

Challenges Faced by Legislative Drafters in Samoa and Other USP Member Countries

Mary Victoria Petelō Fa'asau*

Abstract

Legislative drafting is a skill slowly developing in the Pacific today. This abstract identifies and records an update on the challenges to legislative drafting in Pacific island countries. Due to lack of information on legislative drafting in the Pacific, research was undertaken with the assistance of Parliamentary Counsel and other Pacific drafters. I also attended the second biennial meeting of the Pacific Drafters' Technical Forum in October 2009 where more current challenges were discussed. My own experiences as a legislative drafter are also reflected in this abstract.

The outcomes of the abstract will show that whereas legislative drafting as a specialised skill is recognised by Pacific governments and interests have grown in pursuing legislative drafting as a career, the challenges faced by Pacific legislative drafters are commonly more diverse and complex. In addition to analysing some of these challenges, this paper offers some recommendations to combating them.

Keywords: legislative drafting challenges in Pacific Islands.

A. Introduction

Since 'USP member countries'¹ ('the Pacific') gained independence, they have continued to depend on overseas expatriates and consultants to draft their laws. Only in the last decade has interest in legislative drafting by the local legal professions started to grow. Although this interest in making legislative drafting a career is increasing, the challenges met by legislative drafters have also become diverse and more complex. These challenges are common in the Pacific.

This article focuses on certain challenges faced by legislative drafters in the Pacific. There are not many qualified or experienced legislative drafters in the Pacific, but legislative drafting as a separate and specialized skill is recognized in the legal profession of most Pacific jurisdictions. Although this article focuses generally on the Pacific, specific reference is made to Samoa. Information contained in this article is primarily a result of a secondary research, a questionnaire

* Senior Legislative Drafter, Legislative Drafting Division, Office of the Attorney-General, Samoa; 2011/2012 Greg Urwin Award recipient, Pacific Islands Forum Secretariat; Pacific Legislative Drafters' Technical Forum; Full member of the Commonwealth Association of Legislative Counsel.

1 There are 12 USP member countries – Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu.

Mary Victoria Peteló Fa'asau

survey as well as interviews conducted with legislative drafters and persons involved in the legislative drafting process in Samoa and regional organizations.

This article comprises two main parts. The first part presents a brief overview of the legislative drafting process in Samoa and the role of the legislative drafter in that process. Although it may or may not be the same with other Pacific jurisdictions, the description of Samoa's legislative process represents the latest standard and level that legislative drafters in the Pacific have reached. It is important to understand the legislative process in order to identify and understand the challenges this article discusses.

The second part is an assessment of the challenges faced by legislative drafters in the Pacific. Among the many challenges, this article addresses five main ones: keeping up to date with best drafting practices; poor policy instructions; the shortage of qualified and experienced legislative drafters; drafting in the international context; and the domestication of precedent laws, including regional model laws.

This article advocates the importance of the role of a legislative drafter in the Pacific. It also provides recommendations on how to address these challenges so that Pacific laws are drafted more effectively.

B. The Legislative Drafting Process in Samoa

The *Constitution of the Independent State of Samoa* ('the Constitution') states in Article 43 that the law-making power is vested with Parliament. Before Bills are tabled in Parliament for its consideration and passage, Bills (and draft subordinate legislation) undergo a legislative drafting process, which Samoa, in 2008, specified in its Legislative Drafting Handbook ('the Handbook'). The Handbook:

... prescribes the technical requirements for the drafting of all principal and subordinate legislation in Samoa. From July 1, 2008 all laws drafted for Samoa must comply with the requirements and standards in the Handbook.²

This means that all drafters, whether government or legislative drafting consultants, must draft in accordance with the Handbook.

The Handbook states that the principal roles in the legislative drafting process consist of government ministries and corporations, the Office of the Attorney General ('AG'), government ministers, Cabinet, the clerk of the Legislative Assembly, and the Legislative Assembly.³

The Office of the AG is responsible for:

... drafting necessary legislation, or the final vetting and approval of all legislative drafts prepared by Consultants. The AG must certify a Bill or Regula-

2 Office of the Attorney General, *Legislative Drafting Handbook*, 2008.

3 *Supra* note 2, p. 6.

tion as being appropriate in both form and substance prior to it being submitted to Cabinet.⁴

The Office of the AG employs qualified Parliamentary Counsel, legislative drafting advisors, as well as principal, senior and junior level legislative drafters who form the legislative drafting division ('LDD'). Currently the LDD consists of two Parliamentary Counsels, one legislative drafting advisor, two senior legislative drafters, three junior legislative drafters, one senior Bills Officer, and one Senior Legal Secretary. Compared with other Pacific drafting offices, "Samoa has the largest government or State Law drafting office in the Pacific".⁵

The legislative process begins at the policy-making level. This responsibility is normally with the relevant government ministry that formulates or develops government policies that need translation into law. As stated in the Handbook:

A Ministry's policy formulation and development is made under the direction of the Ministry's C[hief] E[xecutive] O[fficer], and subject to the ultimate approval of the relevant Minister.⁶

The drafter receives the policies in the form of drafting instructions on legislative proposals. The drafter is expected to produce legally effective plain language drafts that give effect to government policy, seek clarification of drafting instructions, assist in solving legal problems and respond to the instructor's comments.

The Samoa Law Reform Commission, which was established under the *Law Reform Commission Act 2008*, extends the government's legislative drafting capacity.

It pursues law reform on the direction of the Prime Minister, Cabinet or the AG to ensure that major law reform is undertaken with broad stakeholder consultation.⁷

The sponsoring Ministry for a Bill is responsible for preparing a Cabinet submission, which is to be submitted together with the Bill to Cabinet. As required by the Handbook, a Cabinet Submission must include the AG's certificate, which is issued by the AG for a final draft Bill to certify his or her approval that the final draft Bill complies with Samoa's legislative drafting requirements and is therefore ready to proceed to Cabinet. Once Cabinet approves a draft Bill, it will then be referred to the Legislative Department at the Legislative Assembly where it is translated into Samoan and placed on the Parliamentary agenda.

In Parliament, a Bill is introduced by the minister responsible for it. Under the Standing Orders of the Parliament of Samoa, the "2nd reading of a Bill occurs

4 *Ibid.*, p. 29.

5 Refer to Table 1 on p. 211.

6 *Supra* note 2, p. 29.

7 *Ibid.*

Mary Victoria Petelō Fa'asau

3 days after the 1st reading”.⁸ “After the 2nd reading, it is referred for consideration by the various Select Committees depending on the area that the Bill deals with.”⁹ A committee may invite submissions from all interested ministries, agencies and individuals and shall consider its provisions in the light of any submissions made to the Committee. The Committee is required to produce a report to the Legislative Assembly of its consideration of the Bill. The report normally lists the people the Committee consulted and sets out the Committee’s recommendations to either amend the Bill or allow it to proceed without amendment. After the Legislative Assembly adopts the Committee’s report, the Bill is then considered in detail by the Legislative Assembly before its third and final reading and approval by the Legislative Assembly.

After the third reading, the P[rime] M[inister] then advises the Head of State to assent to the Bill. The Head of State, upon receipt of the Prime Minister’s advice, must give assent to an Act before it becomes law. In many cases it comes into force upon assent, but it is possible to delay the implementation by requiring notification of commencement to be published in the Government newspaper.¹⁰

Similar to most Pacific countries, Samoa’s legislative process is generally outlined in its Constitution and is complemented by the Standing Orders of the Parliament of Samoa. However, the complex nature of legislative drafting and the differences between the role of the policy maker and legislative drafter have seen Samoa think it appropriate to articulate its legislative process in the Handbook.

C. Assessment of the Challenges Faced by Legislative Drafters in Samoa and Other USP Member Countries

I. *Keeping Up To Date with Best Drafting Practices*

1. *Background*

A legislative drafter’s role is first and foremost technical in nature. Leaving aside the substance of the law or what a law should be about (as these are largely policy matters), a legislative drafter will focus mainly on how to word and frame each provision to minimize any dispute regarding it (unless a court’s discretion is required to further interpret or determine the provision). Because the skill of legislative drafting develops all the time, Pacific drafters need to continually develop in line with best drafting standards and requirements. For Samoa, these so-called

8 Standing Order 100(1) – After the first reading, the bill is set down for a second reading on the third sitting day following. Provided that a bill presented under a certificate of urgency signed by Le Ao o le Malo may be set down for a second reading on the same day the bill was read a first time.

9 Standing Order 101(1) – When a bill has been read a second time, it shall stand referred to the select committee identified by the Speaker.

10 *Supra* note 2, pp. 29-30.

best drafting standards are the drafting practices largely of our neighbouring countries of New Zealand and Australia.

The legislative drafting practices that Samoa adopts today result not only from the international accepted developments in the style of colonial drafters, but more recently from local and regional courses and trainings that the Samoan Government has provided for the LDD and other interested and qualified members of the legal profession. Today, the Handbook is the guideline for all legislative drafters, both local and consultants. The Handbook can be changed and varied from time to time by the LDD with the approval of the AG to update the drafting requirements so that Samoa drafters develop in line with more developed countries, particularly Australia and New Zealand.

There are many drafting techniques that a drafter learns in his or her practice and training, but this article will assess only a few of these techniques used by Samoa's drafters and the difficulties faced in drafting to comply with these techniques, as well as recommendations on how to keep in line with best drafting practices.

2. *Analysis*

a. Drafting in Plain Language

"Legislation is often criticised for being inaccessible in using convoluted language."¹¹ Often provisions were drafted in very complex and detailed sentences that made it hard for the ordinary person to read or understand. This is true where most of our laws contain detailed rules covering all foreseeable cases and are drafted with accuracy and precision to ensure there is certainty with applying rules. This was mainly because "the common law drafter paid little attention to readability but only to give effect to government's policy, and nothing more".¹² This often resulted in legislation that was hard to understand, and it added to administrative and legal costs.

To counter such criticisms, a common drafting style that has been developed over the years is that of plain language drafting. The use and understanding of the English language is therefore very important for all Pacific drafters. This in itself is a challenge because of the cultural diversity in the Pacific society. Countries with English as their first language find this a difficult task. Drafting in plain language in Pacific Islands whose first language is not English is even more challenging. Although the English language and skills of Pacific Islanders have increased over the years, a drafter must continue to refine and update his or her English skills in order to draft more effectively.

