

Teaching Legislative Drafting

The Necessity for Clinical Legal Education

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Abstract

This article makes a case for the application of clinical legal education methods in the teaching of legislative drafting. This need arises to fill the acknowledged gap namely: “the failure of legal education to provide adequate training on the legislative process, statutory interpretation and legislative drafting” considering that there are very few colleges and universities that offer legislative drafting courses. In turn this is a part of a much wider on-going problem in contemporary legal education, namely: “...clinical legal education has not been adopted by many law departments within UK universities”. Using the legislative drafting law clinic at the Institute of Advanced Legal Studies, University of London as a case study, this paper advocates reasons and justification(s) for the application of clinical legal education methods to facilitate the teaching of legislative drafting skills.

Keywords: clinical legal education, legislative drafting, literature review.

A. Introduction

This article aims to blaze the trail by drawing attention to the *possibility* and *desirability* of applying clinical legal education methods in the delivery of formal academic training programmes that Xanthaki eloquently advocates and applies in teaching legislative drafting courses at the Sir William Dale Centre for Legislative Studies, Institute of Advanced Legal Studies, University of London. This approach is contained in her most recent published article: ‘Duncan Berry: A Visionary of Training in Legislative Drafting’.¹ This article will form the basis or springboard for my analysis.

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1 H. Xanthaki, ‘Duncan Berry: A Visionary of Training in Legislative Drafting’, 2011 (February) *The Loophole*, CALC, pp. 18-26, available at <www.opc.gov.au/calc/docs/Loophole/Loophole_Feb11.pdf> last accessed 20 June 2011.

In that article, Xanthaki rightly argues that considering the nature of legislative as “[...] a phronetic discipline [...]”² that involves “[...] Aristotelian application and implementation of its universal theoretical principles to the concrete circumstances of the problem”,³ it is safe to conclude that the

[...] dual nature of drafting, the dual skills required, makes it impossible to consider a drafter trained without formal academic instruction in combination with practical hands-on experience. This is Duncan’s philosophy. This is also Sir William Dale’s philosophy, now acted upon at the Sir William Dale Centre for Legislative Studies, at the Institute of Advanced Legal Studies of the University of London.⁴

Xanthaki concludes by endorsing “specialised combined formal and mentoring training advocated by Duncan Berry as a necessity for drafters”.⁵

My hypothesis is that in addition to Xanthaki’s advocacy for traditional mentoring training within a drafting office, there is now a *necessity* and room and scope for the application of clinical legal education methods for assessment within the formal legislative drafting training curriculum. Also, I shall attempt to prove that the clinical legal education methods can be applied for the assessment of the traditional mentoring training in legislative drafting. In order to prove my hypothesis, I shall examine the nature of drafting as a set of practical skills; then I shall identify some tasks or skills involved in drafting legislation that lend themselves to clinical legal education methods.

The two key research questions I seek to answer are as follows: is it possible to apply clinical legal education methods to the teaching and assessment of legislative drafting and is it desirable; in other words are there benefits in the application of clinical legal education methods in teaching and assessment of legislative drafting? The recently established Legislative Drafting Clinic at the Sir William Dale Centre for Legislative Studies, Institute of Advanced Legal Studies, University of London serves as a representative case study that proves that application of clinical legal education method is an additional “means of acquiring hands-on

2 Id. at p. 18. Also, as Xanthaki has rightly demonstrated, contrary to the prevailing views in civil law and common law jurisdictions, legislative drafting like law is neither a ‘pure form of art’ nor a pure ‘science’ but a ‘phronetic discipline’. However, I prefer the expression *praxis*, which I shall apply throughout this article to describe the fusion of the theory and practice of legislative drafting. The word *praxis* was originally coined and defined as “the subjective [theory] decision making on factual circumstances [practice] or the practical [practice] wisdom of the subjective classification of factual circumstances to principles [theory] and wisdom as episteme” by the German S.U. Von Kirchmann, *Die Werlosigkeit der Jurisprudenz als Wissenschaft*, Verlage von Julius Springer, Berlin, 1848, cited in Xanthaki, *supra* n. 4, at pp. 19, 20.

3 See, generally, W. Eskridge Jr., ‘Gadamer/Statutory Interpretation’, 90 *Columbia Law Review* 1990, p. 635 cited in Xanthaki, *supra* n. 4, at p. 20.

