.

5.2 Effectiveness and efficiency of legislative drafting support

In this section the evaluators examine to what extent the outputs were achieved, and whether they were done effectively (quality) and efficiently (having regard both to cost and time). Where possible, alternative methods are compared. The evaluators found that the support was in general effective and efficient and this was confirmed in the responses to the questionnaires.

In determining the effectiveness of short courses the evaluators used the criteria developed by the Pacific Working Group in 2006. The Pacific Working Group included Attorneys and Solicitors General, parliamentary counsel, legislative drafters, legal educators and legal consultants from the Pacific, Australia and New Zealand. It made recommendations on how to have an effective short course that, given the high level skills and range of relevant experience of the group, can be considered 'industry' best practice. See section 5.2.4 for details of these recommendations.

5.2.1 Training

A number of institutions provide training in legislative drafting. Annex 5 provides details of various courses offered around the world. The next section reviews the training courses which have either been supported by the Commonwealth Secretariat or used by the Secretariat to build capacity in legislative drafting.

The Ghana course

The Ghana course content substantially meets 'industry' best practice for effective training of legislative drafters. It is based on a curriculum developed by a distinguished jurist, reviewed at workshops held in the Caribbean (Barbados, 2003), Africa (June, 2005) and the Pacific (2006).

The only selection criterion of the Ghana course is that the person funded be from a Commonwealth African drafting office. The course is entry level, not advanced as contemplated by the Pacific Working Group. It is not part of a broader programme of training

available for those drafters. In view of the lack of skilled drafters in Africa, this entry level short course with limited criteria for acceptance was a reasonable response in the short term to deal with the urgent need to create a critical mass of skilled drafters. However, to the extent that it does not fully meet the standards for producing properly trained drafters, its efficacy in building capacity to enable African drafting offices to produce legislation efficiently and at a high standard is necessarily reduced.

The course is also an efficient approach in the short term to addressing the lack of trained drafters. The programme costs the Secretariat an average of £100,000 per annum. It enabled the training of a total of 147 CFTC funded participants from Africa during the period 2006 to 2013. The average cost was £4,856 per person.

An alternative approach would have been to supply CFTC experts. The skill level supplied would have been higher than the skill level of staff at the completion of the Ghana course. However, the cost per year per country for the Secretariat would have been about £60,000⁶ and the increase in capacity would have been temporary.

Another alternative would have been to facilitate training in an existing institutionalised training course by providing scholarships. However there are few institutionalised short courses available in Africa that would give the solid foundation that the Ghana course was designed to give. There is a six month residential course offered by the Rwanda Institute Legal Practice and Development which leads to a Post-Graduate Diploma in Legal Drafting. We understand that the Zambia Institute of Advanced Legal Education also offers legislative drafting training but there was no information available on their website at the time of conducting this evaluation. Other short courses available ranged from a few hours to a maximum of four weeks and were comparatively more expensive. However, they were not tailored to the African context. Please see Annex 5 for a comparison of other legislative drafting courses.

The Athabasca course

The Athabasca course only partially meets 'industry' best practice for effective training of legislative drafters. It teaches the elements of drafting legislation relating to writing, including structure. It involves tutorials and practical exercises. There is built-in flexibility in the mode of delivery. However it does not include administrative and constitutional law, the course materials, while generally related to common law countries, lack particular adaptation to the Caribbean context, there are no lectures per se, the courses are evaluated regularly and the review takes into consideration student's perspectives, there are full time programme co-ordinators who are experienced lawyers and educators, though not legislative drafters. The tutors with legislative drafting experience and the mentorship arrangement at CARICOM Secretariat during the final module go some way in making the course relevant to the Caribbean. It does not fully compensate however. The call of one of these tutors for the adaptation of the course to the Caribbean testifies to this.

The significance of this assessment is not that the Athabasca course is not useful, but that a training programme that comprises only that course is incomplete and ineffective to produce drafters of the required standard. There should be a broader programme that has other modes of training to complement the course. There should be training in administrative law and constitutional law. There should be training in specialised areas that are legislation intensive, including regional co-operation agreements (CARICOM Treaty and OECS Treaty) and international agreements (Trade Agreements, Human Rights Agreements). These would be beneficial to both drafters and line ministries responsible for policy development. There should be in-house training and the tools to make this possible within the particular circumstances existing in the small island states.

The only other modes of training apart from the Athabasca course were seminars held in 2011 and 2013. They offer extremely short - and for the most part entry-level - training in drafting. As such they amount to a poor duplication of what is available in the Athabasca course, as opposed to complementing it. (See 'four-week courses and seminars' below).

6 Based on the cost of legislative drafting experts in Africa during the period.

In terms of efficiency, the Commonwealth Secretariat has to pay the Athabasca University tuition of £3,230 per student for the whole course. This represents almost 30% reduction on the standard tuition of £4,541. The Commonwealth Secretariat fee is fixed. However the standard tuition increases slightly from year to year. The MOU is for an indeterminate number of years. Thus, because of the partnership forged by the Commonwealth Secretariat, it has been able to secure training at less than the market value of the training. Further, the distance training and flexible delivery allows the four people taking the course to continue to undertake their work in their respective drafting offices, facilitating the mutual reinforcement of the two - the training helps to improve the quality of their work, and their drafting duties gives them additional opportunities to practice what they are taught - all without loss of service to the government. The additional cost of internship at CARICOM is not available at the time of writing this report as the first four recipients of the scholarship have not reached that stage of the course.

The University of Guyana course and mentorship programme

In terms of effectiveness, subject to differences arising from the skill of the trainers, the comments relating to the Ghana course are applicable, as the course was based on the same format.

As to efficiency it appears that about twenty-five people from seven countries were trained in the two years the course was run. The total cost to the Secretariat was about £160,000. That means an average cost per trainee per year of £6,400 or £22, 857 per country.

The alternatives would have been a course at the University of the West Indies, appointment of legislative drafting experts or utilising courses outside the Caribbean region. Under the legislative drafting expert alternative, the skill level supplied would have been higher than the skill level of the staff at the completion of the Guyana course. The cost per year per country for the Secretariat would have been about £60,000⁷ and the increase in capacity would have been temporary.

Five drafters from across the Caribbean participated in the mentorship programme from 2009 to 2011 inclusive.

Samoan four-week in-house training

This course was effective for the purpose for which it was designed, namely providing advanced training to drafters. The consultant notes in his report:

*"The regular participants proved enthusiastic and very committed to the course and, without exception, fully and professionally involved themselves in the group discussions, the drafting exercises and the review of the drafts. Furthermore, they maintained this level of involvement throughout the training course...In consequence, as the trainer, I consider that the course was a success and fulfilled its objective of generally improving the drafting skills of the participants and introducing them to advanced drafting techniques. The feedback which I received, both generally and also individually, from the participants was that they shared this conclusion."*⁸

He attributed the success to the preliminary analysis of what Samoa required, good administrative support and the full commitment of the participants.

In terms of efficiency, although sixteen people originally signed up and started attending the course, the usual number settled at about twelve and was the maximum capacity that the consultant felt the mode of delivery would effectively accommodate. The cost to the Secretariat was a total of £50,000 or £4,166 per person. This is relatively expensive per person, and is comparable to the cost of legislative drafting courses held in London or the US (please see Annex 5 for a comparison of legislative drafting courses and their costs).

5.2.2 Preparation of legislation

The placement of CFTC experts is effective for increasing the capacity of a drafting office to produce legislation to achieve a country's legislative agenda. From interviews conducted as part of this review and answers to questionnaires, the work of these experienced drafters placed in Africa and the Caribbean has

⁷ Based on the cost of legislative drafting experts to the Caribbean during the period.

⁸ Report of St. John Bates to Commonwealth Secretariat on Advanced Drafting Training Samoa, August 2009.

been highly valued. For example, the Attorney General from Montserrat pointed to the significant positive impact that the CFTC expert placed in that office had on the efficiency of the office and the drafting team, stating:

"Permit me to place on record on behalf of the Government of Montserrat sincere gratitude for the significant technical assistance provided by the Commonwealth Secretariat which has contributed to the realisation of some of our legislative goals and targets".

CFTC experts' work has been critical to achieving compliance with international obligations, as in the case of the CFTC expert who drafted tax legislation to comply with the IMF requirements in Jamaica. It has also been critical to establishing the legal framework to implement new Constitutions, for example in Kenya and Swaziland.

Placement of CFTC experts in a country is not an efficient method of providing legislative support to countries. First it is costly at £ 50,000 to £60,000 per expert per year. Secondly increase in capacity through this means is only temporary. This approach can be contrasted with a regional approach (as was done in the Caribbean, although deficiencies in design hindered this approach from achieving its full potential: see 6.4); sharing of the cost of the expert with the Government (this was done by the Secretariat where the government requested an extension in the term of the expert); and distance drafting from the expert's home base or a regional base, all of which provide opportunities for greater efficiency.

5.2.3 Revision and consolidation of laws

The partnership with the Anguilla Regional Law Revision Centre and the technical support provided by the CFTC law revision expert was effective in enabling the revision and consolidation of laws of Belize, Grenada and Antigua and Barbuda. Its effectiveness in addressing revision and consolidation in the rest of the Caribbean is, however, dependent on the decision of individual Caribbean governments to choose this approach, as opposed to commercial options available on the market. Although this approach to law revision and consolidation is extremely efficient, providing a

cost-effective method of timely revisions, using regional resources and developing regional capacity, individual Caribbean governments, perhaps because of inappropriate considerations, have opted for the commercial option in certain cases.

5.2.4 Policy development, networking and knowledge sharing

The high-level discussion forums facilitated by the Commonwealth Secretariat and described in 4.2.3 were effective to the extent that they resulted in key decisions and activities that provide many answers in the search for a solution to the shortage of drafters and the challenges to retention and recruitment. These key decisions are highlighted below.

- **Commonwealth Law Ministers Meetings (CLMM) and the Senior Officials of Commonwealth Law Ministries Meetings (SOCLMM).** The Commonwealth Law Ministers' Meetings made recommendations on changes that should be adopted to achieve greater success in addressing the shortage, retention and recruitment of drafters. In 2008 it was emphasized that a sustainable approach to legislative drafting requires the use of several different strategies. In 2011 those present at CLMM and SOCLMM made more detailed recommendations and gave more specific mandates to the Secretariat concerning locating financial resources for these strategies and identifying the technical resources that are needed for institutional strengthening. Their resolutions are set out below:

CLMM 2008 (Edinburgh):

Law Ministers considered the perennial problem of the shortage, recruitment and retention of legal drafters and acknowledged that it was not enough to focus on training alone. This problem required a more sustainable approach based on the adoption of different strategies under broad headings which included: institutional strengthening, recruitment and retention of drafters and capacity building.

Law Ministers however recognised that the implementation of these strategies depended on the legal and administrative circumstances and priorities of each Member State.

CLMM 2011 (Sydney):

On financial resources for drafting, Ministers resolved:

- a. *to give explicit support to Secretariat initiatives aimed at identifying extra-budgetary resources for drafting. Given the resonance of rule of law and governance ideals with donor agencies, and awareness of the challenges of legislative drafting in smaller and developing jurisdictions, it is possible to foresee donor uptake of well-designed proposals underpinned by Law Ministers' resolutions;*
- b. *in order to tap into more substantial resources, donor-focused strategies and overtures by the Secretariat and/or ministries ought to be addressed to the substantial aid programmes of other countries;*
- c. *the Secretariat should continue to act as a 'clearing house' for proposals and requests for funding outside of the Commonwealth Fund for Technical Co-operation (CFTC) and related pools without necessarily being joined as project partner;*
- d. *the Secretariat should continue to encourage drafting offices in regions to form networks for sharing ideas and proposals on funding. The Secretariat may then be in a position to co-ordinate a 'network of networks' whose combined input will be more persuasive to donors seeking maximum breadth and depth in their assistance; and*
- e. *recalling that previous Law Ministers Meetings have recognised that recruitment and retention of drafters remain a concern, recommend Ministers consider putting in place measures to retain drafters including through the creation and maintenance of well-structured drafting offices and through the provision of training the trainers courses in order to promote sustainability in the drafting field.*

In regard to technical resources, Ministers resolved to approve:

- a. *the acquisition and development of software and training materials for the following three components of a legislation management system especially for small jurisdictions:*
 - i. *a drafting and paper-oriented (PDF) publishing application that automates many tasks and improves the efficiency, consistency and quality of the product and the working environment;*
 - ii. *an electronic publishing application that permits enacted legislation (including consolidations when available) to be quickly, easily and inexpensively published on the Internet; and*
 - iii. *a conversion application that assists in moving legislation from whatever its current format is to the format used in the drafting and publishing applications;*
- b. *the development of a model statute to provide for an ongoing electronic consolidation of laws, and training materials for preparing consolidations;*
- c. *the implementation of the legislation management system as a pilot project in the legislative drafting offices in some selected Commonwealth jurisdictions; and*
- d. *the setting up of an Advisory Group drawn from experts including those in the Commonwealth Association of Legislative Counsel to assist in the development of software.*

The Meeting of Senior Officials of Commonwealth Law Ministries held at the Commonwealth Secretariat, London, in 2013 considered the issue of developing a legislative drafting management system recommended by CLMM 2011. It was recommended that: the Commonwealth Secretariat continue in its efforts to develop a system which can be used in small Commonwealth jurisdictions; Commonwealth Law Ministers commit the funds needed to develop the system; and Commonwealth Law Ministers agree on how the Advisory Group working on this matter may continue to support the project.