Plain language is not just about doing away with some of the bad drafting practices found in some 'common law'¹³ legislation, like long sentences. Nor is plain language something that the drafter adds to a draft when he or she is doing

11 Notes from Professor St.J. Bates, Samoa 4-week In-Country Legislative Drafting Course, Office of the Attorney General, 22 July 2009.

12 *Supra* note 11.

13 Common law legislation in the context of this article means legislation of common law countries.

Mary Victoria Peteló Fa'asau

a final check of it. Rather, plain language covers every aspect of legislative drafting. It focuses on the structure of legislation, the grammatical structures of sentences, the language used, and on providing aids to improve comprehension and readability.

The aim of plain language drafting is to simplify legislation by removing unnecessary obscurity and complexity and generally to make legislation as easy as possible to understand, even if the legislation deals with a complicated subject matter. Consider, for example, the following provision – “There is hereby constituted and established a department of the Government of Samoa to be known as the Department of Agriculture, Forests, and Fisheries ...”.¹⁴ To use plain English or ordinary language, the following can be substituted – “This section establishes the Department of Agriculture, Forests, and Fisheries’. Another common provision in legislation deals with clarifying that a law, or a provision of the law, is to apply even if another law may contain a contrary provision. Rather than beginning such a provision with ‘Notwithstanding the ... Act’, today, plain English drafting uses ‘Despite the ... Act’. The redrafted provisions avoid archaic words and are more current, direct and not unnecessarily coloured by superfluous words.

Drafting in plain language often results in much simpler rules. Drafters, however, must be cautious that they do not focus on producing simple rules that overlook the complexity of the issues with which they deal. Such simple rules may not give the certainty and precision that are fundamental characteristics of common law legislation. To achieve legal precision, legislation must be a complete and accurate statement of the rules and contain every essential item of information, even if it means that the section will be longer or that the drafter has to use more subsections or paragraphs. A well-known Commonwealth drafter, Garth Thornton, wrote:

The obligation to be intelligible, to convey the intended meaning so that it is comprehensible and easily understood by the affected parties, is best satisfied by writing with simplicity and precision.¹⁵

Thornton suggests that neither simplicity nor precision should be sacrificed for the other in trying to draft intelligible legislation. “The goal of the drafter should be to simplify substantive provisions without sacrificing precision. Plain language drafting will assist the drafter to achieve this goal.”¹⁶

It is not easy for a drafter to draft complex laws that are intelligible (simple and precise). Complex policy, complicated subject matter and a lack of time can make it difficult, but the drafter should always try to draft precise and simple rules.

14 Section 3 of the *Agriculture, Forests, and Fisheries Ordinance 1959*.

15 G.C. Thornton, *Legislative Drafting*, 4th edn, Tottel Publishing, UK, 1996, p. 49.

16 Thornton 1996, p. 15.

It is difficult for the drafter to take pride in his or her work if readers struggle to understand it. If the drafter tries to draft laws that are easy to understand, he or she is being respectful to the readers of the laws.¹⁷

The continuing development of Pacific countries today means they are faced with more complex matters largely to do with international concerns of trade, the environment, weaponry, taxation, and so on. This creates challenges in having to deal with more complex and technical terms and interpreting such language to complement plain language as well as coincide with a country's language. The complexity of modern legislation has led to drafters adopting drafting styles of using labelling and mathematical models to present complex concepts precisely and accurately, particularly with tax legislation. For instance, Section 4A of the *Income Tax Act 1974* of Samoa contains a formula as follows:

4A. Notwithstanding anything else in this or any other Act where in any year a taxpayer earns or derives residual assessable income and salary and wage income the amount of tax payable in respect of that residual assessable income shall be the value 'C' calculated in accordance with the following formula:

$$A B = C$$

Where:

'A' is the amount of tax that would be payable upon the aggregate of:

- (i) The taxpayer's residual assessable income for the year.
- (ii) An amount of residual assessable income equal to the amount of salary and wage income for that year.

'B' is the amount of tax that would be payable upon an amount of residual assessable income equal to the amount of salary and wage income earned or derived by the taxpayer for that year.

'C' is the amount of tax payable in respect of the taxpayer's residual assessable income for that year

A further difficulty in plain language drafting concerns expressing recognized and complex legal concepts accurately and simply to protect legal language from challenge. The language in legislation follows the language of the legal practice of the jurisdiction and uses terms that reflect established legal concepts. Legal language uses a more formal style and vocabulary than is found in ordinary language. A drafter must refrain from and avoid any attempt at defining common law terms such as legal concepts in contract law, criminal law and torts law. If a drafter is relying on a legal concept, he or she should use the term that lawyers commonly use to describe it as well as check the latest cases for any judicial rulings relevant to the term. Examples include 'reasonable', 'intentional', 'negligent', 'reckless' and

17 P. Dodgson & L. Mulitalo, 'Samoa In Country Training Program Legislative Drafting Workshop' (Handbook provided at a workshop held from 4 to 8 August 2008 in Samoa), p. 41.

Mary Victoria Peteló Fa'asau

'fraud'. The interpretation section could define these terms (where necessary), but often they are not defined so as to allow the courts more discretion to interpret them.

A further difficulty with regard to drafting in plain English concerns cultural implications. In 2000, David Lidimani wrote a report based on two lectures delivered to the USP Legal Drafting class of Semester II, 2000, by drafters Dr. Marcus Pilowski and Professor Don Paterson, with regard to legislative drafting and customs. He wrote that careful attention is required when drafting customary rules, principles and remedies:

Law and custom are intangible concepts with seemingly ambiguous characteristics. Understanding, prudence and care are essential requisites when undertaking to express and convert such intangible and ambiguous concepts into a visible form more readily comprehensible to the lay society. Thus, *writing* – the medium through which customs are transmitted into *the formal law* – must *spell* [out] the law in no harder terms than when first understood or intended. Writing out the law with [the] aim of achieving *the* best possible reflection of the customary principles to be incorporated is no easy task in the context of the region. Cultural diversity, oral tradition, and conflicting customs are some of the major barriers faced by drafters. But in any event, the recent move towards legislating for more recognition of customs is a positive development which must be pursued by regional countries with constitutions recognising custom as a source of law. That direction, when pursued by any particular regional country, will land 'benefits' as well as introducing technical problems so far as drafting is concerned.¹⁸

This article fully agrees with the above statement. This is because, ten years on, this continues to be a challenge that a drafter faces and must always be mindful of when drafting any legislation. The Samoa Constitution recognizes under Article 111(1) as part of the laws of Samoa "any custom or usage which has acquired the force of law in Samoa ... under the provisions of any Act ... or under a judgment of a Court ...". Exactly what these customs are varies throughout different villages.

b. Drafting Definitions

Definitions are common features of legislation. In addition to the Constitution, a drafter must be well versed with the provisions of his or her jurisdiction's general interpretation legislation, its implications and how it may be effectively and usefully deployed in drafting. The relevant law in Samoa is the *Acts Interpretation Act 1974* ('AIA'). Ideally, a drafter in Samoa must be well versed with the AIA to avoid drafting problems that often create unnecessary delays to the legislative drafting process. For instance, the interpretation section of an Act is often unnecessarily lengthened with terms already defined in the AIA. For instance, in the Samoa

18 D. Lidimani, 'Custom in Legislative Drafting: Adopting the FUSSY or FUZZY Style?', 2000, <www.paclii.org/journals/fJSPL/vol04/13.shtml> (Accessed 11 December 2009).

Accident Compensation Act 1989, the term ‘prescribed’ was defined even though it is already defined in the AIA. This continues to be a problem for a Pacific drafter, or any drafter for that matter, if he or she is not well versed or simply unfamiliar with the terms of his or her jurisdiction’s relevant general interpretation legislation.

Samoa’s AIA consolidates the laws relating to the interpretation of legislative enactments. The AIA extends and applies to every Act of the Samoan Parliament, unless otherwise stated in the specific legislation. It is often overlooked by lawyers giving legal advice on questions of statutory interpretation, but a drafter of legislation must always have regard to it and should have no excuse otherwise.

The AIA contains common provisions that the drafter can rely on without having to repeat them in other legislation. As a result, legislation is shorter than it would be if the common provisions had to be repeated in each Act. The definitions in an Act or a subsidiary legislation therefore supplement the definitions contained in the AIA, so a definition in the AIA should not be repeated in the Act being drafted. Common terms that a drafter must be aware of avoid redefining, unless it has a different meaning, as provided for under Section 4 of the AIA, include ‘Financial year’, ‘Holiday’, ‘Minor’, ‘Person’, ‘Prescribed’, ‘Savali’ and ‘Samoa’. The AIA also contains general rules of construction, as well as other interpretation rules including applying penal Acts to bodies corporate, when an Act is to commence, and the exercise of statutory powers between the passing and commencement of an Act.

A word used in an Act is given its ordinary (dictionary) meaning unless the drafter defines the word or relies on a meaning given to the word in an Interpretation Act. The meaning given to a defined term applies throughout the Act unless there is a contrary intention. With regard to the latter, the drafter should be alert as to whether interpretations allow for drafting discretion. Almost all interpretation sections of Acts in Samoa allow for discretion in the interpretation of words and phrases. For instance, Section 2(1) of the *Customs Act 1977* provides:

In this Act, ‘unless the context otherwise requires’: ... [‘Boat’] means any vessel other than a ship.

In other cases, such discretion is not allowed and more limited meanings are given to terms, particularly in certain sections or parts of legislation. For instance, Section 169 of the *Customs Act 1977* provides:

In this Part of this Act: ... ***Methylated spirit*** means any spirit which is mixed with methyl alcohol or with wood naphtha, or to which any other substance has been added which has the like effect as methyl alcohol or wood naphtha, in rendering spirit unsuitable for human consumption; and includes any spirit from which methyl alcohol, wood naphtha, or such other substance has been unlawfully removed; and also includes all spirit, whether imported or made in Samoa, which has been entered for home consumption as methylated spirit.