4 Id. at pp. 21, 22.

5 Id. at p. 24.

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practical drafting experience”.⁶ The choice of the representative case study is appropriate considering that it is the only institution in the United Kingdom and in the Commonwealth⁷ that applies clinical legal education method in the delivery of legislative drafting program.

B. Definition of Key Words and Phrases

For the avoidance of any doubts, it is necessary to define the key words such as clinical legal education and legislative drafting.

What is clinical legal education? The prevailing definition, internationally and mostly within the common law world, is that clinical legal education is

a learning environment where students identify, research and apply knowledge in a setting which replicates, at least in part, the world where it is practised [...]. It almost inevitably means that the student takes on some aspect of a case and conducts this as it would [...] be conducted in the real world.⁸

In a nutshell, clinical legal education has been defined as “learning by doing the types of things that lawyers do”.⁹

There are a wide variety of skills that clinical legal education seeks to transmit to law students, such as drafting skills, professional ethics; lawyer–client relationship; advocacy; ‘client interviewing’, ‘negotiation skills’ just to mention a few. The clinical legal education methods of assessment are also varied, such as ‘simulation; mock trials’, research reports, journals, diaries’ ‘placements with practising lawyers’ and group work’.

However, in this article I support the view that

6 See Academic Quality and Standards Committee Paper 11 of 25 January 2011 entitled *Change to Assessment for the LLM in Advanced Legislative Drafting* of the University of London wherein the IALS “seeking permission for LLM students, most of whom are already drafters in their own jurisdiction, to be able to use their work at the Clinic [legislative drafting] as one of the two assessed courseworks for the Legislative Drafting course”, Available at <https://intranet.sas.ac.uk/404.html?&...Change_to_Assessment_for_the_LLM_in_Advanced_Legislative_Drafting>, last accessed 20 June 2011.

7 Based on two recent studies, namely, V.C.R.A.C. Crabbe, ‘Teaching Legislative Drafting: The Commonwealth Experience’, *Statute Law Review*, Vol. 19, No. 2, 1998, pp. 113-128 and R. Webster, ‘Teaching Legislative Drafting: Reflections on the Commonwealth Secretariat Short Course’, *Commonwealth Law Bulletin*, Vol. 36, No. 1, 2010, pp. 41-56, Legislative Drafting programmes are taught at the universities in Canada, University of the West Indies, University of the South Pacific. However, none of these universities apply clinical legal education methods.

8 See R. Grimes, ‘The Theory and Practice of Clinical Legal Education’, in J. Webb & C. Maugham (Eds.), *Teaching Lawyers’ Skills*, Butterworths, London, 1996, p. 138 cited in R. Lewis, ‘Clinical Legal Education Revisited’, 13 *Dakkyo International Review* 2000, pp. 149-169 at p. 154.

9 See H. Brayne et al., *Clinical Legal Education: Active Learning in Your Law School*, Blackstone Press, London, 1998, p. xiii cited in P. Leach, ‘The Effective Assessment of Clinical Legal Education’, *Investigations in University Teaching and Learning*, Vol. 1, No. 2, 2003, pp. 62-65, available at <www.londonmet.ac.uk/library/c18728_3.pdf>, last accessed 21 June 2011.

[...] although [...] and simulations have been included by commentators as examples of clinical legal education, here I wish to confine my discussion to a narrower activity. By clinical legal education I refer only to student involvement with real clients in an environment supervised and controlled directly by the law school. The practical experience forms part of, and is integrated within, the education provided by the law school.¹⁰

Xanthaki¹¹ and other leading scholars of legislative drafting have rightly defined it as “phronetic discipline” to be undertaken as a postgraduate academic training ...in “academic institutions” and “combined with hands on experience in a drafting office [...]” or in a legislative drafting clinic, as is argued in this article.

C. Caveats and Limitations of this Study

Before I proceed to the analysis at hand, it is worth clarifying that the clinical legal method that I advocate does not aim to replace the traditional method of mentoring training altogether. I agree with Xanthaki that there is scope for mentoring in the drafting office under an experienced senior. The question is whether it is now time to supplement the master–apprentice method with the clinic supervisor–clinic student drafter method within a university legislative drafting law clinic. And whether it is now time to subject the traditional mentoring method to the assessment methods of clinical legal education methods.