- **Heads of Legislative Drafters Meetings** made some useful decisions. In the Caribbean the decisions focussed on actions that would improve the framework in which drafters operate. The meeting produced a substantial report and a framework for action. Key action points were to:
 - Prepare an inventory of trainers in the Caribbean region (CARICOM action)
 - Develop a regional legislative drafting manual and guidelines on the legislative drafting process (Commonwealth Secretariat action)
 - Training of government officials in the preparation of drafting instructions (Commonwealth Secretariat)
 - Audit of the number of people trained who are still in the public service (CARICOM)
 - Development of an interactive helpdesk on the CARICOM website for drafters (CARICOM)
 - Engagement of a consultant to advise on career marketing and promotion (CARICOM)

In Africa, the meetings reiterated the importance of the Ghana course and urged continued funding by the Secretariat until other sources of funding could be found. It was agreed that the course should be institutionalised and financial and other support was requested from the Secretariat for this. The Commonwealth Secretariat was also requested to explore the possibility of providing support for a training of trainers course to equip legislative drafting offices with the skills to provide in-house training for their staff. The meetings highlighted the value of exchanges between legislative drafting offices in Africa and other Commonwealth regions and urged African governments to create an enabling environment for drafters that would facilitate their work and provide terms and conditions adequate for attracting and retaining skilled drafters.

- **Pacific Working Group** made recommendations on how to have an effective short course that, given the high level skills and range of relevant

experience of the group, can be considered recommended best practice for legislative drafting training. According to that group, a short course should:

- Include administrative and constitutional law
- Use course materials relevant to the region
- Involve an evaluation of the course materials from a drafter's perspective
- Include lectures, tutorials, and practical exercises
- Have a full time programme co-ordinator with extensive legislative drafting experience and appropriate qualifications who would also teach.

In addition to course content, the Pacific Working Group made the following recommendations about what would constitute an effective course:

- A course providing a strong foundation and leading to formal qualifications is essential, such as the Professional Diploma in Legislative Drafting of the University of South Pacific or the Master of Laws in Legislative Drafting or Master of Laws in Public Law with a legislative drafting component
- A short intensive advanced course teaching critical areas for more experienced drafters is important and should be part of a broader programme, including other flexible modes of training and should be accredited to enable formal qualifications
- In-house practical short courses to complement formal drafting qualifications are essential
- Attachment to other drafting offices and exchange programmes.

- **Pacific Drafters Technical Forum.**

In Vanuatu, discussions focussed on an action plan which had been endorsed earlier in 2007 by the Commonwealth Secretariat, the Pacific Islands Forum Secretariat, the Office of the Parliamentary Counsel of New Zealand and the Pacific Islands Law Network. The meeting in Vanuatu noted significant progress in implementing the

action plan, including creating an email contacts list of approved trainers in legislative drafting, a design survey for the development of a new website, progress with developing a pilot training course and agreement on conducting a survey of terms and conditions of service of legislative drafters.

The Forum in Australia included sessions on the structure of legislation, common legislative provisions, the development of training materials for the Pacific region, stages in the legislative process, drafting instructions, plain language drafting, planning a draft and composing legislative text.

The 2012 Forum in Fiji resulted in an outcomes statement and a revised action plan setting out a sustainable approach to building legislative drafting capacity in the Pacific region. The action plan included proposals to: review legislative drafting courses provided in the region; develop common standards for legislative drafters; improve terms and conditions for legislative drafters; develop advanced training for legislative drafters; and manage the work of consultant legislative drafters.

5.2.5 Analysis of use of funds

The evaluators reviewed the financial information provided by the Commonwealth Secretariat and the section below provides an analysis of budgets and expenditure on legislative drafting.

Analysis of expenditure on legislative drafters

The analysis is based on the financial data provided by GIDD/TCSR, which gives the total amounts budgeted for and spent on individual programmes during the period 2009/2010 to date. The data shows that, over the 2009-2013 period, the total expenditure on legislative drafters was £2,747,097 against a budget of £3,143,463. Annual expenditure has increased by 2.5 times from £278,414 in 2009 to £678,586 in 2013 (Figure 3).

The average budget utilisation over the reporting period was 88%, but there were wide annual variations. For example, in 2011 the expenditure exceeded the allocated budget by 15% whilst in 2013 the expenditure was only 71% of the budget. The percentage expenditure on legislative drafters from the total expenditure has also grown from 8% in 2009 to 19% in 2013 (Figure 4).

As shown in Figure 5, four programmes accounted for 65% of the expenditure, with CARICOM-PGCAR0570 being the largest (23% of the total budget), followed by Kenya – PGKEN0354 (17% of the total), Swaziland-PGSWA069 (13%) and CAIRCOM-PGCAR079 (12%).

Budget utilisation has naturally varied between individual programmes. For example, total expenditure from 2009 to 2013 on the CARICOM-PGCAR079 programme exceeded the budget by 117%, whilst expenditure on the Swaziland-PGSWA069 programme over the same period was 35% under budget.

Figure 3: Total budget and expenditure on legislative drafting

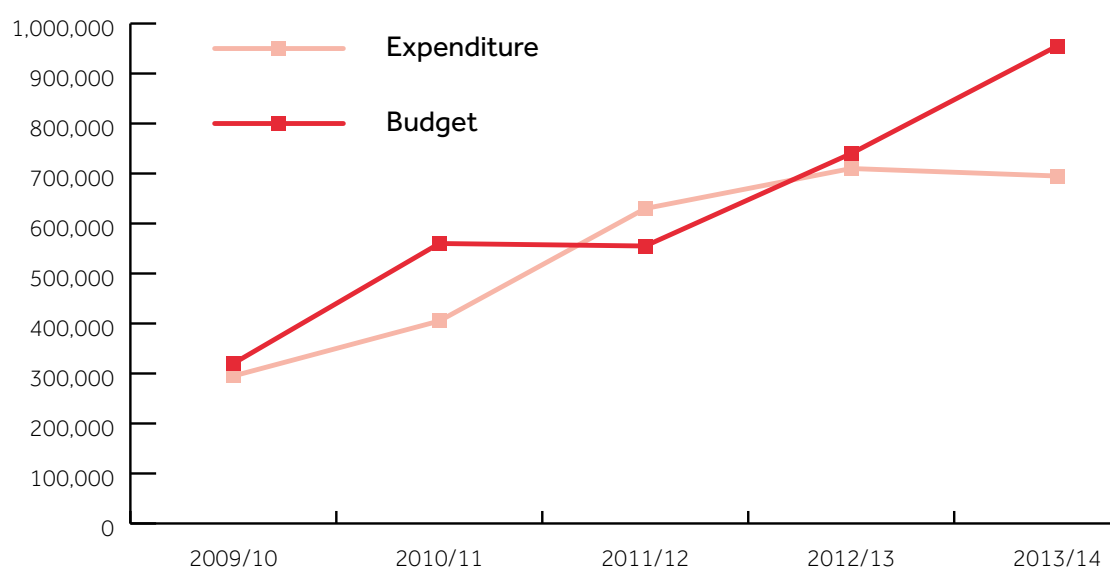
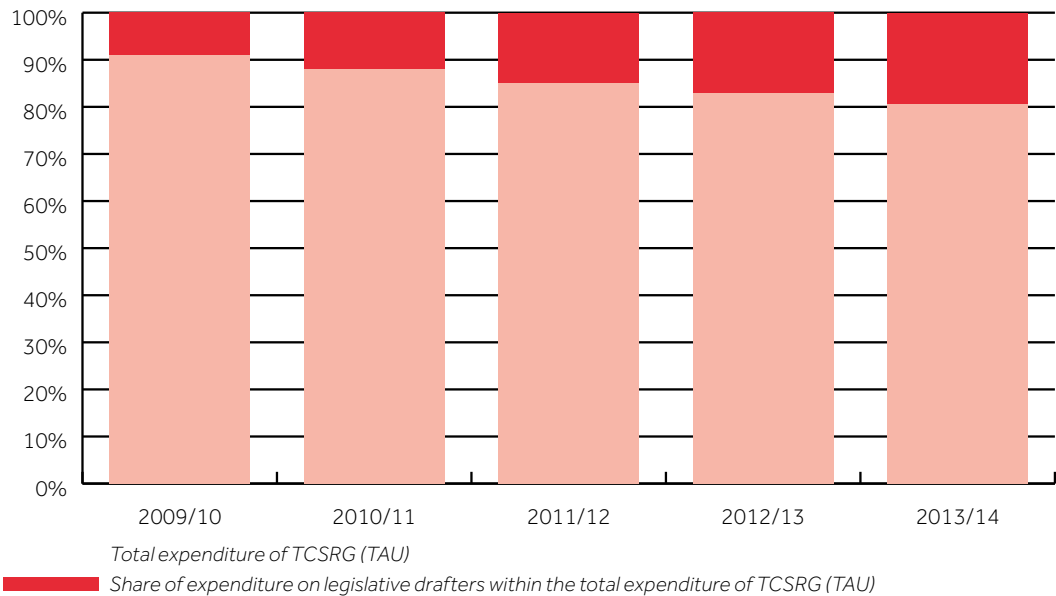


Figure 4: Expenditure on legislative drafters



Analysis of expenditure on the Ghana Legislative Drafting Course for African member countries

This analysis provides a breakdown of costs for courses that took place from 2006 to 2013. The total expenditure on the course was £713,886 against a budget of £739,462. Annual expenditure has almost doubled from £63,172 in 2006 to £113,343 in 2013 (Figure 6).

The average budget utilisation is 96%. In 2008 and 2009 there were slight overspends of 8% and 1% respectively.

There were total of 147 participants funded by CFTC to attend the programme from 2006 to 2013 with an average of 18 funded participants per programme. The cost per participant per programme has risen from £3,716 in 2006 to £5,397 in 2013, giving an average cost per person over the period of £4,856. One of the key contributing factors to rising costs is increased expenditure on per diem allowances (40% increase in 2013 compared with 2007), comprising accommodation (60% increase) and catering (14% increase).

Figure 5: Total expenditure over 2009/10 – 2013/14

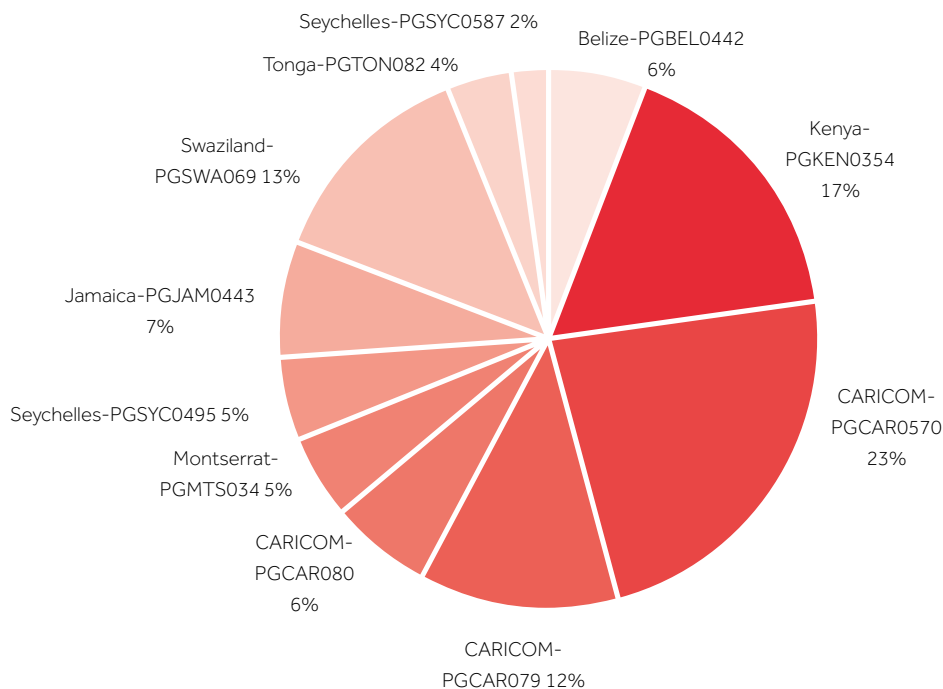
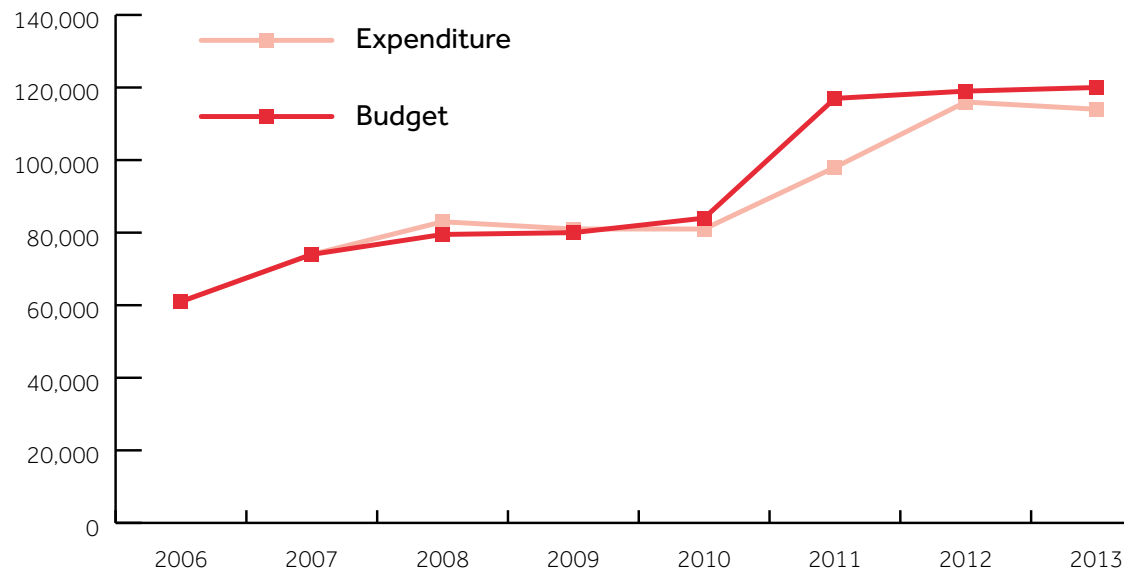


Figure 6: Expenditure on Ghana legislative drafting course

Analysis of expenditure on the Legislative Drafting Course offered by Athabasca University

The evaluators understand that CFTC has sponsored five people in 2013 to follow the online legislative drafting course offered by Athabasca University in Canada at a cost of 5,830 CAN\$ per person, which is equivalent to £3,238 per person. It is 40% cheaper than the cost of the programme offered in Ghana (as described in previous section).