Mary Victoria Peteló Fa'asau

Interpretation provisions have to be used with care, and the drafter must be sure that they fit the drafting needs.

In drafting definitions effectively, a drafter must employ a utilitarian rather than over-elaborate style to avoid ambiguity. To achieve this requires not only the guidance of the AIA but also the skill to draft simply and precisely, while also covering every element required. The challenge in drafting as such is reflected in certain Pacific legislation, for example, Section 2 of the *Environment Act 2002* of Cook Islands defines 'animal' as follows:

'Animal' means any species, alive or dead, of the animal kingdom (other than human beings), and includes the following:

- (a) marine animals;
- (b) terrestrial animals;
- (c) migratory animals that occasionally visit the Cook Islands or Cook Islands waters;
- (d) any part of an animal's life cycle, such as eggs or parts of eggs;
- (e) any part of animals or animal products such as skin, feathers, horn, shell or other part of an animal; ...

The problem with the above definition is that using 'means' and 'includes' in the core definition may confuse the reader. The core definition of animal is also over-elaborated for the purpose, and the associated elements could also be simplified, avoiding the ambiguity of whether the internal organs of animals were included in paragraph (e). A better redraft could be:

'animal' means any living or dead animal other than a human being, any part of an animal, and any component of its life cycle.

The redraft is more simple and short, while also covering all that is intended to be covered by the definition.

The Handbook directs the drafter to draft carefully when drafting definitions. These include drafting only necessary definitions and keeping the list of definitions as small as possible, taking care to include in the interpretation section only words that are used in a draft Bill and concisely stating definitions that assist in the understanding and application of the Act.¹⁹

However, in legislation such as company or taxation legislation, the definitions section is likely to be extensive. For instance, the Samoa *Companies Act 2001* takes over ten pages to define terms and phrases. Unlike most Acts, these definitions are contained in a single schedule at the end of the Act rather than drafted as Section 2 of the Act.

Furthermore, as mentioned above, drafting definitions can be challenging because of varying judicial approaches to statutory interpretation, which drafters have to always remain conscious of. For instance, "Courts assume that every

19 *Supra* note 2, p. 51.

enacted word is intended to have some legislative effect. This is a salutary warning for the drafter, but not applied indiscriminately.”²⁰ Courts will also “identify the ‘mischief’ addressed by the legislation in order to interpret the legislative ‘remedy’”.²¹ Where there are two possible constructions of a provision, one of which would clearly advance the purpose of the legislation and the other would advance it less or not at all, the former is to be preferred. “It may lead a court to adopt a broader interpretation of words than would normally be adopted.”²²

Furthermore, many words today have technical meanings. It is permissible for a provision to be inserted to generally adopt definitions of a technical nature that appear in a related law or a relevant convention or other such document. Technical meanings also use a word to convey a particular concept, or to have a specific connotation in its legal context, as opposed to ordinary meaning. For example, in drafting a Bill related to telecommunications, a drafter will use the technical terms that are used for the subject. If the legislation will have a wide audience and not just experts, a drafter will consider defining the technical terms, as long as accurate definitions can be prepared. In these cases, it is appropriate to use technical terms that are not in common use. Technical definitions require clear policy instructions and explanation from the policy instructor. Often this is not provided, and this creates extra research for the drafter.

c. Legislation and Ultra Vires

Ultra vires, which means ‘beyond power’, is a ground for challenging subordinate legislation in the Courts as well as a focus of parliamentary scrutiny. Ultra vires is consequently a concern of the drafter of both the enabling provisions and the subordinate legislation. With regard to the enabling provision, a drafter must confirm that the terms of the enabling provision are sufficient to allow all that it is properly intended to be done by subordinate legislation. The drafter must also ensure that the terms of the enabling provision do not allow things to be done by subordinate legislation that are not required and that may attract unnecessary parliamentary or judicial concern.

As regards subordinate legislation, a drafter must have a clear understanding of what the enabling provisions that authorize the making of the subordinate legislation are and whether those enabling provisions, given the “judicial approach

20 Notes from Professor St.J. Bates, Samoa 4-week In-Country Legislative Drafting Course, Office of the Attorney General, 30 July 2009.

21 Notes from Professor St. John Bates, Samoa 4-week In-Country Legislative Drafting Course, Office of the Attorney General, 4 August 2009.

22 *Supra* note 20.

Mary Victoria Peteló Fa'asau

to *ultra vires*”,²³ admit the inclusion of everything that the drafter’s instructions require to be included in the subordinate legislation. A drafter must always consider whether there will be parliamentary criticism on *ultra vires* grounds or (where there is such a parliamentary power) rejection of the subordinate legislation on such grounds.

For this reason, it is most important that drafters are always equipped with or have access to the most updated or consolidated laws. Access to the most current and updated laws continues to be a problem in the Pacific. To combat this, Samoa in 2007 undertook to annually consolidate its laws. This consolidation was undertaken with the authority of the AG under the *Revision and Publication of Laws Act 2008*, which is a major advance on the *Reprint of Statutes Act 1972*. Prior to the 2007 consolidation, the Acts of the Samoan Parliament were unrevised and unconsolidated for over ten years. The annual consolidations will ensure that Samoan drafters can always have easy access to the latest laws to assist in ensuring the avoidance of drafting *ultra vires* legislation.

d. Target Audience

Another challenge faced by drafters concerns the varying target audiences because to make laws easy for readers to understand, the drafter needs to develop an awareness of his or her audience and why they read the laws.

Generally, audience groups for legislation include politicians who scrutinize legislation as it passes through the Parliament, people affected by the legislation who want to understand what their rights and obligations are, lawyers and other professionals who give advice or assist people affected by the legislation, government officials who administer the legislation and need to understand their duties under the legislation and judges and magistrates who interpret the legislation if there is uncertainty or ambiguity.

“It is generally accepted that all laws cannot be drafted so that ‘a person in the street’ can understand them.”²⁴ This means that despite trying to draft as simply as possible for the lay person to understand, a drafter will often be faced with the need to adopt more complex language owing to factors such as the technicality of the purpose or subject of the legislation and the legal nature of the particular law. This is particularly the case for laws regulating a distinct part of the community, like trust laws, as well as domestic implementation legislation for international conventions and treaties. Even the laws that affect all members of

23 In administrative law and as applied in Samoa, an act may be judicially reviewable *ultra vires* if an administrator did not have the substantive power under law to make a decision; it was wrought with procedural defects; if there is an abuse of power (e.g., *Wednesbury* unreasonableness or bad faith); or a failure to exercise an administrative discretion (e.g., unlawfully applying a government policy). The doctrine may entitle a claimant to various prerogative writs, equitable remedies or statutory orders if they are satisfied. In the case of *Anisminic v. Foreign Compensation Commission* [1969] 1 All ER 208, Lord Reid is accredited with formulating the doctrine of *ultra vires*. *Anisminic* is known for not depriving courts of their jurisdiction to declare a decision a nullity, even if a statute expressly prevents the decision being subject to judicial review.

24 *Supra* note 17.

the community, such as traffic laws, cannot easily be drafted so that everyone can understand them.

A drafter should expect that a judge or lawyer will be able to understand the law, but should not draft the law for them expecting everyone else to make an extra effort to understand the law. If mid-level government officials or people directly affected by a law can understand it, it should be easier for judges and lawyers to understand. What is therefore most important and equally challenging is that the drafter take every approach to balance the readability and clarity of the legislation against ensuring that the purpose of the legislation is achieved.

Furthermore, to assist the drafter, a drafter has to consider the knowledge and interest of the readers and how they are likely to read the law. For example, lawyers and accountants will closely scrutinize tax laws to lawfully reduce taxation payments for their clients.

Special note should be made of the use of other languages. In countries where there is only one official language and only one legal system, drafting legislation is still a difficult and highly specialized task. Preparing bilingual legislation is an even more challenging proposition. With many different languages, Pacific countries must find effective ways to meet that very challenge. In Samoa, legislation at the national level must be developed, drafted and enacted in both English and Samoan. In Vanuatu, because of national interest, certain laws are translated into Bislama, such as the Customary Land Tribunal Bill and the Family Protection Bill on domestic violence.

The laws were considered to be of interest to such a wide audience that it was not sufficient to have them available only in English and French. Translators in Vanuatu have found plain language legislation easier to translate.²⁵

This further emphasizes the importance of the involvement and recruitment of local personnel as legislative drafters. The assistance of overseas consultants should be sought only for expert assistance where Samoa lacks the expertise.

II. *Poor Policy Instructions*

1. *Background*

To draft effective legislation, it cannot be stressed enough how important it is for a legislative drafter to understand the policy background behind the law. Only then can a legislative drafter undertake his or her job efficiently. In other words, the effective translation of policy into a legislative framework can be done only if there are clear instructions from the policy maker.

However, for Pacific drafters, the dividing line between policy and drafting the legislation is often not so clear. In a paper written by Nainendra Nand on legislative drafting in the Pacific, he stated:

... the countries in the Pacific have experienced that turning government policy into clear legislation is not an easy task. Those responsible for giving instructions to the legal drafters are often middle to lower level managers in

25 *Supra* note 17, p. 42.

Mary Victoria Peteló Fa'asau

government departments who have no training in the law and are often handicapped in giving quality instructions to the legislative drafter.²⁶

This challenge is perhaps the most common challenge faced and agreed to by Pacific drafters. If the drafter does not clearly understand the policy instructions, it is difficult to draft, and the drafting process is usually delayed. For instance, savings and transitional provisions are usually difficult to draft if clear policy instructions are not given. Transitional and savings provisions may be needed if an existing law is repealed and replaced, or amended. Transitional provisions set out rules aimed at ensuring a smooth transition from the old law to the new law.