Although nowhere in Xanthaki’s article is there any mention of the application of clinical legal education method in the formal training in legislative drafting, this should not be taken as an implication that Xanthaki is suggesting that the only venue for the mentoring is “hands on experience in a drafting office by an experienced senior”.¹² Quite to the contrary, Xanthaki is a visionary and champion of the application of clinical legal education methods in teaching legislative drafting, considering that it was Xanthaki herself who championed this author’s initiative to establish a legislative drafting clinic (Law Clinic) at the Sir William Dale’s Centre for Legislative Drafting Clinic, University of London. Furthermore, in January 2011, Xanthaki successfully made a formal application to the University of London’s Academic Quality and Standards Committee for the application of Legislative Drafting Clinic coursework as a method of assessment for the LLM in Advanced Legislative Drafting course. To the best of my knowledge, this is the first legislative drafting clinic in the whole of the United Kingdom.

One limitation of this study is that, at the time of writing, it is too early to ascertain the success or otherwise of the legislative drafting clinic at the Sir William Dale Centre for Legislative Studies, Institute of Advanced Legal Studies, University of London, considering that its official launch is sometime in October 2011.

10 See Lewis, *supra* n. 11, at p. 153.

11 See Xanthaki, *supra* n. 4, at pp. 18, 24.

12 *Ibid.*

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Also, this study does not seek to prescribe any specific or universal rules of clinical legal education method for teachers and trainers of legislative drafting in common law and other jurisdictions.

It simply seeks to state the underlying philosophy and theoretical justifications for clinical legal education in legislative drafting.

D. Literature Review

Besides Xanthaki's article, the literature on teaching legislative drafting from the 1980s until the present provides evidence of the absence of clinical legal education methods.

The major studies on the subject acknowledge that the paucity of clinical legal education methods in teaching and assessment of legislative drafting is part of a much larger Commonwealth challenge, namely, "the failure of legal education to provide adequate training on the legislative process, statutory interpretation and legislative drafting"¹³ considering that there are very few colleges and universities that provide training in legislative drafting. In turn, this is a part of a much wider ongoing problem in contemporary legal education, namely, "[...] clinical legal education has not been adopted by many law departments within UK universities".¹⁴

In 1983, one of the earliest published studies on the subject admitted that there is a "relative paucity and variety of methods in teaching drafting in the United Kingdom".¹⁵ It acknowledged that the previous studies¹⁶ on the subject revealed a cosmetic treatment of the study of legislative drafting, which amounted to a "rudimentary introduction to legislative drafting".¹⁷ Although that study contains the first direct mention or recommendation of the application of clinical to the teaching of legislative drafting thus: "clinical experience whereby students knowledge of the legislative process and legislative drafting were improved by working inside a state legislature",¹⁸ there is no evidence that it was ever applied in the United Kingdom or in the Commonwealth other than the United States. The most closely related legal study is by Stern¹⁹ who applies simulation as a clinical legal education method used in teaching legislative drafting. However, as we shall demonstrate later, simulation does not qualify in the narrow and strict definition of clinical legal education applied throughout this article. During the

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

14 See Brayne *et al.*, *supra* n. 12.

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

16 See, generally, D. Miers & A. Page, 'Teaching Legislation in Law Schools', *Statute Law Review*, Vol. 1, No. 1, 1980, p. 23 and H.N. McHenderson & T.St.J.N. Bates, 'Teaching Legislation in Edinburgh: An Outline', *Statute Law Review*, Vol. 1, No. 3, 1980, p. 151 cited in Donaldson, *supra* n. 18, at p. 180.

17 *Ibid.*, p. 180.

18 See R.J. Hopperton, 'Teaching Legislation in Law School: A Model Course', 19 *Duquesne Law Review* 1980, pp. 43, 46-48 cited in Donaldson, *supra* n. 18, at pp. 188-189.

19 Stern, *supra* n. 16.

1990s, a notable study²⁰ mentioned the application of ‘distance-learning’; ‘classroom teaching’ methods, end of semester examination, seminars, tutorials and submission of dissertation as complements to the ‘time-honoured system of apprenticeship’. Apart from Xanthaki’s article, the most recent study²¹ on this subject lists visits to the Attorney-General’s office and other drafting offices, written examinations as methods of ‘acquiring practical skills’. However, it does not mention the application of clinical legal education methods such as live clients in the assessment and teaching of legislative drafting.