Offices ("meetings") from 2006 to 2013. The data shows that over the period 2006 to 2013, ROL's total expenditure on training and meetings was £396,975 including £219,975 spent on 11 training programmes (55% of the total) and £177,000 on 6 meetings (45% of the total). Figure 7 shows annual variations in total expenditure on both short term training in legislative drafting and heads of legislative drafting offices meetings

Analysis of expenditure on short-term training in Legislative Drafting and meetings of Heads of Legislative Drafting Offices

This analysis gives an estimated cost for short term training in legislative drafting ("training") and meetings of Heads of Legislative Drafting

Expenditure on short term training in legislative drafting

Figure 8 shows that the highest annual spend of approximately £75,000 on training was in 2009. This is because a four-week training programme

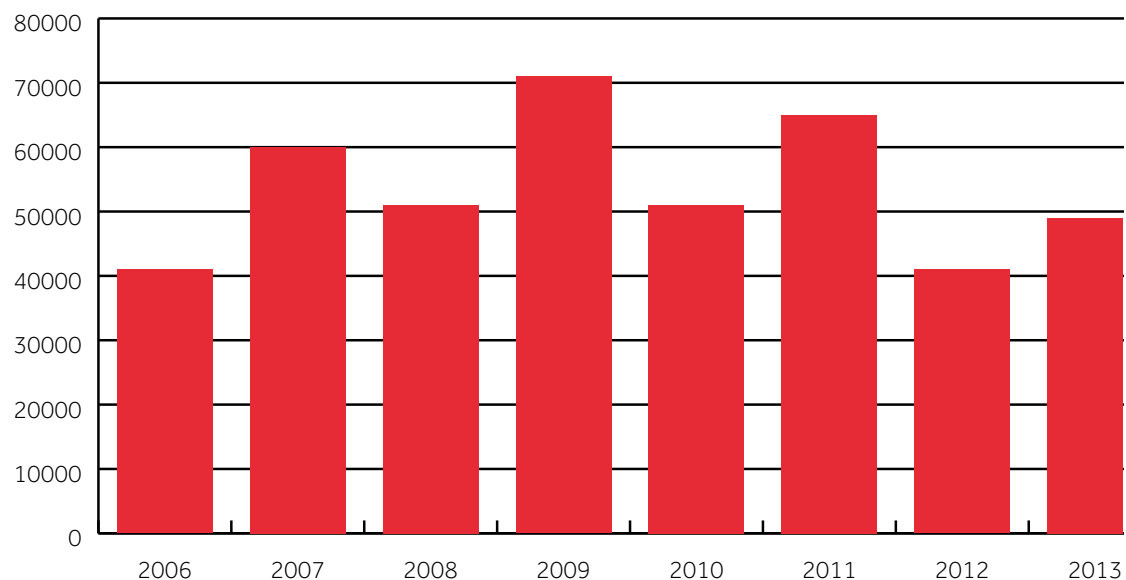
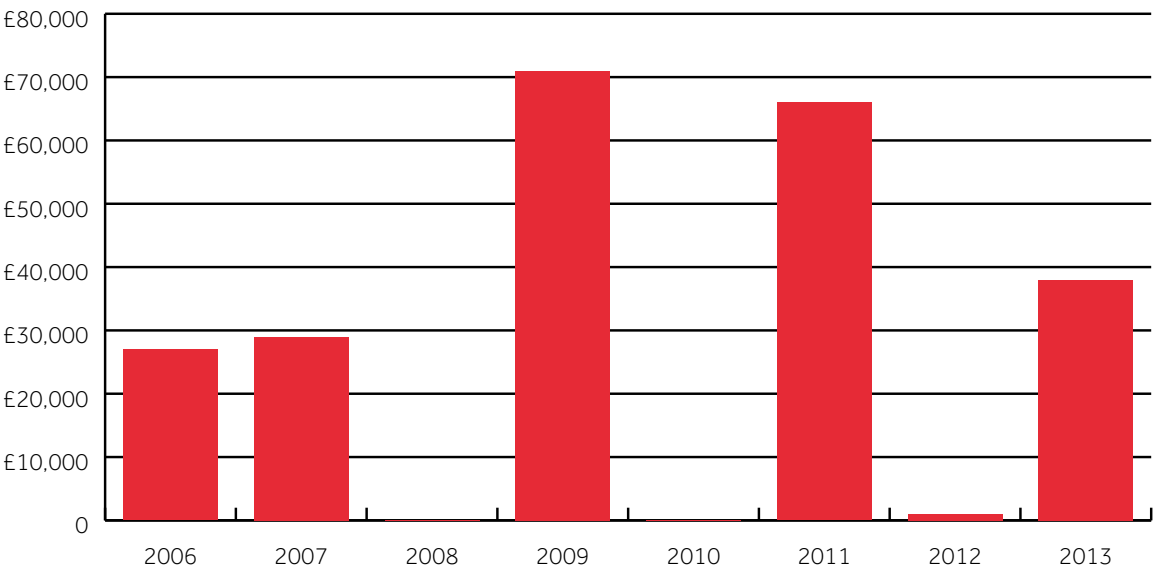
Figure 7: Total combined annual expenditure on legislative drafting training and meetings

Figure 8: Expenditure on short term training in legislative drafting



was held that year at a cost of £50,000 in addition to a three-day course. Similarly, in 2011 the expenditure included the cost of two training programmes, including a four-week course by IALS for three legislative drafters. There was no data available for 2008 or 2010.

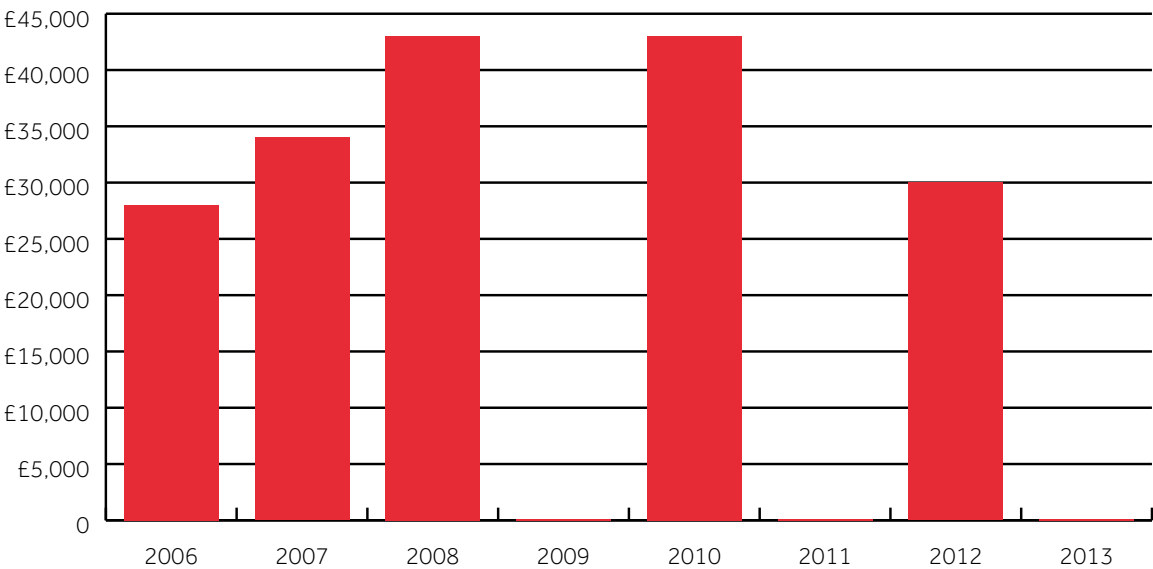
of participants attending the meeting than in previous years (20 vs 15). The average expenditure per person over the period 2006 to 2013 is £1,936. No meetings took place in 2009, 2011 or 2013.

Funds have been well managed and costs have been kept within budgets overall.

Expenditure on Heads of Legislative Drafting Offices Meetings

Figure 9 shows that the highest annual spent of approximately £45,000 on meetings was in 2008. This is because two meetings were held that year. In both 2010 and 2012 the expenditure included the cost of larger number

Figure 9: Expenditure on heads of legislative drafting offices meetings



5.3 Impact and sustainability of Secretariat support in legislative drafting

In this section the evaluation considers the impact of the support in the light of what results were expected by the Secretariat. The expected result of the rule of law programmes is similar under all the Strategic Plans - SP 2013 intermediate outcomes 2.4 and 2.6; SP 2008 result 5; and SP 2004. Based on these statements of expected results for the rule of law programmes, the following may be useful in summarising the expected result of the legislative drafting support:

Drafting offices are better able to play their role in facilitating more effectively the administration and delivery of the rule of law through enhanced legal drafting capacity and improved operational effectiveness.

To assess the extent to which this result has been obtained, three questions are considered: Have there been any changes to the capability and output of drafting offices in member states? (5.3.1 Capacity Building); Are drafting offices better able to draft more legislation of a higher quality to meet the needs of the government? (5.3.2 Efficiency and Effectiveness of Drafting Offices); Are any of these effects expected to last beyond 2013 (5.3.3 Sustainability).

5.3.1 Capacity building

CFTC experts

The placement of CFTC experts appears to have increased the capacity of drafting offices and, by extension, their output, particularly in the case of the tax expert in Jamaica, and in Kenya, and Swaziland. Their six-monthly reports are replete with lists of legislation to which they contributed. However, apart from a few cases (for example the tax expert in Jamaica and experts in Kenya and Swaziland) the evaluators were unable to state in an independent way that the experts achieved their expected mandate. There are several reasons for this. Firstly, the terms of reference of the experts (4.2.1) were not specific enough to make this possible. Secondly, there is generally no verifiable

baseline for evaluators to assess the state of affairs before the arrival of the expert. Thirdly, the only source of information on the output of the expert that is available within the time frame and methodology of this evaluation are the reports of the experts themselves. Although they have been signed by Reporting Officers, and for that reason assumed to be verified and agreed to, the report template did not allow those Reporting Officers to make comments on the quality of work of the expert. Fourthly, the structure of the report does not enable a useful assessment of the quantity of work done. Typically reports have a list of legislation that the expert worked on. Several items reappear in subsequent six-month reports without explanation. There is no way of ascertaining the length of the legislation drafted, the actual contribution of the expert (whether he or she reviewed and amended an existing draft or did a completely new draft), or the work other than drafting that the expert undertook for example in policy development, finalising instructions and conducting consultations. There was no indication in most cases of whether the Bill was approved by Cabinet and whether it was introduced into Parliament and passed and the reasons for absence of approval or failure to be introduced into Parliament. For these reasons the reports make it difficult to assess value for money.

CFTC funded experts' assistance in mentoring more junior drafters has been favourably commented upon by a number of Heads of Legal Drafting. Feedback from questionnaires included positive observations from Botswana, Guyana/CARICOM, Jamaica, Kenya and Swaziland. One Head of Legal Drafting said:

"The Commonwealth Secretariat expert was highly experienced in drafting and she assisted with vetting and developing drafts of junior officers and with mentoring them".

Another stated:

"With the training received through mentoring, seminars and training, the quality of the drafters in the Legal Office has improved".

The Ghana Course

In answer to the question as to what extent the training on the course was found to be useful and relevant, more than half of the participants (twenty-five) stated expressly that the necessary practical skills and capacity had been developed in each of them. This same proposition was also stated slightly differently (eight others stated that it gave them formal and practical training, four that they learned the basic concepts of legislative drafting, and three that they learned everyday drafting techniques). Seven stated that they now had a better appreciation of the law, and a further four referred to a better ability to scrutinise and interpret it. Eight commented on the fact that the course helped them to better understand the policy behind legislation, the drafting of instructions, or the preparation of Cabinet memoranda.

Other benefits derived from the course were seen as the ability to conduct legal research (three), and enabling the approach to drafting to be done in a systematic way. And enthusiasm generally for the course and what it taught was apparent from some of the remarks made: one respondent stated that "the training introduced me to the exciting world of legislative drafting"; another that "I am [now] a core legislative drafter. It is now in my blood."

On the question specifically on improvement of drafting skills and capacity, twenty acknowledged directly that it had, while a further fourteen stated that they had gained knowledge of the principles of drafting, in particular how to construct a legislative sentence. Another eight referred to improved capacity to interpret, scrutinise or proof-read Bills. Four stated that they could now draft Bills on their own, or with minimal supervision. Even those who went back to their jurisdictions to do work other than drafting have claimed real benefits, e.g. preparing legal opinions, providing useful inputs into cabinet memoranda, and improved general written communication. One respondent stated that her effectiveness in litigation had been enhanced by increased awareness of the way in which statutes are interpreted and the extent to which they are effective.

Changes in the drafting practice as a result of the course were seen as a generally improved quality of drafting (eleven), drafting in plain language and a more modern drafting style (six), drafting in a more systematic, consistent way (three) and, importantly, a much faster turnaround of legislation drafted (nine). Other changes were seen to be the ability to draft complex legislation (three), improved efficiency and effectiveness, and improved law revision skills. Only two stated that they had not noticed any changes.

In face-to-face interviews in Nairobi the point was made that the international nature of the course (with participants from all over the African region, including Mauritius and the Seychelles) was seen as very valuable. In particular it made things much easier when drafting legislation for the East African Community (e.g. on trade, customs and excise and immigration) when lawyers from the various jurisdictions concerned (Kenya, Tanzania, Uganda, Rwanda and Burundi) needed to work together (even though Burundi has not been a beneficiary of Commonwealth Secretariat assistance under discussion). And it helped that many of them had had the same training. The international element also facilitated networking, and the possibility of consultation with others who had shared the experience of the course.

One respondent to the circulated forms stated *"in our department we are all products of the Ghana course"*.