For example, it may be necessary to determine how activities that were started under the old law but have not yet been completed will be dealt with under the new law. For instance, a licensing scheme is replaced by a completely new licensing scheme, but the purpose of the scheme is essentially the same. In order for a drafter to draft effectively, the instructor must consider transitional issues such as whether a licence granted under the old scheme should continue to have effect after the new scheme comes into existence and, if yes, whether it should have effect under the old scheme (with the old scheme preserved or 'saved' for that purpose), or whether it should have effect as if it were a licence granted under the new scheme. If an application for a licence under the old scheme is still being considered when the new scheme commences, should the consideration of the application go ahead after that commencement, or should the applicant have to make a new application under the new scheme? If consideration of the application should go ahead, should it go ahead under a preserved version of the old scheme, or should it be translated into an equivalent application under the new scheme? The old scheme and the new scheme both provide for regulations to specify licence conditions. Should the regulations made for this purpose under the old scheme have effect as if they were regulations made for the same purpose under the new scheme, or will a completely new set of regulations be needed for the new scheme?

Ideally, such questions would not have to be asked if the policy instructions are already settled and in place. However, in practice, this is rarely so.

2. *Analysis*

a. Lack of Resources

As stated by one of the Pacific's most experienced legislative drafters, Rupeni Nawaqakuta, "legislative drafting generally involves the formulation, assessment and writing of government policy into legislative sentences".²⁷ He elaborated on this by writing:

26 N. Nand, 'Legislative Drafting, Distance Education and Its Contribution to Good Governance in the Pacific', 2008, <www.wikieducator.org/images/3/37/PID_309.pdf> (Accessed 11 December 2009).

27 R. Nawaqakuta, 'Challenges and Problems of Legislative Drafting in the Fiji Islands', 2003 *The Legal Lali*, pp. 13-14.

The formulation stage is called the policy development of legislative proposals. The planning and assessment involve research into the legislative proposal or policy and actual drafting process. The skills required of a legislative drafter include detailed understanding of the proposal, and the existing law that may impact upon the proposal.²⁸

Such a detailed understanding of the legislative proposal is most often difficult to attain because legislative drafters continue to receive poor policy instructions from the policy maker, which in Samoa is normally a government ministry, organization or even Cabinet. Poor instructions usually result from inadequate policy development, which results in the drafter having very little understanding of the issues behind new government policies. Often inadequate instructions will be clarified through back and forth correspondence or meetings, which often delay the legislative drafting process.

One of the reasons for the inefficiency of policy development concerns lack of resources, which forces difficulties in getting complete and sufficient instructions. This in turn delays and slows the drafting process because a drafter needs to produce more drafts in order to get clear and explicit instructions. Ministries and agencies, for instance, in Samoa who are responsible for providing policy instructions lack human resources in that they do not have specifically trained policy makers such as in the more developed countries, for example, Australia.

Ideally, the drafter should not instigate policy or make key policy decisions. For example, a drafter should not decide the rate of new tax. However, because of often limited capacity to develop policy and prepare detailed drafting instructions, the Pacific drafter is expected to contribute more at the policy development level and the drafting instructions stages. Often a drafter is left to research and make the decision himself or herself, leaving it to the policy maker to comment and confirm. In such circumstances, a drafter is usually faced with having to refer to similar Acts of other countries as precedents for drafting a piece of legislation. All too often, this is the practice in Pacific jurisdictions whose circumstances and legal systems are very similar.

Views vary on the extent to which the drafter should be drawn into the framing of the drafting instructions. If the drafter is involved, this should lead to more comprehensive instructions and facilitate the drafting process. If the drafter is not involved, it enhances the objectivity of the drafter in approaching the instructions, and omissions and limitations can be resolved in subsequent meetings between the drafter and the instructing department. Whatever the degree of involvement, it is important that the drafter bring an independent mind to drafting instructions when they are received. The importance of having the drafter being separate from the development of the policy that leads to the instructions is to facilitate this.

Furthermore, drafters often do not have enough time to do the drafting as thoroughly as they would like to. Because of the still too small size of drafting offices in the Pacific, most drafters work on numerous draft laws at a time, and

28 *Supra* note 27.

Mary Victoria Petelō Fa'asau

late changes to instructions are not unusual. Also, in most Pacific countries with no separate drafting section in their respective State Law offices, a lawyer who is given a drafting job is also often tasked with several other civil or criminal litigation jobs. Either way, a drafter should not put forward a draft Bill or regulations that he or she knows will not work or that contain gaps. However, a drafter may have to put forward a draft Bill or regulations that he or she knows could be made better with more time.

b. Consultation

The consultation part of the legislative drafting process is very important because it is an opportunity to receive the input of public or concerned stakeholders regarding a legislative proposal. This applies to the drafting of major laws as a result of a law reform project. Such laws would involve all relevant government and community stakeholders. The Handbook for Samoa provides that the:

Ministry or agency responsible for a Bill has the primary responsibility to identify stakeholders and to facilitate their effective involvement in a legislative reform project. The extent of stakeholder representation and the means by which stakeholder consultation is to be undertaken must be discussed in detail with consultant drafters and other project officers. In most cases, the appointed officer of the Ministry or agency plays the key role in facilitating the consultation processes. The AG may be authorized by the Prime Minister to give draft Bills upon their referral to Parliament to the Legislative Committee of the Samoa Law Society for their comments.²⁹

Because of the number of laws to be drafted and the time constraints faced by the limited number of legislative drafters of the Samoa AG's Office, major law reform usually involves the procurement of overseas legislative drafting consultants to draft the relevant legislation. The Handbook requires that for such law reform projects, in submitting the final draft to the AG, the consultant legislative drafter is responsible for providing a report on the drafting of the legislation, including the consultation process involved. In many cases, extensive formal consultation on the policy will be undertaken before drafting instructions are issued to the LDD or the legislative drafting consultant. Consultation with other government agencies is required if a legislative proposal impacts on the area of responsibility of another Ministry; for example, public health matters (Ministry of Health) such as malaria control may affect the environment (Ministry of Natural Resources and Environment).

Legislative drafters are often involved in consultations held on a draft Bill or after an Act is passed to explain matters regarding legal interpretation. A common problem faced by drafters is the expectation by stakeholders that the drafter is to explain and clarify issues that concern the enforcement of the Act rather than just the drafting matters; that is, they often have to answer policy questions rather than legal questions, or more specifically, legislative drafting questions. This has been a problem faced by legislative drafters in Samoa where it continues to be mistaken that because drafters *drafted* the law, they are expected to know

²⁹ *Supra* note 2, pp. 13-14.

everything about the draft and so should be consulted on policy matters that the responsible Ministry should be consulted on.

Of course, because the drafter drafted the legislation, the drafter should be expected to know a lot about it. However, the task of clarifying to stakeholders how the legislation is to be enforced or administered should always be left solely to the responsible Ministry or agency. A very simple example is as follows – a drafter is tasked to draft regulations for the Ministry of Transport under Section 45 of the Samoa *Road Traffic Ordinance 1960* to prohibit the usage of mobile phones while driving. The Ministry of Communications confirms the definition in the regulations for ‘mobile phone’ to exclude ‘hands-free mobile phone car kits’ and ‘hands-free mobile phone car sets’. During a consultation on the regulations, the drafter is asked to explain what such car kits and car sets are.

The drafter will refer this to the relevant representative from the Ministry of Communications to explain as he or she should have a more technical and expert understanding of what these are. Although the drafter would have an understanding of what they are, it is a policy matter rather than a drafting matter.

Drafters have also found from consultations how often those who are required to enforce a certain new draft law understand little of the new draft law because they do not know their existing obligations and roles under existing laws relevant to the new law. For instance, in the example of the mobile phones regulations above, it is important that police officers know that the regulations only create an offence of driving while unlawfully using a mobile phone. The regulations would not necessarily specify what police officers are required to do when catching a person who breaches the regulations, because such procedural matters are already covered under current laws such as the Samoa *Road Traffic Ordinance 1961*, *Police Offences Ordinance 1961*, *Crimes Ordinance 1961* and the *Police Powers Act 2007*.

c. Legally and Politically Sensitive Matters

A drafter may be given instructions that are legally or politically sensitive. The difficulty the drafter faces concerns how he or she is to handle such instructions. Ideally a drafter should identify such matters to the instructing department and discuss how the sensitivity might be reduced. For instance, instructions may affect personal rights, such as depriving access to the Courts, unreasonably limiting freedom of speech or right of assembly, reversing the onus of proof in criminal actions and intruding on personal privacy. Instructions may also create excessive bureaucracy with regard to complex procedures and creating forms asking unnecessary wide-ranging questions. Instructions may also create delegated competence for government to impose taxation, or alter taxation regimes. As recently stated by Akbar Khan, Director of the Legal and Constitutional Affairs of the Commonwealth Secretariat:

Mary Victoria Peteló Fa'asau

The legislative drafter plays an important role in promoting the rule of law besides ensuring that the political values of the Commonwealth can be effectively translated into Commonwealth laws.³⁰

In such situations, the drafter's response would be like that of any other lawyer, in that he or she should advise the relevant instructor of the legal implications involved because even if such a draft law is approved by Parliament, the Courts will eventually rule on whether such legislation or part of the legislation is unlawful or unconstitutional. For instance, Section 28B³¹ of the Samoa *Narcotics Act 1967* was held by Judges Morling, Ward and Muhammad JJ in the Court of Appeal case of *Police v. Stehlin*³² as being unconstitutional because it was a breach of a person's right to a fair trial under Article 9(4)(d) of the Constitution. Section 28B has since been repealed.

Similarly, if a drafter is instructed to incorporate a provision in the draft Chemical Weapons Bill 2010 for Samoa to provide that a certificate of an analyst is admissible in any Court or proceedings as prima facie evidence of the facts and of the correctness of the results in the examination, the drafter should draft as follows:

34. Analyst's evidence-(1) The Minister may appoint an analyst for the purposes of this Act.

(2) Subject to Subsection (3), a certificate of an analyst appointed under this section stating that the analyst has analysed or examined a substance and stating the result of the analysis or examination:

- (a) is admissible in Court and before any other judicial or quasi-judicial body; and
- (b) is prima facie evidence of the facts stated in the certificate and of the correctness of the results of the analysis or examination.