E. The Justification(s) and Necessity²² for Clinical Legal Education in Legislative Drafting

In order to assess the necessity of application of clinical legal education methods in modern training in legislative drafting, it is necessary to identify the similarities between both in terms of their nature, the skills and methods of assessment of clinical legal education that makes it amenable, justifiable and applicable to modern training in legislative drafting in the following areas.

I. *The Changing Nature of Legal Profession and Legal Education*

Professor Sherr, one of the pioneers of clinical legal education, rightly predicted and argued that “legal education and training should react to changes in the legal profession”. One of the trends in the legal profession is the emergence of legal careers, ‘sub-professions and sub-specialisms’ or legal professional is the ‘drafts-person’, which includes the acceptance of legislative drafting as “a sub-discipline of law, and drafting skills as specialised professional skills”.²³ These changes require alteration to the traditional “[...] structure of the curriculum [...] of [...] ‘old legal subjects’ such as legislative drafting in terms of the curriculum, the approach, the subject-matter and the skills with which to educate the lawyer of 2010”.²⁴

Following Sherr’s argument above, in this day and age, especially the year 2011, it is logical to conclude that it is now ripe for a paradigm change by including clinical legal education method in the teaching of legislative drafting.

20 See Crabbe, *supra* n. 10.

21 See Webster, *supra* n. 10.

22 For a general reading of justification(s) for clinical legal education methods in teaching, learning and teaching of law in general see, generally, J. Marson *et al.*, ‘The Necessity of Clinical Legal Education in University Law Schools: A UK Perspective’, 7 *International Journal of Clinical Legal Education* 2005, pp. 29-43.

23 Xanthaki, *supra* n. 4, at p. 24.

24 See A. Sherr, ‘Professional Work, Professional Careers and Legal Education: Educating the Lawyer for 2010’, *International Journal of the Legal Profession*, Vol. 7, No. 3, 2000, pp. 325-342 at pp. 325, 339.

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II. *The Nature of Clinical Legal Education and Legislative Drafting*

One of the outstanding similarities between clinical legal education and legislative drafting is that they both have a 'phronetic' nature reflecting praxis a fusion of 'academic'²⁵ and 'practical'²⁶ training.

Furthermore, as Xanthaki has rightly demonstrated, legislative drafting is generally recognized as a 'sub-discipline of law'. Also, the core contents of legislative drafting course consist of elements of both procedural and substantive law subjects such as constitutional law, administrative law and legislative drafting.

Considering that the general rule is that all sub-disciplines in law, subject areas of law (whether procedural or substantive issues²⁷ or both), at all levels of study (whether undergraduate²⁸ or postgraduate) are assessable by clinical legal methods, it can be concluded that legislative drafting as a "[...] formal training offered in postgraduate mainly academic programmes [...]"²⁹ course is no exception to the general rule.

III. *Teaching and Learning of Professional Skills and Ethics*

Another similarity is that the teaching and learning of professional skills and professional ethics are at the core of both legislative drafting³⁰ and clinical legal education. It follows that it is both possible and necessary to apply clinical legal education methods in the assessment, teaching and learning of 'professional ethics'³¹ to students of legislative drafting.

One of the drawbacks of the mentorship approach in the training of drafting ethics is that there is a likelihood that the seniors or mentors themselves are ignorant of the professional ethics of drafting, considering that they may not have attended formal training in legislative drafting but learnt it through on-the-job training.

The establishment of the Legislative Drafting Clinic attempts to fill this gap by providing a checklist of drafting ethics skills that students will be assessed on using clinical legal education methods.

25 See Leach, *supra* n. 12, at p. 63 where he states that 'academic aims' and 'vocational goals' are part of the objective of assessment of clinical legal education.

26 See Xanthaki, *supra* n. 4, at p. 20.

27 Leach, *supra* n. 12, at p. 61.

28 Although generally clinical legal education is applied in 'undergraduate programmes', several studies such as this Leach have demonstrated that it is applicable to postgraduate programmes including sub-disciplines such as Human Rights which are not necessary core law courses. It follows that it is applicable to legislative drafting considering that it is a postgraduate course and it is a sub-discipline of law. See Leach, *supra* n. 12, at p. 62.