In summary, the evaluation study found from interviews during the field visits and from responses to questionnaires that, across Commonwealth Africa, the impact on participants has been:

- Increased awareness of the principles of good drafting, including use of plain language
- More consistency in drafting
- Deeper understanding of what legislation provides
- Increased awareness of the relationship between policy and legislation
- Reduction in the need to copy the legislation of other jurisdictions
- Ability in law offices to turn work around more quickly
- Instilling an enthusiasm for legislative drafting

Athabasca Distance Learning Course

It is too early to assess the impact of this course in a meaningful way in view of the comparatively early stage of participation of those four still undertaking the course. It is thus not surprising that feedback from two out of the four remaining participants offers little in the way of specific information.

However, as with any form of distance learning, the following factors need to be borne in mind:

- Motivation of students to keep going with the studies in practice this requires dedicated supervision or at least support in the participant's home country as well as from the course mentors at Athabasca. It is often difficult to keep up the studies when students are undertaking their normal work duties
- A potential drop-out rate tends to be a factor that is not normally present on a face-to-face course (and one student has already left the Athabasca course)⁹
- Academic supervision, while there is no reason to doubt the quality of this, tends not to be as effective on-line as in face-to-face classroom situations, if only because students tend not to pursue points in the way they would during discussions in class (lack of understanding of particular points in the course text thus tends to be apparent only after the submission of written work).

9 Once a course participant is back in his or her office the pressures of ordinary duties put a strain on the commitment to an on-line course, and if local leave cannot be obtained for the purpose the student has to do the requisite study in his or her own time. In the 1990s RIPA in London ran a pilot scheme for a proposed COL distance learning drafting course on which about one-third of the participants failed to complete all of the written exercises involved. Since 2011 RIPA International has run a legislative drafting course that has one two-week in-class module with the remainder of the course to be completed by participants back home on-line. In 2012 one of the five participants failed to undertake any of the on-line exercises; in 2013, out of the six participants, one failed to undertake any of the on-line exercises, while another completed only three out of the eight set; and in 2014, where there was an exceptionally large class of 18, at the time of writing one had failed to undertake any of the on-line exercises, and two others had completed respectively only three and four out of the eight set.

The shorter courses

Questionnaires were sent out to all those who had attended the short courses referred to and who could be traced through using the lists of former participants.¹⁰ Most of the replies commented very favourably on the experience, although for a proportion of the respondents the training concerned was stated to be the only training they had ever had in legislative drafting, (although some of these were not actually employed in the discipline at all, and some were employed in allied disciplines e.g. law reform or law revision). Undoubtedly for those people, whatever training they were given was to some extent beneficial. Most commented on the benefits of learning to apply plain language and more modern styles of construction.

From more senior drafters comments were, however, occasionally telling. One participant on the Barbados seminar commented "... However, the time granted to [contribute to the training and obtain valuable critique] was limited and meant that in-depth training couldn't be undertaken in specific areas, due to the short duration of the [seminar]". One on the Trinidad seminar stated "Some presentations provided information already common to legislative drafters. It needed to be on current [trends in] legislation and supported with modern cases". Another on the same seminar commented "The quality [of Commonwealth Secretariat assistance] is high but its scope could be widened to include more drafting issues". A fourth wrote "greater effort should be made to get international academics and specialists in drafting to come in and share at these workshops rather than CARICOM personnel who are often not as skilled as the drafters they are seeking to train".

The advanced course in Samoa seemed to improve the skills of a drafting office which already had strong drafting capacity. The consultant notes:

"Based on my consideration of legislation enacted in the small South Pacific Commonwealth jurisdictions both in the preparation for the Samoan course and also for the earlier proposed twelve-week training course for the region which I prepared for the Commonwealth Secretariat, I would consider that Samoa has one of the

10 A total of 108 questionnaires was sent out, of which 36 (39%) were completed in whole or in part.

stronger capacities in legislative drafting in the region. It also has one of the largest number of Government lawyers primarily employed in drafting. It follows that other jurisdictions in the region might well derive even greater benefit from drafting training..."

These shorter courses were beneficial for drafters with relatively little or no experience. However, for experienced drafters, shorter courses are more valuable if they focus on a specialised area of drafting.

5.3.2 Efficient, effective drafting offices

The CFTC experts contributed to the increased efficiency of the drafting office by drafting legislation, by mentoring drafters (where there were drafters in post to be mentored) and through producing certain legislative tools, more basic than those contemplated by CLMM 2008 and 2011) such as manuals in Jamaica and legislation templates in Belize.

Responses to questionnaires by Heads of Legislative Departments confirmed increased efficiency in their offices from the improved skills of officers who returned from training. This was more notable where the training was long term as opposed to a short seminar.

The Handbook for Africa and the Pacific Guidelines developed under the auspices of the Secretariat have contributed to efficiency. They are in use in Africa and have been considered by Heads of Drafting Offices in the Caribbean.

The effectiveness of drafting offices depends on the quality of the Bills that they produce, both in terms of legislative drafting standards and the extent to which it satisfactorily implements strategic initiatives. The monitoring and control tools of the Secretariat (local supervision; six-monthly reports) do not contain information from which the quality and acceptability of the drafts can be inferred.

5.3.3 Sustainability

Some of the impact of the support of the Secretariat is long lasting, for example Bills prepared by experts and passed into law, legislation templates and manuals, revised and consolidated laws, partnerships in training,

relationships created through international training and regional meetings. These are building blocks in any solution to the challenges in legislative drafting and positively impact the rule of law.

Generally however, sustainability continues to be a challenge. The key answers to sustainability provided in regional meetings have for the most part not been implemented. The question arises whether the lack of funding for CLMM and Senior Official meetings contributed to this by preventing the participation and buy-in of the poorer countries, where the shortage of drafters is acute and whose participation and buy-in are therefore essential to addressing the problem.

Whatever the reason, without the implementation of the overarching policy recommendations of the CLMM, increased capacity and gains in efficiency are short term, and the problems faced by drafting offices continue for two main reasons:

- Commonwealth Secretariat support was not part of a long-term plan of action
- Counterpart measures by Governments and agencies that are critical for the support by the Commonwealth Secretariat to have sustainable impact have not been taken.

The Ghana course provides a good example of the latter. Institutionalisation in the Ghana School of Law in order to make the course sustainable in the long term has been discussed over the years, but this has not been achieved and the course is still dependent on support from the Secretariat.

Belize provides another good example of the absence of counterpart measures and of a long-term plan of action, resulting in the impact of the support being short term. Before Commonwealth Secretariat assistance, the legislative drafting capacity of the drafting office was extremely poor. There was not even a distinct drafting office administratively speaking, but one or two officers within the Attorney General's Chambers with little or no training employed to do drafting. The Government departments had no confidence in the drafting capabilities of the AG's Chambers and sent their drafting work elsewhere.

This situation was completely turned around through the placement of an expert and through training. With the assistance of an experienced Solicitor General, a drafting unit was established with new offices, new posts and recruitment of additional drafting officers, both experienced and inexperienced. There was training and mentoring of these officers. A legislation template was introduced that standardised and made more efficient and professional the preparation of drafts. Morale was high, output and efficiency increased, Government departments developed confidence and directed more work to the department.

The in-country visit during the course of this evaluation revealed that practically all of those gains have been reversed. There was one drafter remaining whose only formal training had been a two-day seminar earlier. One of the other drafters was abroad attending training and a lawyer in a different department of the Attorney General's Chambers was following the Athabasca drafting course.

A long-term plan of action would have provided for the type of training that would build capacity in the long term, given the particular circumstances of Belize, to ensure sustainability. Formal training, and not mentoring, was necessary because the drafting officers had practically no training and so could not benefit from mentoring, which is more suited to honing the skills of drafters with some training and experience. Furthermore, given the extensive workload of the expert, as outlined in 4.2.1 above, the expert could not have devoted adequate time to mentoring staff even if mentoring were an appropriate approach. Aspects of the terms and conditions of service provided by the Government were also unattractive. For example, it was government policy that only Belizean nationals were eligible for training. The two drafters interviewed at the time of the field visit were not Belizean. One had left office and the other, although keen to stay in Belize and draft, was reviewing her options. Both mentioned the policy as a disincentive to long-term service in Belize.

6. Constraints and Weaknesses

As shown in section 5 above, the relevance, effectiveness, efficiency, impact and sustainability of the legislative drafting support, whether training, technical assistance, or policy development and networking, were limited. The evaluators found that there are certain constraints and weaknesses common to all the various types of support that contributed to this limited achievement of the objectives of the support. The more important constraints and weaknesses that the evaluators believe need to be addressed are highlighted below. These, together with the lessons learned from the support discussed in section 7, lead to the recommendations to guide the Commonwealth Secretariat on the way forward, as set out in section 8.

6.1 Ad hoc and fragmentary support

The legislative drafting support was demand-driven with projects being developed in response to requests submitted by member countries. This was to ensure that requests were in line with national development priorities and that there was a broad support for the project at the appropriate levels of government. This meant that support was fragmentary, and assistance that was critical for sustainability was not given, in particular, support to improve the operations and processes in the drafting office. The importance of such institutional strengthening is highlighted in 5.1.3. Indeed, the problem of the shortage of drafters can only be solved through strategic planning that describes what the destination looks like and sets out an action plan containing all the steps that must be taken to get there. Section 7 (Lessons Learned) and the evaluators' recommendations for developing an action plan for sustainable legislative drafting support (see Section 8), clearly show that ad hoc and fragmentary support is the antithesis of a sustainable approach to solving the perennial drafting problem.

6.2 Counter-productive support

The internal planning mechanisms of the Commonwealth Secretariat emphasize that its support is to deliver 'specific, tailored and sustainable technical solutions to clearly identified development challenges' of member countries. It is not a 'placement of experts service.' (TCSRG Strategy Paper). The aim is to 'close gaps' not 'fill gaps' (Strategic Plan 2008, Programme 5 Institutional Capacity Development). However, the nature of the requests for technical assistance and the resulting terms of reference have been broad and unspecific (see mandates for each programme in 4.2.1 above). This risks the support becoming a gap filling and a placement of experts service.

6.3 Counterpart support absent

Several of the projects were designed based on an understanding that there would be counterpart action by the requesting country or regional organisation, for example the institutionalisation of a training course for its sustainability, the employment of drafting staff to facilitate transfer of skills by experts. In addition, high-level meetings of member countries, which reiterated the mandate to the Commonwealth Secretariat for legislative drafting support, also acknowledged the importance of counterpart measures by member countries. Nevertheless, sometimes the legislative drafting support was designed, implemented and renewed despite the absence of counterpart actions, even though such an absence would negatively impact the sustainability of the support.

6.4 Support not fully adapted to context

The intended outputs of the Caribbean experts were affected by unanticipated challenges in providing drafting support using a regional approach. These unanticipated challenges include inefficiencies in legislation approval processes at CARICOM, resource and operational deficiencies within the Office of the General Counsel, the limitations of the CARICOM Secretariat in influencing the adoption of 'model' Bills by CARICOM Member States, the nature of model Bills and the process and resources necessary to have them transformed into national legislation, the attitude to consultant drafts and the restrictions on consultant drafters in participating in the national law making process. These are discussed in more detail in Annex 6, paragraphs 1 to 3.

6.5 Weaknesses in day-to-day management and of legislative drafting experts

Rather broad terms of reference of experts made day-to-day management of experts important. Technical assistance projects were designed so that management and control depended principally on Reporting Officers and reports written by experts assigned to countries. However these reports do not provide adequate information to allow effective management of the expert (see 5.3.1 for details of deficiencies), there are usually no adequate performance appraisal systems in-country and the six-monthly reporting format did not provide for feedback by Reporting Officers. In addition, Reporting Officers' needs are naturally broader than the purpose for which the expert is placed and they may direct the expert in a manner inconsistent with the terms of reference of the expert. Further, by definition the requesting drafting office has limited staff so that effective quality control may be a challenge.

6.6 Weaknesses in internal management and control mechanisms

The TCSRG relied on LCAD technical legal advice for legislative drafting support activities. Legal drafting was supposed to be the responsibility of the Law Development Section of LCAD, but was removed and assigned to the Justice Section in 2004 where the staff were experienced at working on judicial programmes, not legislative drafting.¹¹

Generally missions to verify the state of legislative drafting were conducted by staff of GIDD, which had project management specialists, as opposed to LCAD, which had legal expertise. Exceptionally LCAD was involved, for example when an LCAD staff member was already in-country for other reasons. Another exception was the needs assessment mission conducted by CFTC experts based at CARICOM to Saint Lucia, St. Vincent and the Grenadines, St. Kitts and Nevis and Antigua and Barbuda under CAR0570.

The inadequate understanding of the context in the case of the Caribbean discussed in 6.5 affected management. For example, issues resulting in bottlenecks were not correctly identified and addressed. This is discussed in more detail in Annex 6, paragraph 4.

11 It is noted that the weakness in allocation of duties within LCAD and deficiencies in relevant legislative drafting skills have been recognised and addressed by the Secretariat after the period under review by placing Legislative Drafting in the Law Development Section of ROL and expanding that Section to include two new Law Adviser positions, the qualifications for which include legislative drafting.

7. Lessons Learned

In this section the evaluation study looks at the lessons learned from the legislative drafting support given by the Secretariat during the period 2006 to 2013. These lessons learned, together with the constraints and weaknesses of the support discussed in section 6 above, lead to our recommendations to guide the Commonwealth Secretariat on the way forward, set out in section 8.

7.1 Support generally

The key to a sustainable approach to legislative drafting support generally is two-fold. The first, as demonstrated in 5.3.3, is as follows:

- It is not enough to focus on training alone. For sustainability different strategies must be used which include institutional strengthening, recruitment and retention of drafters and capacity building.

This was identified eight years ago by the Commonwealth Law Ministers but has not been fully implemented by the Commonwealth Secretariat, which has maintained an ad hoc and fragmentary approach to its support (see 6.1). Another reason for the failure fully to implement. The CLMM mandate is that certain strategies envisaged by the Law Ministers regarding recruitment and retention are not within the control of the Commonwealth Secretariat. For example, only governments can change the terms and conditions of service to encourage the recruitment and retention of legislative drafters. The other aspect of the key to a sustainable approach is:

- Counterpart measures by governments are critical for the support by the Commonwealth Secretariat to have sustainable impact.