(3) A request may be made by the Court for the analyst to appear in the proceedings for the purpose of examination

The drafter should also advise that the instructions appeared to imply a breach of a person's right to a fair trial under Article 9 of the Constitution and that this clause was therefore drafted to circumvent constitutional challenge by subjecting

30 Commonwealth Secretariat, 'Legislative Drafting Skills Critical for Development of the Rule of Law', 2010, <www.thecommonwealth.org/news/218774/180110legislativedrafting.htm> (Accessed 3 February 2010).

31 28B. **Reports as evidence** – (1) The Court shall, in any proceedings brought under this Act, accept a certified report by the Department of Scientific and Industrial Research in New Zealand on narcotic specimens or samples sent by the Police Service to New Zealand for laboratory analysis and tests as conclusive evidence of the truth of the contents of such report without having to call the person who made the report to testify as to such report:

(2) Notwithstanding subsection (1) of this section where a defendant challenges the truth of the contents of such report, the Court may, if satisfied that the challenge is based on reasonable grounds other than the hearsay rule of evidence, refuse to accept such report as conclusive evidence of the truth of its contents.

32 [1993] WSCA 4.

subsection (2) to a new subsection (3). This will allow the Court to request the appearance of the appointed analyst so that the relevant party to the proceedings has the right to examine the analyst's evidence.

Likewise, legislation may contain privative clauses, which are clauses that may potentially exclude the courts from further reviewing a decision by a lower Court, a quasi-judicial or administrative decision making body. For instance, Section 71 of the Samoa *Land and Titles Act 1981* is a privative clause, which provides that:

... no decision or order of the Court shall be reviewed or questioned in any other Court by way of appeal, prerogative writ or otherwise howsoever

This means that a person who is aggrieved by any decision or order of the Land and Titles Court cannot appeal or seek judicial review from the Supreme Court. However, the Supreme Court has, in a number of cases, read down this privative clause, meaning that it does not effectively prevent review. For instance, in the case of *Alomaina v. Ulises and Others v. Land and Titles Court and Others*,³³ the Supreme Court held that Section 71 is still subject to the supreme law of Samoa, which is the Constitution, specifically Article 4,³⁴ regarding the right of a person to apply to the Supreme Court to enforce his or her rights under Part II. The Supreme Court therefore held that it has jurisdiction to review a decision of the Lands and Titles Court where that decision breaches the rights of a person under Part II of the Constitution. Likewise, in the case of *Pouniu v. Land and Titles Investigations Committee*,³⁵ it was held that if a person or body that performs a public function commits an error of law or a jurisdictional error in coming to a decision or determination, that decision or determination is subject to review by the courts regardless of a privative clause. Since the landmark decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission*,³⁶ virtually every error of law, including a breach of natural justice, is now a jurisdictional error that is reviewable by the courts irrespective of a privative clause. The rule of law would be seriously at risk if the position were otherwise.

A drafter must also be open-minded and aware of changes in different subject areas. For instance, it is not unusual for a drafter to draft laws that he or she may disagree with. For instance, if a drafter were instructed to draft a law to legalize abortion in Samoa, despite his/her first impression and strong belief that abortion should never be allowed under any circumstance, the drafter must be more open-minded to the policy reasons of the instructions. For instance, after further clarifications with the instructors, the drafter may find that abortion is only

33 Unreported decision of the Supreme Court of Samoa dated 4 November 1998.

34 Art. 4. **Remedies for enforcement of rights** – (1) Any person may apply to the Supreme Court by appropriate proceedings to enforce the rights conferred under the provisions of this part.

(2) The Supreme Court shall have power to make all such orders as may be necessary and appropriate to secure to the applicant the enjoyment of any of the rights conferred under the provisions of this part.

35 [2003] WSSC 5.

36 [1969] 1 All ER 208.

Mary Victoria Peteló Fa'asau

meant to be legalized in emergency circumstances where it is necessary to do so for the mother's health.

A drafter is therefore obliged to ask for further clarification about the instructions and provide the relevant and correct legal advice, which may possibly affect how the relevant Bill or regulations will be drafted. In any case, the drafter's role is exclusive of policy, and a drafter should be prepared to draft according to policy instructions even if at a personal moral level, he/she is in complete disagreement with those instructions. It is therefore important that a drafter, like any other lawyer, must always be both diplomatic and effective in dealing with the instructing department. Likewise, throughout the drafting process, instructions should always be clarified to enable the drafter not only to provide the correct legal advice but especially to provide an effective draft that could be more acceptable rather than unacceptable.

III. Shortage of Qualified and Experienced Legislative Drafters

1. Background

As shown in Table 1, there remains a need for more legislative drafters in the Pacific. Table 1 shows that to date, there are 41 'local'³⁷ legislative drafters in the 12 USP member countries. In State Law offices, Samoa contains the largest number of local legislative drafters (seven) and most other countries range from zero to five. This shortage has been a "persistent problem that has remained since the colonies gained independence from their colonial rulers".³⁸

It has been recognized regionally, not only by Pacific governments but also by the Pacific Islands Forum Secretariat (PIFS), that the "need for high quality legislative drafters is one of the most pressing legal needs in the Pacific Region."³⁹ As a result, many of those required to undertake drafting training assignments lacked the necessary skill and experience needed. The use of unqualified drafters leads to inconsistencies in laws, policies and practices, which in turn leads to ambiguity around certain laws.

In addition to personnel constraints, government officials and heads of department generally do not realise the time and skill required for adequate drafting but rather wrongly assume that legislation could materialise almost instantly ... as many jurisdictions do not have specific draftspersons the role is instead fulfilled by persons within the Attorney-General's Office whom, along

37 Local means that the number does not include overseas consultants or advisors engaged by different Pacific countries to assist or undertake legislative drafting work.

38 *Supra* note 26.

39 Australian AG's Department, 'Legislative Drafting Pairing Program', 2008, <www.ag.gov.au/www/agd/agd.nsf/Page/InternationalDevelopmentAssistance_Pacificlegalknowledgeprogram_Legislatedraftingpairingprogram> (Accessed 11 December 2009).

Table 1 *Number of Qualified Local Legislative Drafters in USP Member Countries as of February 2010*

Pacific Island Country	Number of Legislative Drafters^a	Government/Private Practice
Cook Islands ^b	2	Both in private legal practice
Fiji ^c	7	5 government and 2 in private practice
Kiribati ^d	0	
Marshall Islands ^e	3	All government
Nauru ^f	2	Both government
Niue ^g	0	
Samoa	9	7 government and 2 private
Solomon Islands ^h	5	All government
Tokelau	-	
Tonga ⁱ	8	3 government and 5 private
Tuvalu ^j	0	
Vanuatu ^k	5	All government
<i>Total</i>	<i>41</i>	

Note: The above figures do not include Legislative Drafting Consultants who are commonly engaged by Pacific governments to draft or assist in drafting their laws. Also, a figure could not be obtained for Tokelau.

a Number of lawyers who undertake legislative drafting tasks on a daily basis.

b Email from Mona Ioane <mona@crownlaw.gov.ck> to Mary Faasau <nolap@ag.gov.ws> 9 February 2010.

c Email from Selai Lewanitoga <selai.lewanitoga@ag.gov.fj> to Mary Faasau <nolap@ag.gov.ws> 9 February 2010.

d Email from Taaira Timeon <taaira@legal.gov.ki> to Mary Faasau <nolap@ag.gov.ws> 8 February 2010.

e Email from Divine Waiti <djwaiti@yahoo.co.uk> to Mary Faasau <nolap@ag.gov.ws> 8 February 2010.

f Lalotua Mulitalo, 'Legislative Drafting Challenges – Our Neighbours' (Paper presented at the Judiciary and Samoa Law Society Bi-Annual Seminar 2009, Apia Samoa, 9-11 December 2009).

g Email from Justin Kamupala <justin.djls@mail.gov.nu> to Mary Faasau <nolap@ag.gov.ws> 9 February 2010.

h Email from Rupeni Nawaqakuta <rnawaqakuta@attorneygenerals.gov.sb> to Mary Faasau <nolap@ag.gov.ws> 7 February 2010.

i Email from James Lutui <jlutui@crownlaw.gov.to> to Mary Faasau <nolap@ag.gov.ws> 7 February 2010.

j Email from Filiga Taukiei <fili3s10@gmail.com> to Mary Faasau <nolap@ag.gov.ws> 11 February 2010.

k Email from Angelyn Saul <asaul@vanuatu.gov.vu> to Mary Faasau <nolap@ag.gov.ws> 8 February 2010.

with drafting, are expected to prosecute and advise, placing further restrictions on time.⁴⁰

40 Pacific Working Group on Legislative Drafting. The *Report and Framework for Action* mentioned here contains the meeting outcomes of the Pacific Working Group on Legislative Drafting. The report was prepared by and belongs to the Commonwealth Secretariat, 2007.

Mary Victoria Petelō Fa'asau

2. *Analysis*

Where there was once a lack of interest in legislative drafting, there is now increased interest. Pacific Island Governments are looking to have the growing number of returning graduate lawyers contribute to all legal professional areas, that is, criminal, civil and legislative drafting. To date, a number of Pacific lawyers have shown more interest in committing to drafting as a career, although “some who are now public servant drafters would have that occasional longing to at least once put that pencil down, don a gown and participate in court litigation”.⁴¹

In the past few years, there has been progress in the number of drafters in the Pacific, particularly in Samoa, which today has a LDD of seven lawyers who are qualified legislative drafters. Because of the recognition that is given to the distinct features of legislative drafting, the State Law offices of Pacific countries such as Samoa, Vanuatu and the Solomon Islands are influencing young minds to pursue a career in legislative drafting. This contrasts with the situation at least five years ago, when there were no legislative drafters.

However, according to Pacific drafter Nawaqakuta in 2003, he says:

... [f]rom experience, it takes a minimum of about 5 years to train one to become a reasonably experienced legislative drafter.⁴²

The majority of the 39 drafters in the Pacific have less than three years training and experience in legislative drafting. The number of drafters as well as the amount of experience and training is still developing, so within the next two to five years, the Pacific will be seeing more local legislative drafting experts.