29 Xanthaki, *supra* n. 4, at p. 21.

30 *Id.* at p. 24 confirms that "drafting skills as specialised professional skills". Also, the prevailing view is that professional ethics is an integral part of teaching legislative drafting. One example of the ethical skill that is required of drafters is the duty to keep confidentiality. For a full discussion of Ethics of Legislative Drafting see, generally, V.C.R.A.C. Crabbe, 'The Ethics of Legislative Drafting', *Commonwealth Law Bulletin*, Vol. 36, No. 1, 2010, pp. 11-24.

31 See Leach, *supra* n. 12, at p. 61.

IV. *Change in the Demographics of Student Enrolment for Training in Legislative Drafting Programmes*

The leading studies³² on teaching legislative drafting mostly in the Commonwealth have demonstrated that one of the founding presumptions and pre-qualification conditions for admission into the legislative drafting courses is that the participants are already employed as drafters in legislative drafting offices within the Commonwealth. Perhaps it is this presumption that has inspired Xanthaki and others to conclude that the mentoring or vocational training aspect of the training in legislative drafting be completed “in a drafting office by an experienced senior”.³³ It may be noted, drafting office in this context refers to a government drafting office or drafting agency.

However, this presumption is no longer a modern reality considering that the majority of students³⁴ currently enrolling in legislative drafting courses are, at the time of enrolment, not employed in any drafting office. The evidence of this comes from both personal experience during my 2005/2006 Master of Laws (LLM) in legislative drafting programme and a survey of current 2010/2011 students on the Master of Laws (LLM) in Advanced Legislative Studies, Institute of Advanced Legal Studies, University of London.

In view of this current reality, the application of clinical legal methods would serve as a means for teaching practical drafting skills and assessing such students who are not already employed in a drafting office.

V. *The Structure of Clinical Legal Education Law Clinics*

Both the 1995 and 2002 editions of the *Model Standards in Clinical Legal Education* of the *Clinical Legal Education Organisation* advocate a structured method of

32 See, generally, Crabbe, *supra* n. 10 and Webster, *supra* n. 10.

33 Xanthaki, *supra* n. 4, at p. 24.

34 During my legislative drafting training programme, 70% of student participants were not employed in any drafting office, only 30% were then in the employment as drafters in drafting offices. Also, from an interview conducted on the 6 June 2011 with some of the current 2010/2011 Master of Laws (LLM) in Advanced Legislative Drafting students of the Institute of Advanced Legal Studies, University of London, this researcher found that some of the students had no institutional affiliation with drafting offices in any jurisdiction, one of them was a private legal practitioner (Barrister). According to him his motive for pursuing the LLM in legislative drafting course was just to carry on academic intellectual activity, which he has not performed since his graduation from the Bachelor of Laws (LLB) degree programme. Also, from my personal experience during my 2005/2006 Master of Laws (LLM) in Legislative Drafting programme at the Nigerian Institute of Advanced Legal Studies, University of Lagos campus, out of a total of 17 students only five were legislative drafters and staff from the Ministry of Justice, and the rest were private legal practitioners in private law chambers. To the knowledge of this author, upon completion of the LLM in legislative drafting course, none of these twelve private legal practitioners undertook a mentoring training in any drafting office. The twelve returned to private legal practice in private law chambers. It was only in the year 2009 that one of them was appointed an Attorney-General of a state (region) in Nigeria. The position makes him the chief legislative drafting officer of the state (region) responsible for drafting and submission of government legislation and bills to the State (regional) executive council for onward transmission to the State House of Assembly (regional legislature). For details of the class list showing the institutional affiliations, please visit the website of the Nigerian Institute of Advanced Legal Studies at: <nials-nigeria.org/Press/orderofpreceeding.pdf>, last accessed 21 June 2011.

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assessment, “an integral part of the learning experience”,³⁵ wherein a student gains experience under the supervision of a professional.

This is similar to the mentor–student structure proposed by Xanthaki and others for teaching practical drafting skills in legislative drafting.

It is envisaged that this shall be applied in law clinics for legislative drafting trainings.

E. Conclusion

From the foregoing, it has been established that there is scope within Xanthaki’s approach for the application of clinical legal education methods for formal training in legislative drafting for teaching and theoretical drafting principles ...and application of ‘practical drafting skills’.

The practical skills training aspect of the legislative drafting course is now offered and assessed as coursework at the Legislative Drafting Clinic, Institute of Advanced Legal Studies, University of London, which is a step in the right direction and could serve as a guide to other institutions offering formal training in legislative drafting.

35 See Leach, *supra* n. 12, at p. 63.