Unfortunately, counterpart measures have not been part and parcel of programme design. Even when they have been identified as important to the success of the programme, they have not been enforced (see 6.3).

7.2 Training generally

As discussed in 3.2, there is a continuing need for training in legislative drafting. From that section, the evaluators conclude that:

- One of the factors fuelling the continuing need for training from external sources is poor resource allocation and a failure of the drafting office to take responsibility for the training of its drafters. This may result from insufficient resources being made available or a lack of political will.
- Even in well-structured offices that recognise that they have primary responsibility for training, some external professional development training and entry level training will be necessary.

In section 5.2.4, best practice developed at the meeting of the Pacific Working Group (with the assistance of the Commonwealth Secretariat) concerning training of legislative drafters was discussed. In summary:

- Ideally the objective is for drafters to have formal drafting qualifications coupled with in-house practical short advanced focussed training courses, attachment to other drafting offices and exchange programmes.

The various meetings and forums discussed in 4.2.3 and 5.2.4 reiterate the importance of the Commonwealth Secretariat's support for training in legislative drafting.

- Commonwealth Secretariat support (financial, technical or exploiting its comparative advantages, for example, to form strategic partnerships) will be critical for enabling appropriate training provision.

7.3 In-house training

The following lessons have been learned from the experiences in small Commonwealth member countries in the Caribbean, Africa and Asia:

- In-house training requires access to highly experienced drafters.
- In-house training may be difficult to achieve in small jurisdictions. The pressure of work placed on a small number of drafters can result in there being no time for this to take place. In addition the office may not have highly skilled, experienced drafters.
- It is not economic to provide short term drafting training within jurisdictions with a small number of lawyers. A regional approach in which the drafters come to one place (physically or virtually) for the training is better.

7.4 Training courses

From the Pacific Working Group (5.2.4) and this review of the effectiveness and efficiency of Commonwealth Secretariat training support (5.2.1), the evaluators found that:

- Short courses of four weeks or less (more usually one or two) and seminars of one or two days have certain advantages that make them attractive to governments. The primary benefits are that participants can continue to undertake their duties, even though part-time, and costs are lower. However, short courses are not as effective as longer courses for fully training drafters. Building up the capability to draft effectively is not something that can be achieved in a short space of time. Time is needed properly to absorb the various elements that are taught and to undertake written assignments designed to reinforce what participants have learned and allow them to learn from their own mistakes. Also, the numbers attending may make it for practical purposes impossible for participants to undertake exercises individually (because there is not enough time to assess them individually) and the exercises have thus to be undertaken in small groups. There is of course some value in this, but considerably less than when done on an individual basis.

- Although short courses are less effective than longer courses to train drafters fully, they can be used to give advanced training to experienced drafters in critical areas, or can operate as an overview for inexperienced drafters (as well as for those who are not required to draft) or a refresher course for those with some experience of drafting.
- Short courses should be part of a broader programme for training that contains other modes of delivery.
- Whilst relatively long courses such as the Ghana course are more likely to result in drafters improving their skills, it must be recognised that courses of any length will be expensive and it may not be feasible for participants to be absent from their offices for any length of time. Courses could be structured into a number of modules. However, these are still likely to be comparatively expensive. Cost sharing would go some way to addressing the issue of funding for training. In this regard, emerging blended learning and distance learning programmes such as that available at UWI in the Caribbean and Athabasca University may be useful.

7.5 Technical drafting assistance

From the evaluators' review of the technical drafting assistance provided by the Commonwealth Secretariat in the form of drafting experts (5.2.2 and 5.3.1) and the experience of the CARICOM based experts (6.4 and 6.6), the following lessons are important points for the Commonwealth Secretariat to bear in mind when doing its strategic planning:

- Producing good legislation requires policy development skills to provide the drafters with proper drafting instructions, but these are different skills from legislative drafting skills and are outside the scope of this report.
- Limited in-house capacity leads to the need to engage consultant drafters to add to capacity. Expertise from outside the region could prove valuable, but effective drafting requires a full understanding of the legal

context in a particular jurisdiction and of the policies underlying legislative proposals.

- Support through model laws should be used with caution, as model laws require further drafting resources to transform them into national law and, the need to adapt model laws can add to the backlog of legislation to be drafted by the drafting office (see 6.4). It is more useful to provide country-specific model law which is already transformed for each country to which it is to be applied.
- Whilst there might be cases in which a policy expert (as opposed to a drafting expert) in a specialised area is contracted to draft legislation, these should be exceptions.
- Distance drafting, regional placements and cost sharing provide opportunities to obtain greater efficiencies in the provision of technical assistance through drafting experts.

8. Recommendations and the Way Forward

In this section the evaluators make recommendations for the future development of and the way forward for legislative drafting support to member countries in different regions of the Commonwealth.

As discussed in 3.2, member countries will continue to face an increased need for legislation which will be a challenge for national drafting offices, particularly in the small states, because of the complexity, the volume, the time constraints, or a combination of these factors. Drafting offices will have to be better resourced and better equipped to face these challenges. They will need backstopping support in the form of additional drafting capacity and professional development of existing capacity while they find and implement a long-term solution. They will also need support to devise and implement the long-term solution.

The Commonwealth Secretariat has a critical role to play in providing that support. It should take advantage of the increased interest of development agencies in providing legislative drafting support (3.2) to secure strategic partners to assist. In providing or facilitating support, it should try to avoid the weaknesses in past support and should pay particular attention to strategic planning (section 6) and bear in mind the lessons learned (section 7), most importantly, that sustainability will be achieved if different strategies are used that include institutional strengthening, recruitment and retention of drafters and capacity building. Below are specific actions that the Commonwealth Secretariat can consider taking in this regard.

8.1 Generally

- A technical forum should be introduced in each region for the purpose of enabling strategic planning to determine what the solution for sustainable legislative drafting looks like and to draw up a plan of action to be taken by governments, as well as the external support needed to get there.

The technical forum should bring together Heads of Legislative Drafting departments/units and policy makers responsible for legislative drafting. Contrary to what currently holds for the CLMM (5.3.3), support for attendance should be provided, but should be made conditional on the country providing information concerning its legislative drafting needs and plans that the Secretariat considers useful. Such a forum can be held at intervals of four to five years, for example, subject to the Commonwealth Secretariat's views on this.

- Regional Heads of Legislative Drafting meetings should be used to operationalise and report on/review the implementation of the strategic plan. Such meetings can be held at intervals of two to three years, for example, to reflect the project cycle for support for the region. Unless there are exceptional circumstances, support to the region during the project cycle period should be determined at the start of the period. Requests for legislative drafting support during that period should be timed accordingly.
- Consideration should be given to what partnerships are possible for support for legislative drafting. Partnerships in training as with Athabasca University can be useful. Another useful partner may be the CALC which has access to a network of skilled drafters. The Secretariat should consider exploring partnership with CALC.

8.2 Legislative drafting technical assistance

- Sustainability can be improved if the support is designed as technical co-operation in which the government commits to implementing counterpart measures, instead of one-way technical assistance from the Secretariat. The commitments can be made as part of the strategic planning process described in

8.1 and the support should be conditional on their fulfillment within the agreed time frame.

- The counterpart measures should include the strategic measures recommended in CLMM 2008 and further detailed in 2011 regarding institutional strengthening and to encourage the retention and recruitment of drafters, which will contribute to a well-structured and well-equipped drafting office.
- Before the start of the support there should be verification of the state of legislative drafting described in the request and that there are drafters with some minimum training in the office who can benefit from mentoring by the expert (unless mentoring is not part of the expert's terms of reference).
- Impact can be improved by designing the assistance so that outputs are specific items of legislation and there is always a work plan that sets out the expert's expected activities. The work plan should expressly take into consideration other activities that will affect the delivery of the work of the expert, for example consultations, and the process and timing of governmental inputs and approvals. The work plan should also include assumptions and risk mitigation strategies, which should be reviewed periodically. Such a work plan would be an effective tool for assessing not only the work of the expert, but also the commitment of the government to playing its part in ensuring the efficiency and effectiveness of the support.
- If specific terms of reference are implemented, consideration should be given to the length of the placement. The longer the period, the more difficult it is for the work plan to be accurate and provide an effective standard. The period cannot be too short either because the legislative process lasts months. Perhaps it could be not less than six months and not more than one year, with automatic renewals (up to a total of two years) once the Secretariat is satisfied that the work plan is on target, or there is good reason for not achieving it.
- An initial needs assessment should be carried out in the member country

requesting drafting assistance, unless there are exceptional circumstances. The needs assessment should be conducted by a team including Commonwealth Secretariat project design and legal expertise. Ideally this should be done by email/skype/phone and field visits only made if necessary. Needs assessments will provide benchmark information to facilitate the preparation of the work plan. Regional Heads of Legislative Drafting meetings described in 7.1 can be used to obtain information to contribute to the needs assessment and work plan.

- As suggested in 5.2.2 and 7.5, distance drafting is useful to assist member countries and is more successful if the drafter has spent some time in the particular jurisdiction. The tax expert in Jamaica and the CARICOM experts illustrate this. Ties are formed and relationships of trust and respect are built that can make the Attorney General/Minister comfortable with that person drafting on their behalf. The drafter is also more effective as he or she is usually able to work with drafting officers and develop a sound knowledge of the capacity and needs of the drafting office. It would be worth making more use of remote drafters, depending on the requirements of the member country in question.
- The Commonwealth Secretariat should continue its use of a regional approach to providing technical assistance in the Caribbean and any other region where it is not feasible on grounds of cost-effectiveness to provide experts for individual countries owing to the small size of the countries. Care must be taken to address the deficiencies in design and management highlighted in 6.4, 6.6 and Annex 6. In the case of the Caribbean, the relocation of the expert closer to, or within on a part time basis, the member countries he or she is to serve should be considered. The idea should not be a regional office for experts, but a regional network of drafters led by the experts to facilitate the sharing of drafting and research tools, for example, software, drafting expertise and legal knowledge; the standardization of drafting norms and processes; and informed and harmonized approaches to

legal and drafting issues. Such a network will mean not only improvements in the quality of legislation but sustainability. Drafters move around among islands but generally stay in the region and so professional development of people in the network will continue to benefit the network and thus all islands, regardless of where a particular drafter moves.

- Drafters' regular reports on progress and performance would benefit from including an analysis of their performance and progress written by their Reporting Officers and information about the progress of Bills completed, having regard to the work plan.
- The Secretariat should consider carefully management arrangements for drafting experts. Monitoring and management of experts should be undertaken by a team that has sound project management skills as well as comprehensive understanding of the legislative processes and legal and political context in which the drafter works.
- The Secretariat can improve the effectiveness of their role in supporting countries if they develop a database of qualified and skilled drafters in each region. Such a database could include drafters who have been trained on courses funded by the Commonwealth Secretariat. Strategic partners may be able to assist in populating this database (7.1).
- The Commonwealth Secretariat should also continue initiatives for establishing an electronic platform for sharing useful and relevant legislative drafting resources among Commonwealth legislative drafters.

8.3 Training generally

- Decisions concerning training (whether through mentoring, short courses or otherwise) should be made as part of the planning process described in 8.1.
- Here again counterpart measures by Governments are necessary. Recruitment and retention measures should include bonding in addition to attractive terms and conditions. In keeping with the idea of a regional network, consideration should be given to bonding a person to the region as opposed to one country and for more than one year. The regional approach here and in outlined in 8.2 will help minimize the disruption caused to a drafting office by high turnover of staff. The replacement drafter would be stepping into a well-oiled machine with access to a network of expertise and would be able to produce outputs more quickly than one who has to start the job by putting in place processes and procedures and has to continue work on legislation, the provenance and history of which is uncertain. The learning curve would also be less if the processes and procedures are similar to other jurisdictions where the drafter has worked. Consistency in drafting will be achieved with benefits for statutory interpretation and consequently the rule of law.
- Before providing entry level legislative drafting training, consideration should be given to how many times such training has been provided in the past; whether the country put in place the necessary terms and conditions for retaining the trained drafter; and what was the reason for any such failure.
- The Commonwealth Secretariat could consider making more use of new technologies for training and capacity building. For example, if the Athabasca course is judged to be an effective way of training drafters (at the moment it is too soon to tell), more people could be encouraged to participate in on-line courses. The UWI blended learning course available since 2013 should also be looked into.
- Short courses should be used primarily for advanced training for experienced drafters on areas critical to them.
- Other approaches to training should be facilitated in addition to training courses, in particular, internships/placements in well-structured offices to give legislative drafters, not just trainees, an opportunity to see how a well-structured office functions. This approach gives rise to opportunities for south-south co-operation, which has been a useful approach to address support to developing countries. The Secretariat can use its good offices to encourage this type of co-operation among its members.

- The particular challenges of small drafting offices in respect of in-house training should be factored into the design of support.
- Training should be assigned judiciously to avoid overburdening technical assistance experts with more work than they can manage or with the responsibility of training people who have little or no drafting training and to avoid short-changing trainees.

8.4 The Ghana Legislative Drafting Course

The evaluation team considered various options for the Ghana Legislative Drafting course. For a more detailed analysis of the course and explanation of the thinking behind these options, please see Annex 7. One option would be to discontinue funding completely. There are of course other options; that assistance funding for the course should continue:

- For only a definite stated period under the same conditions as regards support as have existed hitherto
- For a definite stated period on the basis that assistance funding is reduced forthwith
- On a "phasing out" basis, under which assistance funding is reduced to some extent forthwith and then gradually reduced further.

If funding is continued, it would be a matter for the Commonwealth Secretariat to decide on how long it wished to continue to support the course, but clearly in the absence of an open-ended commitment some definite period has to be decided on, and it is suggested that a further period of seven years would lead to an overall round aggregate assistance period of fifteen years. There could be a further review after a set number of years (say, four). As for phasing out, during that period Commonwealth Secretariat commitment could gradually reduce.