One of the reasons why it is difficult to recruit local lawyers in this field concerns the technical nature of the work, as it is often seen as boring and not as ‘exciting’ as litigation. Legislative drafting is more associated with experienced or senior lawyers. When a law student graduates from law school, the main interests of the student would fall in the specific areas of criminal or civil litigation because these cover the main subjects taught in law school. It makes it even more important in our small Pacific societies where being such a lawyer (litigation lawyer) is highly recognized and respected within families and communities.

The nature of legislative drafting is completely different from litigation or any other legal work. Although a litigator will spend most of their time solving legal problems in Court, a legislative drafter will spend most of his or her time solving problems through pen and paper. Such work may not be exciting to young graduates, and of course they choose to do what they consider to be more upbeat. For instance, over three years, the LDD acquired five new graduates as opposed to the other divisions (Criminal and Civil), which acquired up to ten each. Upon questioning twenty junior lawyers of the Samoa Office of the AG as to whether they were interested in moving to the LDD, seventeen said yes and three were

41 L. Mulitalo, ‘Legislative Drafting Challenges – Our Neighbours’ (Author’s notes from conference presentation delivered at the Judiciary and Samoa Law Society Bi-Annual Seminar 2009, Apia Samoa, December 2009).

42 *Supra* note 27, p. 14.

unsure. This goes to show that there is interest in legislative drafting. However, of those who said yes, most of their reasons were that they heard that legislative drafters make the most money but that they do not want to move instantly because they also think it is 'boring'.

Secondly, training policies focused on legislative drafting need to be improved. Since 2007, Samoa has been very proactive in developing capacity building of local legislative drafters. Drafters not only receive local training but also overseas training opportunities, such as the Pacific Drafter's Technical Forum on Legislative Drafting (PDTFLD), the second of which was held in Canberra in October 2009.

Furthermore, in 2007, the Pacific Working Group on Legislative Drafting noted that:

... [t]here is a shortage of qualified and experienced legislative drafters in the Commonwealth, particularly in smaller jurisdictions where resources are limited, remuneration is poor and the work is overwhelming while the recognition is lacking. A common practice is for lawyers to multi-task and undertake a range of duties including legislative drafting. This aggravates the problem of recruitment and retention of legislative drafters. This does not help in the revision or development of laws, or the ratification and implementation of international conventions into national laws.⁴³

For example, most Pacific State Law offices such as in Kiribati,⁴⁴ Tuvalu⁴⁵ and Tonga⁴⁶ have about ten lawyers or fewer and priority is towards criminal prosecution and civil litigation work as opposed to legislative drafting. This lack of local lawyers makes it hard to recruit and retain local lawyers who are interested in legislative drafting, and the lack of qualified legislative drafters means these countries are often pressured to engage overseas consultant legislative drafters to draft and review most of their laws.

However, even in Samoa, which currently has seven State Law office legislative drafters, the demand by governments for the engagement of legislative drafting consultants is quite common not only because of inadequate capacity but also because of the complexity and technicality of certain legislative proposals. For example, recently, consultants were engaged to modernize a number of Acts such

43 *Supra* note 40.

44 The Kiribati Office of the AG is mandated to carry out legislative drafting, reviewing and reform. Owing to the small number of lawyers, there is no person specifically tasked or qualified to draft laws. However, the AG assigns to staff only minor legislative tasks. Major legislative tasks are dealt with by consultants. (Email from Taaira Timeon <taaira@legal.gov.ki> to Mary Faasau <nolap@ag.gov.ws> 8 February 2010.)

45 Currently, there are three lawyers in the Tuvalu Office of the AG so everyone is involved to some extent in legislative drafting. (Email from Filiga Taukiei <fili3s10@gmail.com> to Mary Faasau <nolap@ag.gov.ws> 11 February 2010.)

46 In the Tonga Crown Law Office, apart from the Solicitor General, two other solicitors have taken the Professional Diploma in Legislative Drafting Course and so are qualified to undertake some legislative tasks. However, civil and criminal litigation are prioritized. (Email from James Lutui <jlutui@crownlaw.gov.to> to Mary Faasau <nolap@ag.gov.ws> 7 February 2010.)

Mary Victoria Peteló Fa'asau

as the *Housing Corporation Act 1989*, *Development Bank Act 1974*, *National Provident Fund Act 1972* and the *Airport Authority Act 1984*.

Most Pacific countries rely heavily on legislative drafting consultants to draft their laws because of the technicality not only of the skill of drafting but also of the subject matter that requires reform and new laws drafted for. For Samoa, before the inception of the Handbook, procurement of legislative drafting consultants, although useful, was also burdensome. The inception of the Handbook for Samoa has lessened the burden by restricting how a consultant drafter can draft. The AG, Ming C. Leung Wai, in his foreword to the Handbook, states:

Over the years my Office has been presented with a great many draft law that have failed to meet the most basic technical assessments and quality tests. Large amounts of time and financial resources have been committed to the drafting of legislative reforms, and in too many cases the quality of the legislative output has not justified the resources committed to their preparation. The purpose of retaining the services of consultant drafters is to apply their expertise and to lessen the considerable burdens which are placed on the legislative drafters of my Office. All too often the expertise has not been evident and the workload of my Legislative Division has been added to by deficient drafting.⁴⁷

For other Pacific countries, procurement of consultants is still a problem. This was a common problem expressed by regional participants in the 2009 PDFLD. Apart from Samoa, all other countries have no clear process for the procurement of consultant legislative drafters. Problems included lack of coordination among Ministries in relation to applications for assistance and that Ministries apply independently for assistance without seeking the advice of the AG. Most consultant drafters also drafted according to their own style. Samoa, in particular, faced these problems, which have now largely been addressed with the introduction of the Handbook.

D. Conclusions and Recommendations

I. Conclusions

This study has found that whereas interest in making legislative drafting a career has increased in the Pacific, the challenges met by legislative drafters or by lawyers carrying out legislative drafting tasks in the region are not only common but have also become diverse and more complex. The challenges assessed have helped to identify a number of important factors that contribute to enhancing not only the role of the legislative drafter in the legislative drafting process but the legislative drafting process itself.

These important factors include the following: a legislative drafter must keep abreast with best drafting practices through ongoing practice and education; pol-

⁴⁷ *Supra* note 2.

icy development urgently needs improvement in order that legislative drafters obtain clear policy instructions that will enable them to draft more effectively; the shortage of qualified and experienced legislative drafters in the Pacific may possibly improve in future in response to increasing interest, capacity and recognition by Pacific governments; main concerns for the drafter when drafting in the international context include language and structure, human rights, constitutional and cultural implications; and legislative drafters need to ensure that model provisions and precedents used in the drafting of a law coincide with the policy instructions and requirements of the country that they are drafting for.

II. Recommendations

The following recommendations specifically address each challenge discussed in the previous section.

1. Keeping Up To Date with Best Drafting Practices

To develop in line with best drafting practices, drafters need to continue to take advantage of available legislative drafting training programme and workshops. Issues and skills covered by such training programme usually take a drafter years to learn and understand. There are a number of legislative drafting capacity-building opportunities provided for the Pacific, including the annual Professional Diploma in Legislative Drafting (PDL) offered by the USP, as well as similar courses for Samoa such as the “In-country Legislative Drafting Workshop”⁴⁸ and the in-country “Commonwealth Secretariat Advanced Legislative Drafting Course”.⁴⁹ The Australian Office of the AG, the PIFS as well as the Commonwealth Secretariat are examples of organizations that have technically and financially assisted Pacific countries to develop legislative drafting capacity and expertise. These opportunities should be prioritized, sought and taken advantage of by Pacific countries.

The difficulty, of course, is that not all drafters of an office can be discharged to undertake training at one time, so another option may be to obtain the assistance of in-house legislative drafting advisors and consultants to work together with new and developing legislative drafters. For instance, the Samoa AG’s Office currently employs a legislative drafting advisor, on a two-year term, from Australia to assist Parliamentary Counsel in supervising the work of the LDD. Four junior members of the LDD agreed that the Advisor has assisted greatly in their daily understanding of the legislative drafting process.⁵⁰ For young and new legislative drafters, it is vital to have the supervision of an experienced legislative drafter. This is why it is crucial for governments to employ and engage the assistance of our neighbouring developed countries to provide us with legislative drafting advisors to supervise and train young drafters in their daily work.

48 This in-country training was conducted by P. Dodgson of the Australian Office of Legislative Drafting and Publishing from 4 to 8 August 2008.

49 This course was conducted by Professor St.J. Bates (England) from 20 July to 14 August 2009.

50 These new drafters are L. Teueli, C. Tafua Rivers, S. Wright and the author of this paper.

Mary Victoria Peteló Fa'asau

More importantly, whereas training assists in updating a drafter's technical skills, these can developed further only if put into practice. Thus the quickest way to furthering ones drafting skills is to actually do the work! The interest in legislative drafting is continuing to grow, and rather than always engaging overseas consultants to do the work, local and new drafters should be given the opportunity and the challenge. Just as young advocates are actively involved in the Court process, so should young and new legislative drafters be actively involved in the legislative drafting process.

In recent years, Samoa has been involved in on-going legislative drafting capacity building and development through a number of training programmes offered by the Commonwealth Secretariat as well as the Australian AG's Department in Canberra. For the region, the PIFS, together with the USP Law School with the Commonwealth of Learning, offers and funds the PDL. According to Nainendra Nand, a senior law lecturer at the USP:

Since the 1980s, short courses in legislative drafting [were] offered for the Pacific. These courses however were not structured and offered only when donor funding was forthcoming. The USP started its own PDL in 1998, which is now regarded as the premier qualification in legislative drafting in the region.⁵¹

The number of students taking the PDL has varied over the years since its inception, as shown in Table 2.

The year 2002 records the lowest number of students (4) enrolled in the course, and the year 2010 records the highest number of students (36) enrolled in the course. The number of Pacific countries taking the Course has increased since 2006 from 3 (Fiji, Cook Islands and Vanuatu) to 13. These figures reflect the growing interest as well as recognition that Pacific governments have of legislative drafting. A majority of the students who have taken the course completed and graduated with the certificate. "Students who did not complete the Course in 2008 and 2009 either failed to submit any assignments or withdrew from the Course."⁵² Most of the students who have completed the programme have a legal background and have completed an undergraduate law degree.