The simplest way to reduce funding commitment would be to gradually decrease the number of participants on the course to be funded. Bearing in mind that the present commitment to assist one place for each African Commonwealth jurisdiction (eighteen at present), that could be on one of the following bases:

Option 1

Funding could be provided for 18 participants for the first two years of renewed commitment, then three fewer places each year after that, so that in the third year 15 places would be assisted, in the fourth 12, and so on down to 3 places in the seventh and final year.

Option 2

Funding for 18 places could be committed until a review after four years as to whether the funding should be continued at all, and if so then continued on the basis of a more drastic reduction of, say, five places each year (so that in the fifth year 13 would be assisted, in the sixth 8, and in the seventh and final year, 3).

For practical reasons the first of these options would be easier to operate and probably, because it is more gradual, seen by all concerned as being fairer. It would also have the effect of gradually weaning the authorities in Ghana off dependence on assistance, and encouraging any steps necessary to put the course on a commercial footing. Obviously a selection process would have to operate once the numbers of assisted participants were reduced, although, all things being equal, this could simply be on a "first come, first served" basis.

It could also be a condition of continued funding that a successor to the current Programme Director be found and committed to the course.

In summary, therefore, it is recommended that assistance funding for the Ghana course be continued:

- For a set period of seven years
- On the reduced time and funding bases discussed in Annex 7
- On a gradual phasing out basis
- On condition that a successor to the Programme Director is appointed.

8.5 Other types of assistance

The evaluators' recommendations for other types of assistance that can be offered are:

- Establishing regional networks of drafters to provide support and knowledge sharing, including making use of websites, on-line forums, etc.
- Drafting and style manuals should be developed for each jurisdiction as a valuable resource for drafting offices.

8.6 Management arrangements

- The evaluators are aware that the Commonwealth Secretariat has recently revised its inter-departmental co-ordination arrangements. The evaluators recommend that efforts are continued in order to make communication and co-ordination between TAU and ROL as effective as possible.
- Feedback received from Commonwealth Secretariat staff included a suggestion that a more coherent and "joined-up" approach to providing support for legislative drafting could be achieved by designing an umbrella Legislative Drafting Programme. The evaluators' recommendation that future projects and activities would benefit from more strategic planning is compatible with this idea. Whether and how responsibility for the umbrella Legislative Drafting Programme is shared between TAU and ROL is something that the Commonwealth Secretariat may wish to consider.
- The Commonwealth Secretariat may wish to review the role of the Primary Contact Points and the way that requests for support are dealt with. Some people who responded to the questionnaires complained that having to channel requests via the Primary Contact Point in their country led to unnecessary delays.

8.7 The Commonwealth Secretariat and member countries

The Commonwealth Secretariat should continue to exploit its comparative advantage as a trusted and respected inter-governmental agency to encourage member country governments to support legislative drafting by:

- Promoting increased recognition of the value of drafters and the importance of legislative drafting as a career
- Providing the resources to build a well-structured drafting office which has capabilities for in-house training
- Improving the terms and conditions of employment of drafters so as to assist with the recruitment and retention of drafters
- Developing mentoring schemes for trainee drafters
- Considering recruitment of experienced lawyers, not necessarily with a background in drafting, with the capacity to analyse and draft well
- To ensure retention of drafters who have been funded on training courses, consideration should be given to making it a condition of the award for training that the participant returns to their drafting office and serves for a defined period of time after being trained. Alternatively, governments may oblige the candidate to enter into a bond with the government to secure their return to office after training
- Lobbying member country governments to view Commonwealth Secretariat assistance for legislative drafting as part of their national strategy to promote good governance and the rule of law.

Annex 1

Evaluation of Commonwealth Secretariat's support to member countries on legislative Drafting

Terms of reference

1. Background

As part of the ongoing programme of in-depth evaluation studies, the Commonwealth Secretariat's Strategic Planning and Evaluation Division (SPED), in collaboration with the Legal and Constitutional Affairs Division (LCAD), is undertaking an evaluation of the work undertaken by the Secretariat in supporting member countries in the area of legislative drafting between 2006-2013.

Support for legislative drafting capacity across the Commonwealth has remained a feature of Commonwealth Secretariat programmes since the 1973 Law Ministers meeting in London. It remains a recognised comparative advantage of the Commonwealth, based on its shared tradition of public administration and judicial process.

The Secretariat's rule of law programme contributes to goals of the Commonwealth Secretariat's Strategic Plan 2013/14 - 2016/17 which are strong democracy, rule of law, promotion and protection of human rights and respect for diversity. The main objective of the rule of law programme of the Secretariat is to support member countries to strengthen the rule of law that underpins strong democratic and accountable governance as well as to assist member countries to harmonise their national laws with international frameworks. This objective is borne out of the fact that the main challenge facing Commonwealth countries today is the capacity to develop and maintain strong democratic and accountable governance underpinned by the rule of law.

Within the LCAD, which is responsible for the rule of law programme, the legislative drafting work is coordinated by the Justice Section under the Public Institutions pillar that focuses on the design and delivery of programmes of assistance to Commonwealth member countries aimed at strengthening the rule of law, the administration of justice

and reforming justice systems, including the training of the judiciary, training of legislative drafters, promoting access to justice initiatives and supporting good governance in public administration. These programmes target institutions responsible for the administration and the delivery of justice and of the rule of law.

The legislative drafting work is coordinated by the Justice Section and implemented in collaboration with the Technical Cooperation and Strategic Response Group (TCSRG) and the Governance and Institutional Development Division (GIDD).

There are three key modalities through which the Commonwealth Secretariat presently gives support in the field of legislative drafting. These are:

- a. Long term technical assistance to members by way of provision of legislative drafters as long term experts (through CFTC funding);
- b. Long term assistance to training in legislative drafting; and
- c. Short term training on legislative drafting.

TCSRG and GIDD, with the technical advice of the Justice Section of LCAD, have been responsible for (a) and (b), whilst the Justice Section has been responsible for (c).

The assistance provided by the Secretariat (through both LCAD and GIDD) in the field of legislative drafting contributes directly to Strategic Outcome 2.4 of the Strategic Plan, namely "National institutions effectively facilitating the administration and delivery of the rule of law and justice". Moreover, the long term technical assistance provided by TCSRG through CFTC funding in the field of legislative drafting meets Enabling Outcome II of the Strategic Plan contributing to the needs and capacity building priorities of the member countries.

2. Purpose

The overall purpose of this evaluation is to assess the relevance, effectiveness efficiency, sustainability and impact of the legislative drafting support provided by the Secretariat between 2006 and 2013, with a view to defining the focus and form that future assistance should take, and to recommend strategic and operational changes that may be required by the Secretariat to make support more focused in accordance with the Strategic Plan and in line with the views expressed by Commonwealth Law Ministers at their meeting in Sydney in 2011.

Specifically, the evaluation will:

- Review the relevance of support provided to member countries over the period being evaluated and undertake an assessment of the likely demand in those areas over the coming years.
- Assess the effectiveness of regional and in-country training programmes and support mechanisms on legislative drafting (both long and short term) to determine their quality, impact and sustainability.
- Assess the overall effectiveness and impact of the legislative drafting assistance provided to member governments in meeting their requirements.
- Assess the efficiency of the Secretariat's support in legislative drafting, including resource allocation and management approaches, internal mechanism for delivery and implementation strategies.
- Assess the 'comparative advantage' and 'added value' of Secretariat's work in legislative drafting. Is the Secretariat support adding valued to the capacity of drafting offices in member countries? Is the Secretariat duplicating the work of other organisations?
- Identify lessons learned (or not learned) in the design and delivery of the legislative drafting programmes in member countries and recommend strategic and operational changes that may be required to make the future support on legislative drafting more focussed, relevant and sustainable.

3. Scope and focus

The evaluation period will cover Secretariat's support to member countries on legislative drafting during 2006-2013, though some

reference may be required to mandates implemented prior to this period, particularly with regard to the lessons that could be usefully applied in determining the future direction of the programme. Based on the evaluation findings, the study is expected to propose both strategic and operational changes that would enable the Secretariat to better deliver its mandate.

4. Suggested methodology

The Consultant will include the following key steps in the conduct of the evaluation for information collection, analysis and feedback during the study.

- Review of all pertinent records and data related to the legislative drafting work of the Secretariat.
- Interviews with relevant Secretariat staff (including but not limited to LCAD, TCSR, GIDD, SGO, SPED, HR-CFTC) engaged in the delivery of legislative drafting activities of the Secretariat.
- Interviews of selected stakeholders- governments, programme partners, collaborating institutions, and project beneficiaries - through field visits and electronically/ telephonically.
- Electronic survey of Secretariat's legislative drafting training programme participants and in-depth electronic/telephone follow-up with selected few.
- Such additional activities, as may be agreed with SPED Evaluation Section, in order to enable the proper execution of the evaluation study.

5. Deliverables

The evaluation study will provide the following deliverables to the Secretariat:

- Inception report with the evaluation framework, work plan and methodology
- Draft evaluation report (following the interviews, survey and field work)
- A seminar/ presentation on the evaluation findings and recommendations
- Final evaluation report, incorporating all feedback/ comments.

The deliverables must be submitted to SPED electronically as a Microsoft Word document.

The Inception Report is due within two weeks after the initial meetings with the Secretariat staff (SPED, LCAD, TCSRG, GIDD) and the review of literature. The draft Evaluation Report is to be submitted within two weeks of completion of the survey and field visits. Following the presentation of the evaluation findings at a seminar at the Secretariat and receipt of feedback comments from the Secretariat and other stakeholders on the draft report, the evaluator is expected to submit a

revised final Evaluation Report. The draft (and final) Evaluation Reports must be no more than 50 pages, excluding all annexes.

6. Schedule and level of effort

The study is planned to commence in February 2014. It is estimated that up to 45 consultant days will be appropriate to complete the study, including agreed fieldwork visits. The consultant(s) will work in close collaboration with the Secretariat (SPED/LCAD).

Annex 2

Key questions used in evaluation

Evaluation criteria	Evaluation questions
Relevance	<p>Objectives of the Commonwealth Secretariat's support to legislative drafting</p> <ul style="list-style-type: none"> Is the design of the legislative drafting support, i.e. aims, objectives and implementation arrangements consistent with the Strategic Objectives of the Secretariat's Strategic Plan, specifically Strategic Outcome 2.4 and Enabling Outcome 11? Are the implementation arrangements for the legislative drafting support appropriate and adequate for addressing the expected outcomes of the Commonwealth Secretariat supported projects, as outlined in the Project Development Documents (PDDs)? To what extent does the design of the legislative drafting support address (a) the recommendations of the 2011 CLMM meeting? (b) national capacity building objectives for legislative drafting in Commonwealth member countries? Are the aims and objectives of the support clearly understood by all stakeholders: governments, relevant sector ministries and agencies and beneficiaries? What is the level of member countries' involvement in the design, formulation and monitoring of the long-term technical assistance support? What is the level of technical support/input from the Secretariat (a) into the design of country level training/TA support programmes (b) monitoring the outcomes of support to member countries in legislative drafting?
Efficiency	<p>The efficiency of the support and project implementation, focusing on resource inputs and use, results achieved</p> <ul style="list-style-type: none"> To what extent is the legislative drafting support adequately funded to achieve its objectives? Is the current institutional management of the support suitable for achieving its intended outcomes? What challenges and opportunities does the current structure present? How does the quality of the training courses delivered by the Ghana Law School compare with other legislative drafting courses in other countries/regions? To what extent do the resources expended match the results and outcomes of the support? Do the results obtained offer value for money? To what extent does the support include local and regional expertise in the design and implementation of training programmes? Does Commonwealth Secretariat support to member countries complement other in-country donor funded legislative drafting programmes? Has the Commonwealth Secretariat developed a comparative advantage in designing and supporting legislative drafting for member countries?

Evaluation criteria	Evaluation questions
Effectiveness	<p>The benefits derived by the targeted beneficiaries (governments, legislators, programme beneficiaries, citizens)</p> <ul style="list-style-type: none"> • Is there any evidence of improvement in legislative drafting capacity and policy making above the baseline at the start of the Commonwealth legislative drafting support? • Are there monitoring and evaluation strategies in place for documenting the outcomes of the legislative drafting support? • To what extent has the support enhanced institutional capacity, skills and expertise in legislative drafting in Commonwealth member countries? Are there additional institutional development needs for legislative drafting? What are the capacity strengthening needs at country level? What aspects of delivery processes need to be improved? • What is the quality of the systems and processes for collecting performance data for the legislative drafting support? • Are the processes for the assessment, monitoring and review adequate and transparent? Are they specified in documented guidelines? • Are there adequate institutional systems for monitoring the outcomes of the support? How are outcomes monitored and documented in relation to the 2013/14 – 2016/17 Strategic Plan?
Impact	<p>The current and potential impact of the legislative drafting support</p> <ul style="list-style-type: none"> • Has the support provided a clear and effective methodology for strengthening legislative drafting capacity in Commonwealth member countries? • To what extent has the support created value added/synergies and encouraged a division of labour/partnerships with government, and other donors? • What are the indirect benefits of the support and are there linkages with other development sectors?
Sustainability	<p>The sustainability of the interventions undertaken during the period 2006 to 2013 and scope for replication and improvement</p> <ul style="list-style-type: none"> • How should the legislative drafting support be mainstreamed with other policy support processes at country level, now and in the future? Are there additional needs, special approaches for adaptation and replication of approaches across Commonwealth countries?

Annex 3

List of people interviewed

Commonwealth Secretariat

Strategic Planning and Evaluation Division

Nabeel Goheer, Director

Yogesh Bhatt, Adviser and Head of Evaluation

Tyson Mason, Evaluation Officer

Rule of Law Division (formerly Legal and Constitutional Affairs Division)

Katalaina Sapolu, Director

Jarvis Matiya, Adviser and Head, Justice Section

Mark Guthrie, Legal Adviser, Justice Section

Marie-Pierre Olivier, Legal Adviser and Acting Head, Law Development Section

Diya Beesoondoyal, Legal Officer, Law Development Section

Technical Assistance Unit (formerly Governance and Institutional Development Division)

Tim Newman, Acting Director

Pauline Campbell, Adviser, Technical Co-operation

Oluwatoyin Job, Adviser, West Africa

Member countries

Belize

The Hon. Mr. Wilfred Peter Elrington, Attorney General and Minister of Foreign Affairs

Nigel Hawke, Acting Solicitor General (Litigation), Attorney General's Chambers

Donna-Marie Neaves-Rostant, Assistant Solicitor General, Legislative Drafting Office, Attorney General's Chambers

Iselma Sosa, Legislative Assistant to Law Revision Commissioner, Law Revision Unit Attorney General's Chambers

Sharmila Williams, Attorney General's Chambers

Ghana

The Hon. Denis Adjei, Judge of the Court of Appeal, Office of the Chief Justice

Georgina Ahorbo, Assistant Systems Analyst Ghana School of Law

Mimi Nana Akua Afriyie, Assistant State Attorney, Ministry of Justice and Attorney General's Office

Estelle M Appiah, Former Head of Legislative Drafting Office

David O Asare, Senior State Attorney, Law Reform Commission

Professor Vincent Crabbe, Course Director Ghana Legislative Drafting Course

Kwasi Prempeh-Eck, Director of Legal Education, Ghana School of Law

The Hon. Georgina T Wood, Chief Justice, Office of the Chief Justice

Guyana

Safiya Ali, General Counsel, CARICOM Secretariat

Segametsi Mothibatsela, CFTC Legislative Drafting Expert, CARICOM Secretariat

Keith Friday, CFTC Legislative Drafting Expert, CARICOM Secretariat

Justice Abdullahai Zuru, CFTC Law Revision Expert, CARICOM Secretariat

Jamaica

Erica Boswell-Munroe, Deputy Chief
Parliamentary Counsel, Office of the
Parliamentary Counsel

Albert Edwards, Chief Parliamentary Counsel,
Office of the Parliamentary Counsel

The Hon. Mark Golding, Minister of Justice,
Ministry of Justice

Ian Gray, CFTC Legislative Drafting Expert,
Tax Administration Jamaica

Ainsley Powell, Commissioner General of Tax,
Tax Administration Jamaica

Grace Rookwood, Deputy Commissioner
General for Legal Support, Tax Administration
Jamaica

Petrona Sealey-Browne, Senior Legislative
Drafter (CFTC Legislative Drafting Expert),
Office of the Parliamentary Counsel

Andrea Shepherd-Stewart, Commonwealth
Secretariat Primary Contact Point
Manager, Multi-Lateral Technical
Cooperation Unit, Planning Institute of Jamaica

Kenya

Jaosh Dache, Chief Executive Officer,
Kenya Law Reform Commission

Professor P L O Lumumba, Director,
Kenya Law School

The Hon. Githu Muigai, Attorney General,
Office of the Attorney General

Marion Muriithi, (participant on Ghana Law
Course)

Njee Muturi, Solicitor General,
Attorney General's Ministry

Fred Mwachi, (participant on Ghana Law
Course)

Margaret Ndawula, Legal Drafter,
Kenya Law Reform Commission

Mbage Ng'ang'a, Chairman,
Kenya Law Reform Commission

Margaret Nziaka, Chief Parliamentary Counsel,
State Law Office

Catherine Ochanda, (participant on Ghana
Law Course)

Stephen Onchoke, Commonwealth Secretariat
Primary Contact Point, Head of UK/
Commonwealth Division, Ministry of Finance

Maleka Shamsy, Legal Drafter
Kenya Law Reform Commission

Phone/Skype discussions

Pacific Islands Forum Secretariat

Lorraine Kershaw, International Legal Adviser

Nola Faasau, Legislative Drafting Officer

Samoa

Ming Leung Wai, Attorney-General

Swaziland

Sebolangi Dlamini, Attorney-General's Office

Annex 4

List of documents reviewed

Commonwealth Secretariat documents

- Concept Paper for Evaluation of Legislative Drafting Assistance in the Commonwealth, Justice Section, Legal and Constitutional Affairs Division
- Background Note on Legislative Drafting in the Commonwealth, Governance and Institutional Development Division 2012
- Strategic Plan for 2013/14 – 2016/17
- Strategic Plan 2008/9 – 2011/12
- Strategic Plan 2004/5 – 2007/8
- Evaluation of Commonwealth Secretariat Training Programmes 2004–2008
- Annual Performance and Assistance Report 2012/13
- Evaluation of Commonwealth Secretariat's Support to member countries on Criminal Law 2007/8 to 2011/12
- Impact Assessment of Malta-Commonwealth Secretariat Third-Country Training Programme 2004 – 2008
- Advisory Group on Legislation Systems for Small Jurisdictions – Questions to help in assessing important aspects of legislation systems for small jurisdictions 6 December 2012
- Summary of responses to Advisory Group on Legislation Systems for Small Jurisdictions 16 January 2013

Documents relating to Long-Term Legal Drafters

- Terms of Reference, Reports, Reviews, Background Papers for:
Belize, Botswana, Guyana, Jamaica, Kenya, Montserrat, Seychelles and Swaziland

Documents relating to the Ghana Legislative Drafting Course

- Participants' details, correspondence, course evaluation feedback, Course Director's reports for 2009 and 2012
- A Manual on Legislative Drafting, Professor Vincent Crabbe, 2009

- Legislative Drafting Manual for African Commonwealth Jurisdictions, Estelle Matilda Appiah, then Director of Legislative Drafting, Attorney General's Department

Papers from Meetings of Senior Officials of Commonwealth Law Ministries

- London, UK, 1-3 October 2007 – Meeting Papers
- Edinburgh, Scotland, 7-10 July 2008 (Paper on legislative drafting and legislative drafting manual for African Commonwealth jurisdictions)
- London, UK, 18-20 October 2010 – Record
- London, UK 9-11 September 2013 (Report of the Advisory Group on Developing a Legislative Drafting Management System)

Communiqués from Meetings of Senior Officials of Commonwealth Law Ministries

- Kingstown, St. Vincent & the Grenadines, 18-21 November 2002
- Accra, Ghana, 17-20 October 2005
- London, UK, 1-3 October 2007
- Kampala, Uganda, 23-25 November 2007
- Edinburgh, UK, 7-10 July 2008
- Trinidad and Tobago, 27-29 November 2009
- London, UK, 18-20 October 2010
- Sydney, Australia, 11-14 July 2011
- Perth, Australia, 28-30 October 2011

Communiqués of Meetings of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions

- Jersey, Channel Islands, 15-17 May 2000
- Kingstown, St. Vincent and the Grenadines, 18 November 2002
- London, UK, 21-22 October 2004
- London, UK 4-5 October 2007
- London, UK 21-22 October 2010

Annex 5

Legislative drafting courses around the world

Organisation/ Country	Organised by	Duration	Face-to-face or on-line	Cost (where known)	Qualification (where known)
Tulane University Law School, USA	The Public Law Center 6329 Freret Street, Suite 130 New Orleans, LA 70118 USA T: 00 1 504 862 8850 F: 00 1 504 862 8851 Email: tp1c@tulane.edu	2 weeks (summer programme)	Face-to-face	£2,454 i.e. £1,227/ week	N/A
University of Pretoria, South Africa	University of Pretoria Hatfield Campus T: 00 27 12 434 2500 Email: info@ce.up.ac.za	15 two- hour sessions	Option 1: face- to-face evening classes Option 2: On- line	£408 i.e. £476/week	N/A
Institute of Advanced Legal Studies, UK	Prof. Helen Xanthaki T: 020 7862 5861 Email: Helen.Xanthaki@sas.ac.uk	4 weeks (annually)	Face-to-face	£4,995 i.e. £1,248.75/week	N/A
International Law Institute, Uganda	T: 00 256 414 347523 Email: administrator@ili.or.ug	2 weeks	Face-to-face	£2,291 (inc. ipad) £1,736 (exc. ipad) £2,167 (early sign up inc. ipad) £1,162 (early sign up exc. ipad) With approx 50-75% reductions for Uganda residents	N/A

Organisation/ Country	Organised by	Duration	Face-to-face or on-line	Cost (where known)	Qualification (where known)
Civil Service College, Singapore		16 hours	Face-to-face	£259	N/A
Athabasca, Canada	Dale Dewhurst Email: daled@athabascau.ca Archie Zariski Email: archiez\@athabascau.ca	5 courses each for a 6 month period = 2.5 years but can be completed sooner or be extended	On-line	£3,238	Post Graduate Diploma
International Journal of Legislative Drafting and Law Reform, USA	International Post Graduate Diploma in Legislative Drafting	5 courses each of two months Min. completion 6 months, max. 1 year	On-line		N/A
International Law Institute, USA	Workshop on Legislative Drafting: International Law Institute 1055 Thomas Jefferson St. NW Suite M-100 Washington DC 20007, USA T: 00 1 202 247 6006 F: 00 1 202 247 6010 Email: info@ili.org	2 weeks	Face-to-face	£2,378 i.e. £1,189/week	N/A

Organisation/ Country	Organised by	Duration	Face-to-face or on-line	Cost (where known)	Qualification (where known)
The University of South Pacific, Fiji	Mrs. Prem Shekhar, Suva Division, School of Law University of the South Pacific Laucala Campus Suva, Fiji T: 00 679 3232984 F: 00 679 3232998 Email: shekhar_p@usp.ac.fj	30 weeks	Face-to-face and on-line	£1,950	Professional Diploma
The Honorable Society of King's Inn, Ireland	Advanced Diploma in Legislative Drafting: King's Inn Henrietta Street Dublin 1, Ireland T: 00 353 1 874 4840 F: 00 353 1 872 6048 Email: info@kingsinns.ie	20 weeks (part-time 2 evenings a week for 2 hours)	Face-to-face	£3,569 i.e. approx. £1,115/week (based on a 25 hour week)	Advanced Diploma
RIPA International, UK	LD: A blended approach RIPA International Barnard's Inn, 86 Fetter Lane, London EC4A 1EN T: 020 7470 9100	2 weeks (and then 3 months to complete)	Face-to-face and on-line	£5,800	N/A
RIPA International, UK	Complete LD, inc. Translating Policy into Legislation RIPA International Barnard's Inn, 86 Fetter Lane, London EC4A 1EN T: 020 7470 9100	4 weeks (and then 3 months to complete)	Face-to-face and on-line	£8,500	N/A

Organisation/ Country	Organised by	Duration	Face-to-face or on-line	Cost (where known)	Qualification (where known)
University of Johannesburg, South Africa	Faculty of Law University of Johannesburg P. O. Box 524 Auckland Park Johannesburg 2006 South Africa T: 00 27 11 559 3739 Email: esmeraldedp@uj.ac.za	One semester of 4 modules on a part-time basis	Face-to-face	£573	N/A
London Corporate Training, UK	Law-Making and Legislative Drafting: T: 020 3178 3080 Email: info@lct.co.uk	2 weeks	Face-to-face	£3,700 i.e. £1,850/week	N/A
London Corporate Training, UK	Drafting Legislation T: 020 3178 3080 Email: info@lct.co.uk	1 week	Face-to-face	£2,350/week	N/A
Bureau of Parliamentary Studies & Training, Parliament of India (open only to India and countries covered under the Indian Technical and Economic Cooperation and Special Commonwealth African Assistance Plan)	International Training Programme in Legislative Drafting	4 weeks	Face-to-face	Not available	N/A

Organisation/ Country	Organised by	Duration	Face-to-face or on-line	Cost (where known)	Qualification (where known)
Rwanda Institute of Legal Practice and Development	ILPD PO Box 49 Avenue des Sports Nyanza Southern Province Rwanda Tel : 00 250 788 616 394 Email : info@ilpd.ac.rw	6 months	Face-to-face, residential	Not available	Post-graduate Diploma
The National Institute for Legislative Studies, Nigeria	Master's Degree in Legislative Studies	Minimum 6 semesters, maximum 8 semesters	Face-to-face	Not available	Master's Degree
University of the West Indies	David Berry, Dean of the faculty David.berry@cavehill.uwi.edu Course: Master of Law (LLB) in Legislative Drafting UWI, The Faculty of Law Cave Hill Campus PO Box 64 Bridgetown BB 11000 Barbados T: 00 246 417 4000 F: 00 246 424 1788	Full time	Fully residential, Face-to-face	Citizens of most smaller Caribbean jurisdictions £7483 Citizens of other Caribbean countries Including Barbados, Jamaica, Trinidad & Tobago £16436	Master's Degree

Annex 6

Discussion on sections 6.4 and 6.6

How support was not fully adapted to the context and affected project design and management

As stated in 6.4 and 6.6, one of the weaknesses in the support that limited the expected impact of the support provided to the Caribbean through experts located at the CARICOM Secretariat was that the support was not fully adapted to the context.

1. Unclear mandate in project documents

The mandate of the experts in respect of domestic legislation to give effect to domestic policy (as opposed to giving effect to the Treaty) was not clearly stated in the project documents.

Firstly, programme CAR079 was in response to the request by CARICOM for legislative drafters to support the CARICOM Legislative Drafting Facility (CLDF). The CLDF drafts legal instruments and model laws for adaptation by CARICOM Member States.

Secondly, paragraph 2 of Project Completion Report stated:

The purpose of GCAR079 was "to provide a regional drafting service for all members of CARICOM...as a result of [which] CARICOM member states would be more able to adapt model legislation as the basis for their own laws..."

On the other hand, paragraph 7 of that report states that "providing assistance through CARICOM was considered to be a cost effective way of utilizing limited resources to assist governments in the region, as opposed to them individually requesting the same CFTC assistance." [Emphasis added.]

In the follow-on Project CAR 0570, the Commonwealth Secretariat sought to address the lack of clarity regarding the experts' mandate to draft laws for the Member States. The Project Design Document and the TORs for the experts stated that the purpose of that project was to provide, among other things:

- a. direct assistance to legal drafting offices in Commonwealth Caribbean countries to draft national legislation either emanating from treaty obligations or domestic policy initiatives; and
- b. assistance to CARICOM Secretariat in the drafting of community level legislation as required and agreed under the Treaty of Chaguaramas was also part of this component.