In Samoa, the course is encouraged not only for and taken by the LDD but also for and by other members of the Civil and Criminal Divisions who do not undertake any legislative drafting task in their daily work. Pacific countries need to continue to give more recognition and importance to this course to develop and teach legislative drafters or even non-legislative drafters of skills that may or may not be learnt or may take years to learn on the job.

The PDL promotes and enhances technical legislative drafting skills associated with developing office manuals and legislative precedents, ways of properly writing and drafting legislative sentences and expressions, working with rules and

51 *Supra* note 26.

52 Interview with Daiana Buresova, Legislative Drafting Officer, PIFS (Suva, 3 November 2009).

Table 2 *PDDL Student Numbers/Completions 1998-2010^a*

Student Numbers/Completions			
Year	New Entrants	Completion	Countries
1998	22	7	
1999	12	13	
2000	5	-	
2001	19	-	
2002	4	19	
2003-2005			Not offered
2006	17	12	Fiji, Cook Islands, Vanuatu
2007	16	16	Fiji, Kiribati, Nigeria, Samoa, Vanuatu
2008	28	22	Fiji, Cook Islands, Kiribati, PNG, Samoa, Tonga, Solomon, Vanuatu
2009	19	18	Fiji, Cook Islands, Samoa, Solomon, Tonga, PNG
2010	36	[In progress]	Fiji, Cook Islands, Kiribati, Australia, NZ, Samoa, Marshall Islands, PNG, Tonga, Tuvalu, Solomon Islands, Vanuatu

^aThese figures and information were obtained from P. Shekhar at the Institute of Applied Legal Studies, USP, Suva, Fiji. (Email from Prem Shekhar <shekhar_p@usp.ac.fj> to Mary Faasau <nolap@ag.gov.ws> April 2010.) In relation to the last column, records could not be obtained for the years 1998-2002.

interpretation, analysing and brainstorming policy instructions and making legal considerations, ways of working consistently with the Constitution and the fundamental rights provisions, preparing an effective legislative plan before drafting legislation, and drafting repealing, amending, savings and transitional provisions.

A student learns that the role of the drafter is demanding and complex, and being a drafter requires responsibility and effort as well as commitment.⁵³

Another programme developed in response to the need to train Pacific drafters in legislative drafting includes the Legislative Drafting pairing program developed and offered by the Pacific Unit and the Office of Legislative Drafting and Publishing (OLDP) of the Australian AG's Department. This pairing program places a Pacific Island drafter with the OLDP for approximately three months. It aims to improve drafting skills and capacity for legal officers within Pacific Island countries through practical experience, training and mentoring by the OLDP. The program includes training and practical experience in drafting legislation under the guidance of an assigned OLDP mentor.

The training and drafting experience provided is tailored to the drafter's experience, capacity and needs. The placement also includes participation in a statutory interpretation course run by the Australian Government Solicitor and the provision of drafting materials for the drafter to take back to their home office. Sarona Rimoni, who is now Parliamentary Counsel for Samoa, was the first

53 Office of the AG, 'Professional Diploma in Legislative Drafting (PDDL) Workshop', *Legislative Drafting Update*, Vol. 2, No. 4, 2009, p. 8.

Mary Victoria Petelō Fa'asau

to take part in this pairing program and was placed with the OLDP from June to August 2007. She is now one of two Parliamentary Counsels for Samoa. Also, as part of the pairing program, two officers from the Department travelled to Samoa and provided assistance to the LDD in the areas of legislative drafting and information management. Since then, the OLDP has also provided similar assistance to drafters of other Pacific countries.

More recently, from July to August 2009, drafters of Samoa undertook an in-house advanced legislative drafting course offered by the Commonwealth Secretariat. It was offered to all legislative drafting officers in the LDD and to government lawyers in Ministries and statutory authorities who had had some previous drafting training or experience. It is a course that should be offered in the future not only to the government LDD but also to private drafters and those with drafting experience in ministries and statutory authorities who liaise with the LDD.

For Samoa, because of the necessity of all participants to manage their everyday workload at the same time as attending the course, the AG required that the course run from 9 a.m. to 1 p.m. every workday morning for four weeks. However, the full-time engagement of all participants could not be achieved as some participants frequently left the course briefly to attend to urgent work matters. The time commitment of each drafter was therefore a challenge. The time commitment required of participants is significant, and needs to be considered in offering such a course in the future. Many smaller Pacific countries with only one to five drafters would not be much inclined to allow their drafters to leave their posts for any significant period of time.

However, the participants found the course valuable in that the preliminary presentation each day provided context, historical background and explanations for drafting in particular ways and circumstances. The printed materials provide an ongoing reference and examples of precedents for ongoing use. The practical drafting exercises of thirty or more required each participant to draft provisions to cover, include or exclude certain fact situations, in some cases by drafting from scratch and in others, drafting amendments to a given piece of legislation. Everyone's version was photocopied and then there were discussions about the different ways the various participants had tried to overcome what they saw as the drafting issues. Constructive criticism of each draft was a helpful way of enhancing the drafter's skills so that all learn from one another. The course materials also included Pacific pieces of legislation that were very useful.

As some training or experience in drafting was a prerequisite for the course, it provided the hands-on drafting and critique that most of the participants were seeking. The fact that the participants maintained their attendance and were obviously engaged when doing and discussing the exercises showed that the course met their needs. All this indirectly assists in better drafting outcomes in practice. Such an advanced course needs to be offered on a regional basis.

Finally, to draft in line with best drafting practices, a drafter must always be open-minded to new changes and developments in drafting practice. If a new technique helps the legislative drafting process, a drafter is encouraged to look at

it and probably use it. As former Samoa Parliamentary Counsel, Lalotoa Mulitalo, said, “A writer of law must have the freedom of an artist”.⁵⁴

2. *Improving Policy Development and Instructions*

a. Training of Policy Instructors

There is an urgent need to train policy makers concerning the legislative process. Many are unaware of their role in contributing to the production of quality legislation and that without such training programme, the job of the drafter is made more difficult and less efficient. As Heather Holt⁵⁵ wrote for the Fiji *Legal Lali* in June 2005:

the standard of legislative drafting in the Fiji Islands would be greatly improved if there were policy officers in Ministries and departments skilled at policy development. Their work then would serve as a basis for adequate drafting instructions, should it flow from the completed policy that legislation is the best or the only option. Not all Ministries and departments have legal officers and even when they do, because the skills of a lawyer differ from those of a policy officer, a legal officer is not necessarily the best person to engage in policy development.⁵⁶

This applies not only to Fiji but also to Samoa and to a large extent, other Pacific countries.

Ideally, the role of policy instructors in the drafting process is firstly to develop comprehensive policy that can be expressed as drafting instructions. An instructor must also prepare drafting instructions and explain them to the drafter. An instructor must also examine the draft and provide comments on every draft presented and approved the finalization of the draft Bill. The drafter can make a contribution to the policy as part of the drafting process by asking questions about the policy and drafting instructions to clarify issues, as well as make suggestions to improve the policy and the drafting instructions. However, as previously noted, the drafter should not initiate policy or make policy decisions.

The Samoa LDD recently conducted training programmes on 22 and 23 April 2010 for heads and senior officials of Government Ministries and agencies (policy instructors). The training was to inform and remind policy officials of the legislative drafting process in Samoa, with particular emphasis on the different roles of the drafter and the policy maker. Following the evaluation of the trainings, the LDD identified issues faced by participants with regard to policy and legislation. These relevant issues include the process of amending legislation, reconciling

54 *Supra* note 41.

55 H. Holt was the Second Parliamentary Counsel in the Fiji Office of the AG from September 2003 to September 2005. She is currently the legislative drafting advisor for the Samoa Office of the AG.

56 H. Holt, ‘Experiences in Legislative Drafting in the Fiji Islands’, 2005 *The Legal Lali*, p. 29.

Mary Victoria Petelo Fa'asau

international standards with existing legislation, access to consolidated laws, developing of policies in accordance with international standards, the overall drafting process, review and enhancement of legislation, procedures for consulting the AG's Office and the external consultant, developing Bills or Acts by Cabinet or Minister directives without policies, unavailability of electronic or hard copies of Acts in Ministries, enforcement of policies and legislation, the need for awareness campaigns on policies and regulations, Cabinet submissions, whether culture is taken into account when Bills are reviewed or drafted, implementation of penalties, legislation that appears not to accord with public policy, guidelines for AG's discretion and impracticality of laws. Overall, the participants were made more aware of the legislative process and the different matters and technicalities involved. They also indicated the usefulness of the training and recommended additional or regular training to address these issues.

A legislative drafting handbook for each Pacific country is another way to inform policy instructors of the legislative process. Samoa is the only Pacific country with a Legislative Drafting Handbook that binds all persons drafting laws for Samoa. At the 2009 PDTFLD, other Pacific countries recognized and noted the importance of having legislative drafting handbooks and are considering having them. A handbook can assist not only legislative drafters, both new and experienced, but also policy makers.

b. Meetings

Face-to-face meetings with clients are a tool for analysis and problem solving as well as a way of efficiently progressing the drafting of legislative proposals.⁵⁷ Effective meetings need to be planned and prepared for. Poor meetings sap everyone's energy, whereas productive meetings keep the momentum for a drafting project going. This article advocates meeting early before any drafting is done, because at this stage, a drafter can inform the client of factors associated with the drafting process that policy makers need to be aware of. An early meeting also facilitates an understanding of the legislative proposal, facilitates analysis of the problem, generates solutions to the problem and facilitates and evaluates the problem and solutions that may not be necessarily achievable in the first meeting.

A particular job may require more than one meeting and so a drafter should be prepared to meet clients as the need arises. The drafter's listening skills are also very important. Apart from getting a better understanding of the client's instructions, it is also a way of showing respect for what other people are saying.