Despite the increased clarity, the waters were muddled by the use of community level legislation. There is no community level legislation in the Caribbean in the sense of CARICOM legislation applicable in Member States. In the Caribbean context, this phrase can only be taken to mean CARICOM model legislation. The experts continued to draft treaties and other instruments under the follow-on project, explaining that:

"The purpose of the project is to provide model treaties/legislation. However, the work on treaties outweighs legislation... The Office of the General Counsel handles more treaty matters than model legislation. Unless and until treaties are signed or ratified by Member States, the model legislation is not drafted."

In summary, the fact that the project was implemented in response to a request by CARICOM for drafting support in the preparation of instruments and model legislation, the language of the project documents, the absence of qualified drafters in the OGC and the location of the experts in the OGC led to a misunderstanding and misdirection of Commonwealth Secretariat support for Member States of CARICOM.

2. Failure to design project around certain institutional challenges in Member States

Some domestic legislation was done but the progress was unsatisfactory. Failure to design the project around institutional challenges in Member States may have contributed to this. (Some of the institutional challenges are also found in the OGC.)

- **Cabinet will only consider for tabling in Parliament legislation from its Drafting Office**

Drafts prepared externally through direct drafting are in effect proposals to be reviewed and amended by the Government's drafting office. External 'drafts' therefore require in-house legislative drafting resources and their progress is affected by the number and seniority of in-house drafters, the legislation work programme and work plan and efficiency of Chambers.

- **External drafters do not have the authority to make decisions concerning legislation or act on behalf of the Government**

Drafting offices are reticent about giving certain responsibilities necessary for the progress of legislation to external drafters, for example conducting public consultations or advising Ministers of Government. In these cases the AG's drafting resources need to be engaged early on in the process to carry out these responsibilities instead of, or alongside, the external drafter. Again the progress of the external drafter's work will be affected by the number and seniority of in-house drafters, the legislation work programme and work plan and efficiency of Chambers.

- **The CARICOM Secretariat is not in a position to compel the enactment domestically of its model laws.**

One expert explained the juridical underpinnings of this in his report in August 2013. He states:

"The implementation of model laws and international instruments is a protracted process. It is the responsibility of national Governments to ensure the implementation of such model laws and international instruments. Unlike the case of the EU Treaty, under the Revised Treaty of Chaguaramas, sovereignty lies with the States and is not transferred to the Regional Organisation. Hence the CARICOM Secretariat [and by the same token the external expert] has very little influence on national implementation of treaties or implementing legislation."

- **Model legislation is just a model and requires drafting resources to implement it in domestic law**

Model legislation proposes changes to the Statute Book of a country. How that model law is to be implemented depends on what changes it makes to the Statute Book. As the Statute Book of every member country is different, the changes necessary to implement a model law will be different. If the model law seeks to regulate an area that is already dealt with on the Statute Book, then the implementing law will be different in every case unless the matter was dealt with in a harmonized way on the existing Statute Books. St. Lucia provides a good example in respect of its Civil Code. Model legislation that affects matters in the Civil Code has to be practically redrafted to amend the Civil Code to achieve the objects of the model legislation.

- **The absence of processes and procedures for legislative planning and controlling drafts through the legislation making process makes the progress of all proposals slow.**

Drafts are sometimes lost, or the provenance and history of a Bill being dealt with by the office is not clear, requiring a drafter to 'start from the beginning' if requests for the Bill are revived after a lapse of time. There are interruptions due to change in priorities. This is exacerbated by high turnover of legislative drafting staff. (At the regional level, CARICOM procedures for the approval of model legislation are inefficient and cause delays in finalisation of model legislation by experts. The experts' outputs were therefore negatively affected and their impact reduced).

It is not surprising that the Project Completion reports cite staff shortages and heavy workload in Drafting Offices in Member States as the reason for not achieving project goals:

'Delays in responding to draft legislation from member countries impeded the progression of work. These were a result of shortages of staff in many Member States' Drafting Offices, the resultant workload pressures and officers sometimes having multiple portfolio responsibilities including drafting, but lacking sufficient drafting experience.' (PCR-GCAR079 at para. 3.1)

The monitoring and evaluation processes of the project brought to light the consequences of these institutional challenges. In addition to the reference to delays, there are references to bottlenecks created by poor feedback. There was an attempt to address the difficulties by requiring greater clarity in respect of the legislative drafting process involving Treaty, model legislation and domestic legislation and increasing the time spent in-country for face-to-face consultations.

This suggests that there was some lack of clarity as to why drafts were not progressing as they should in country, and a belief that the issue could be addressed through more face-to-face consultation to gain consensus to get the necessary feedback.

However, given the institutional challenges, in particular the status of external drafts, the issue was not one of consensus, but one of capacity. The difficulty was that instead of adding to in-house capacity, Commonwealth Secretariat support was designed to rely on it. Increased in-country presence would have been useful but was not appropriately designed because it was aiming at consensus not at adding capacity. Possible approaches to addressing the issue are set out in the Recommendations at section 8 below.

3. Poor planning and direction by Office of the General Counsel

The day-to-day management of the CARICOM experts was undertaken by the General Counsel at CARICOM who was required to discuss requests, agree priorities and set work programmes for each expert on a yearly basis. Her ability to direct work was affected by the absence of legislative planning and management systems both in the OGC and the national drafting offices. One expert complained:

"The forward plan has to be clearly outlined. We work on issues that come up from time to time at the Secretariat. There is need to design a forward plan..."

At the commencement of CAR079 in 2008 there was difficulty determining what work was unfinished for assignment to the expert

because a record of work done was not kept on a continuous basis. During the course of projects CAR079 and CAR080 one expert repeatedly recommends that CARICOM take a more proactive role in initiating model laws. The report of one expert was consistently non-responsive in respect of future plans, leading the manager at one point to note that "Currently it appears that you do not have very much to do..."

It appears therefore that the expert was not given a work programme for the year as contemplated by the project documents, resulting in their working ad hoc on matters as they arose in the Office of the General Counsel. Not surprisingly, they worked on matters not directly within the scope of the project (for example, assisting with preparing submissions for litigation) to the detriment of the main project work.

4. Incomplete appreciation of the Caribbean context

The lack of clarity in the mandate (1.), the failure to take into consideration institutional challenges (2.) and the day-to-day management arrangements (3.) suggests an incomplete appreciation of the CARICOM context: CARICOM and Member State processes, the role of the CARICOM Secretariat vis-à-vis the Member States in respect of legislation, the structure of the Office of the General Counsel and the state of readiness for the implementation of the project. As a result the import of reports was not fully appreciated, issues were not properly identified engendering inappropriate solutions.

The following request for clarity by the Commonwealth Secretariat is an example:

"The drafting assistance facility at the CARICOM Secretariat...needs to be able to demonstrate the impact of the services rendered at the Member Country level. In order to achieve this, more clarity needs to be provided by the drafters on the full drafting process that begins with the Treaty of Chaguaramas ...continues with the preparation of model laws reflecting various clauses in the treaty and ends with the subsequent pieces of national legislation that are derived from the model laws."

However, CARICOM process and the country level process are two distinct processes controlled by different entities, CARICOM and the Member State respectively. CARICOM is essentially an international agreement among the Member States. Its objectives is to achieve economic integration among Member States, enhance social development and co-ordinate foreign policy. It does not create a supra national jurisdiction. Thus, the political sovereignty of each State remains in the State, and in the case of the British Overseas Territories (OTs), in the UK subject to the Constitution of each Territory. In other words, the Community and the Organisation are not part of the governance structure of its Members. Their relationship is governed by international law. Decisions and legal acts of the Community and the Organisation have no effect in the legal landscape of a Member State, unless it is given effect by the State in accordance with its constitutional processes. Each Attorney General's Office/Ministry of Justice therefore remains constitutionally responsible for advising Cabinet on legislation. The Office of the General Counsel of CARICOM (OGC) does not have this authority. This is so even for legislation concerning CARICOM matters, in respect of which CARICOM may make recommendations to Attorneys General/Ministers of Justice.

In summary, the incomplete appreciation of the Caribbean context negatively impacted the design and the technical management of the project.

Annex 7

Options for the Ghana Legislative Drafting Course

For reasons given, the Ghana course represents value for money and has given an enormous amount of benefit. It is an effective regional course in that it is professionally sound, it is run in an African context for jurisdictions with generally medium to large populations (it does not therefore need to consider e.g. the needs of regions like the Caribbean and the Pacific which contain a number of very small jurisdictions) and similar cultures, and it is run by Africans.

On the other hand there has doubtless been some wastage, in that some officers trained in Accra have gone back to their countries and have for various reasons not subsequently been employed in central drafting offices (though they may continue to draft in other organisations such as Parliament or parastatals) or in drafting legislation at all. There is also the undoubted problem of the ability to continue of the current Course Director due to his advanced age.

Factors already referred to (section three) mean that demand for training in legislative drafting in Africa is likely to continue. It is also clear that the Commonwealth Secretariat is well placed to offer assistance to Commonwealth jurisdictions for this. By contrast, donor countries or international agencies would be much more likely to offer assistance on a country-specific basis (as a result of bilateral aid) or a subject-specific basis (as with the IMF or the various divisions of the UN).

The authorities in Ghana concerned with running the course were, when interviewed, concerned that, whether or not the course were integrated into the Ghana School of Law, there would not be a sufficient number of people needing training on an annual basis from that country, nor sufficient numbers from abroad funded from individual governments or organisations, to make the course economically viable. It was feared that it would quickly cease to be viable and close down, as had happened in a similar situation the 1990s with the course run in Barbados.

The question nevertheless remains as to whether these fears should be, so to speak, put to the test. Should not the Commonwealth Secretariat, having already provided funding assistance over a period of eight years that has given considerable benefit, nevertheless decide that this assistance cannot continue indefinitely, that the original intention was to offer funding assistance for only a limited period of time (which has already been exceeded), that a break has to be made at some point and that it might as well be now as later? That is certainly a possible, and not unreasonable, view to take, especially in view of the original Commonwealth Secretariat intentions, and having regard to the fact that it is human nature for all those with an interest in the matter to want what is an undoubted benefit to continue, if not indefinitely, then for as long as possible.

What would be the consequence of an immediate complete break? In the absence of assistance funding from elsewhere (which would unlikely from the Ghana Government especially in respect of non-Ghanaians, and take time to arrange from other donor agencies such as DFID or the EU, even if they were favourably disposed to do so), there would be nothing between the two extremes:

- the course would continue on a commercial basis
- the course would close down

In the latter case, the previous experience of the Barbados course indicates that there would in all likelihood be renewed requests for assistance with an African regional, or even a Commonwealth-wide, legislative drafting course in a few years' time. Any such course would have to start from scratch, and with no guaranteed administrative base.

- There are of course other options; that assistance funding for the course should continue:
- for only a definite stated period under the same conditions as regards support as have existed hitherto

- for a definite stated period on the basis that assistance funding is reduced forthwith
- on a “phasing out” basis, under which assistance funding is reduced to some extent forthwith and then gradually reduced further.

If funding were to be reduced, on what basis could this be most practicably done?

At twelve weeks in length, the course is probably longer than it needs to be. Courses in London that used to run for twelve weeks are run on commercial principles, and the institutions running them have realised that this is too long and the resulting course too expensive; for example in London the RIPA International course was reduced over a period from twelve to seven weeks (all but the first two of which are now conducted on-line by distance learning) and the IALS course to four weeks.

When the question was put to them, the Programme Director and one of the previous Heads of Drafting for the Ghana Government were in agreement that this would be a reasonable way to proceed. Though doubtless some minor costs would be fixed whatever the course length, a course of eight weeks would not cost much more than two-thirds of the twelve week one. The content would obviously have to be trimmed according to the time available, and although no such commitment has been given by her, it is conceivable that the previous Head of Legislative Drafting might be persuaded to take over the directorship of a shorter course on the retirement of the Programme Director.

Further, it seemed from discussion with the two people mentioned also to be common ground that countries sending participants should be asked to pay something towards the costs of the course. Countries sending lawyers to the course have mostly already been paying the costs of the relevant air fares, but should they not also pay an element in the general costs (say, the daily subsistence allowance for accommodation, food and necessities)? Such contributions would be easier to finance on the part of countries concerned than for the total costs involved (especially for a course of eight rather than twelve weeks' duration), and those costs would be considerably more modest than

they would be in, say, London. The requirement to pay them would help to ensure that those sent were serious candidates who were not simply using a “free passage” because it is available.

As for the period of the commitment, this would be a matter for the Commonwealth Secretariat, but it is suggested that a further period of seven years would lead to an overall round aggregate assistance period of fifteen years. There could be a further review after a set number of years (say, four). As for phasing out, during that period Commonwealth Secretariat commitment could gradually reduce.

The simplest way to reduce funding commitment would be to gradually decrease the number of participants on the course to be funded. Bearing in mind that the present commitment to assist one place for each African Commonwealth jurisdiction (18 at present), that could be on one of the following bases:

Option 1

Funding could be provided for 18 participants for the first two years of renewed commitment, then three fewer places each year after that, so that in the third year 15 places would be assisted, in the fourth 12, and so on down to 3 places in the seventh and final year.

Option 2

Funding for 18 places could be committed until a review after four years as to whether the funding should be continued at all, and if so then continued on the basis of a more drastic reduction of, say, five places each year (so that in the fifth year 13 would be assisted, in the sixth 8, and in the seventh and final year, 3).

For practical reasons the first of these options would be easier to operate and probably, because it is more gradual, seen by all concerned as being fairer. It would also have the effect of gradually weaning the authorities in Ghana off dependence on assistance, and encouraging any steps necessary to put the course on a commercial footing. Obviously a selection process would have to operate once the numbers of assisted participants were reduced, although, all things being equal, this could simply be on a “first come, first served” basis.

It could also be a condition of continued funding that a successor to the current Programme Director be found and committed to the course.

In summary, therefore, it is recommended that assistance funding for the Ghana course be continued:

- For a set period of seven years
- On the reduced liability discussed above
- On a gradual phasing out basis
- On condition that a successor to the Programme Director is appointed.



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