Face-to-face meetings are useful because people are brought together in one room, and this increases the chances that all parties will have a joint understanding of matters and that the understanding will develop at the same time. Effective meetings accelerate the process of drafting as memoranda do not have to be written and sent back and forth, and persons do not have to be rung a number of times to clarify instructions. Meetings are also always best in the drafter's office

57 Office of Legislative Drafting and Publishing, 'Meetings for Drafters and Clients' (Forum paper provided at the Pacific Drafter's Technical Forum on Legislative Drafting, Canberra Australia, October 2009).

so that policy instructors are not distracted by other work that is going on around them. Most importantly, meetings improve client relationships.

c. Advice on Practicality of Draft Legislation

The drafter should assess the practicality of the proposed legislative scheme. This is particularly relevant in small jurisdictions with limited technical and financial resources. The drafter should be satisfied that the scheme is suitable for the jurisdiction and capable of being implemented. For example, if the scheme requires the creation of one or more expert bodies, are there sufficiently qualified people in the jurisdiction? If not, should there be only one body, with expert and non-expert members? The drafter should ask whether the legislation is capable of enforcement. This relates particularly to offences in the Bill, and a drafter should not draft offences that are not capable of being proven.

Similarly, the drafter may take the view that some or all of the instructions do not require legislation as the matters are already addressed by existing legislation. This may be accepted by the instructing department, but the drafter may be met by the argument that nevertheless the legislation is needed so that the government may demonstrate publicly that it is actively addressing an issue.

The instructing department may be unenthusiastic when faced with a drafter's suggestion that parts of the proposed legislation are impractical, inadequate or unnecessary. However, it is a professional function of the drafter to address and seek to resolve such issues in the interests of achieving the most effective draft Bill.

In the final analysis, the drafter may have to accept – however reluctantly – that legal analysis has sometimes to give way to political expediency. In such cases, the drafter may decide that primary legislation action is unnecessary to achieve an instructed objective, and propose that it can be satisfactorily achieved by other means such as making subsidiary legislation under existing enabling powers, adopting a policy without necessarily giving it the force of law or issuing internal guidelines.

d. Improving Consultation

We now live in what many are calling the 'information age', and it is inevitable that the attitudes and expectations of an increasingly computer-literate public will lead to many different styles of consultation using the Internet. It is therefore entirely possible that we will see more widespread use of technology in the legislative drafting arena by politicians, departments and lobby groups.

This has not happened in the Pacific, but this article recognizes its operation and effectiveness in other bigger, more resourced countries such as the United States of America where legislative drafting consultations are held online via the use of 'wiki' – a website that allows visitors to add, remove and edit content. An example of a type of wiki being used to inform legislative drafting is US Senator

Mary Victoria Peteló Fa'asau

Dick Durbin's site entitled 'Legislation 2.0: Getting our discussion underway'.⁵⁸ The Senator seeks online participation before drafting legislation relating to broadband access. He says:

I think this is a unique experiment in transparent Government and an opportunity to demonstrate the democratic power of the internet. If we're successful, it could become a model for the way legislation on health care, foreign policy, and education is drafted in the future.⁵⁹

This move may not be foreseeable in the near future for Pacific countries because of the lack of resources and the non-necessity for such a move. However, with available and sufficient resources as well as if the need arises, it is an option that could be considered in future.

3. *Increasing Qualified and Experienced Legislative Drafters in the Region*

In order to build the capacity of Pacific drafters, firstly there is a need for Pacific national governments to continue to recognize the distinct features of and challenges associated with legislative drafting compared with any other legal work so that it can be included in a government's budget. To promote and effectively market legislative drafting as a career to attract lawyers, a legislative drafter's salary should be increased to an extent that will truly reflect the complexity and distinct features of legislative drafting, which should be more than what an ordinary lawyer is paid. This is currently the practice in other jurisdictions such as Australia. In Samoa, for example, a government legislative drafter earns the same as any other government lawyer of the same level undertaking criminal or civil litigation.⁶⁰ In private practice, legislative drafting consultants undertaking, for instance, a one-month drafting project, whether to draft a Bill or regulations or both, earn on average between \$50,000 tala and over \$100,000 tala. Consultancy work is therefore very attractive as opposed to government legislative drafting work but requires experienced and qualified legislative drafters, which, as discussed earlier, Pacific countries lack.

Secondly, the USP School of Law should include a separate legislative drafting course in the LLB syllabus as either a third or fourth year compulsory or optional course. This will generate interest at an early stage so that when students enter the legal profession, they have the basic skills required to start drafting, as well as an early appreciation of the importance of having well-drafted laws. This in turn

58 D. Durbin, 'Legislation 2.0: Getting Our Discussion Underway', 2007, <http://openleft.com/showDiary.do;jsessionid=E674D13460DB3712296D603CF8DA62C5?diaryId=36_3> (Accessed 14 February 2010).

59 *Supra* note 58.

60 Currently, state solicitor level lawyers (whether in the civil, criminal or legislative drafting division) earn about \$27,000 tala per annum; senior state solicitor level lawyers (whether in the civil, criminal or legislative drafting division) earn about \$36,000 tala per annum; principal state solicitor level lawyers (whether in the civil, criminal or legislative drafting division) earn about \$44,000 tala per annum; and Parliamentary Counsel earn about \$82,000 tala per annum, which is equal to what Assistant AGs (leaders of the civil division and the criminal division) earn.

will overcome current problems to do with the government funding basic training for lawyers as most would have already completed such training in law school.

In addition, the USP should also consider a Master's level course in Legislative Drafting (LL.M. in Legislative Drafting). There are very few countries in the world offering such a degree, the most relevant one for the Pacific being the LL.M. in Legislative Studies, which is offered by the Institute of Advanced Legal Studies at the University of London. Nowadays young professionals strive for better qualifications, and such a qualification will be a bonus for a Pacific drafter. However, rather than for a Pacific Islander to go half-way around the world to obtain such a degree, he or she can obtain it from our very own university, the USP. The PDL has been a success so far and even participants from Australia, New Zealand and Papua New Guinea have taken or are taking it because it is the premier legislative drafting qualification for the Pacific. An LL.M. programme will contribute to increasing the interest, knowledge, skills, competency and confidence of the legislative drafter and supplemented by practical experience, which will lead to better drafted laws.

Furthermore, each State Law office in the Pacific should create structures that promote the development of legislative drafting. For instance, Samoa law graduates applying for a job at the AG's Office are given a choice of working in any of the three divisions of the office – criminal prosecution, civil litigation or legislative drafting. Most graduates choose either criminal or civil litigation and very few choose drafting. The LDD focuses 'only' on legislative drafting, ensuring that legislation reflects instructions submitted by sponsoring Government Ministries/corporations and is consistent with the Constitution and other legislation. Because their focus is only on legislative drafting, the skills and expertise are enhanced. This, of course, is only possible because of the large number of lawyers in the AG's Office, as compared with other Pacific State Law offices, which cannot cater for such because of the small number of lawyers who are faced with being 'jacks-of-all-trades'. Nevertheless, AGs and senior government lawyers need to continue to encourage their lawyers to take up some form of training in legislative drafting.

With regard to the PDL, although this is a most useful eighth-month course, the main challenge with it is that it is only offered online. Although this suits the time constraints of targeted and most likely participants (public servants and private lawyers), such a course can better be taught and understood if provided face to face. This way, the progress and understanding of the students would be better assessed to determine the effectiveness of the programme. Students will also have the opportunity as a group to effectively discuss different approaches to legislative drafting. These can all very well be done via e-mail or Internet but it would not be as effective as if they were done face to face.

The PDL does provide a compulsory face-to-face one-day workshop at the end of the course. However, participants who have taken this course, for example, from Samoa and Tonga in 2008 and 2009, agreed that this is not sufficient time or opportunity for each participant to address and discuss with other students the issues they face from the course.

Mary Victoria Peteló Fa'asau

Legislative drafting is a very technical skill and requires a person's full time and attention, so such a course should in future be provided intensively over a one- to two-month period. Otherwise, as recommended above, if a legislative drafting course is taught as one of the LL.B. courses, there would not be a need to have a PDL or the PDL could be an advanced programme.

With regard to the procurement of overseas consultant legislative drafters, the PIFS should be the focal point for sending drafting assistance to Pacific countries. There should be a pool of experienced legislative drafters on different subjects for countries to draw on from time to time to act as advisors for local legislative drafters, as is the practice in Samoa and the Solomon Islands. It is most important for trainee drafters to work together with experienced drafters as part of a learning process. This generates faster learning and development because of the transfer of skills. Also, the recruitment of experienced lawyers, not necessarily with a background in drafting, but with the capacity to analyse and draft can be part of a recruitment strategy.

However, this article recognizes that the recruitment of overseas legislative drafting consultants is dependent on the political will of the sixteen PIFS member governments and, more importantly, is dictated by the allocation of financial resources for this purpose.

With regard to the Australian OLDP programme, while this is a most useful and rewarding approach, this article advocates that in-country legislative drafting advisors are more effective as opposed to each drafter waiting to take their turn on an overseas programme. Because of time and resource constraints, Pacific countries should continue to apply for such overseas positions while at the same time, engaging in-country legislative drafting advisors to assist those who do not have the opportunity to go on such overseas programs.

Finally, the network of legislative drafters in the region should be strengthened, as was recognized in 2006 by the Pacific Working Group on Legislative Drafting.⁶¹ There is a need to continue this support for legislative drafters including networking and conferencing. In the 28th meeting of the Pacific Island Law Officers' Network (PILON), which was held in Samoa in December 2009, it was recommended by the Pacific International Maritime Law Association that a:

Pacific Islands Legislative Drafter's Forum be established. It is [proposed] for the Secretariat and the USP Law School to work together to establish a Legislative Drafter's Forum by the 2010 PILON meeting.⁶²

61 *Supra* note 40, p. 9.

62 PILON Secretariat, 'PILON Annual Meeting Outcomes Report' (2009) <[www.pilonsec.org/www/pilon/rwpattach.nsf/VAP/\(C7C220BBE2D77410637AB17935C2BD2E\)~PILON-FinalOutcomes2009.pdf/\\$file/PILON-FinalOutcomes2009.pdf](http://www.pilonsec.org/www/pilon/rwpattach.nsf/VAP/(C7C220BBE2D77410637AB17935C2BD2E)~PILON-FinalOutcomes2009.pdf/$file/PILON-FinalOutcomes2009.pdf)> (Accessed 4 February 2010).