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# EQUIPPING STUDENTS FOR THE REAL WORLD: USING A SCAFFOLDED EXPERIENTIAL APPROACH TO TEACH THE SKILL OF LEGAL DRAFTING

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TAMMY JOHNSON\* AND FRANCINA CANTATORE\*\*

## I INTRODUCTION

Jeremy Bentham called for the reform of legal drafting as early as 1843, noting that while regulation would not guarantee perfect drafting, it could impose desirable requirements and might help to prevent ‘certain defects’.<sup>1</sup>

Despite efforts to import the attributes of ‘brevity’, ‘simplicity’ and ‘clear expression’<sup>2</sup> into legislation, law students today are still faced with confusing and obscure provisions in the law that require interpretation and application to factual situations. The task of incorporating complex provisions into legal documents is a daunting process for the legal scholar. The requirement of using plain language in legal drafting provides an additional challenge for the drafter. Significantly, the majority of law students go on to enter legal practice,<sup>3</sup> where the ability to draft clearly and concisely is an essential skill and prerequisite. Failure to capture the essence of the law and convey the terms of the document effectively could have dire consequences for the firm and client alike.

This article traverses the difficulties associated in achieving a balance between protecting the client’s relevant legal interests and conveying the appropriate message to the intended audience in plain language. Using an example drawn from a consumer lending

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<sup>1</sup> Jeremy Bentham (published under the Superintendence of his Executor, John Bowring), *The Works of Jeremy Bentham* (William Tait, 1838) vol 2, ch 10, 651. <<http://oll.libertyfund.org/title/1921/114011>>.

<sup>2</sup> Ibid.

<sup>3</sup> Sumitra Vignaendra, *Australian Law Graduates’ Career Destinations*, Centre for Legal Education, Sydney (1998) 39; Council of Australian Law Deans (CALD), *Legal Education in Australia* <<http://www.cald.asn.au/slia/Legal.htm>>.

transaction, this article illustrates how educators can provide law students with the guidelines necessary for avoiding drafting pitfalls in legal practice. While it is acknowledged that the development of legal writing skills is important both within and outside the context of law school,<sup>4</sup> the writers make a distinction between the broader skill of legal writing and the more specific skill of legal drafting which is applied in legal practice. This article focuses on the teaching (and development) of legal drafting skills. Its scope is limited to illustrating the benefits of adopting a scaffolded approach when teaching these skills and the advantages this teaching approach gives students as they leave law school and enter legal practice.

Part II of the article highlights the challenges often faced by lawyers drafting legal documents (here using the example of a commercial contract). It also considers the drafting skills that the lawyer must possess in order to effectively address the (sometimes legislative) requirement of plain language drafting. Part III canvasses, contextually, the theory of teaching and learning legal skills; it demonstrates that law students may effectively develop drafting skills in a scaffolded and experiential learning environment. Part IV concludes in favour of a scaffolded approach.

## II THE LAWYER'S CONUNDRUM — TRANSLATING LAW INTO PLAIN LANGUAGE

### A *Laying Down the Law*

The requirement for plain language drafting has been codified in a number of Australian statutes in recent years, including the *National Consumer Credit Protection Act*,<sup>5</sup> the *National Credit Code*,<sup>6</sup> the *Australian Consumer Law* (the ACL),<sup>7</sup> and the *Australian Securities and Investments Commission Act* (the ASIC Act).<sup>8</sup> These inclusions are in accordance with the provisions of European Union Directive 93/13 EC,<sup>9</sup> dealing with unfair contract terms, specifically Article 5, which states:

In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language.<sup>10</sup>

<sup>4</sup> It is necessary to develop these generic legal writing skills in order to complete the more traditional forms of summative assessment such as essays and exams.

<sup>5</sup> *National Consumer Credit Protection Act 2009* (Cth), ('*The National Credit Code*').

<sup>6</sup> *Ibid* sch 1.

<sup>7</sup> *Competition and Consumer Act 2010* (Cth), sch 2 ('*Australian Consumer Law*').

<sup>8</sup> *Australian Securities and Investments Commission Act 2001* (Cth).

<sup>9</sup> *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.

<sup>10</sup> *Ibid* art 5.

The United Kingdom unfair contract terms provisions also use the expression ‘plain and intelligible language’.<sup>11</sup> In *Office of Fair Trading v Abbey National plc and Others* Smith J explained what was meant by it:

Regulation 6(2) ... requires not only the actual wording of individual clauses or conditions be comprehensible to consumers, but that the typical consumer can understand how the term affects the rights and obligations that he and the seller or supplier have under the contract.<sup>12</sup>

In Australia the statutory recognition of this requirement was foreshadowed in an early Victorian Government report dealing with clarity in drafting.<sup>13</sup> The Report made recommendations for formal training of parliamentary counsel in drafting and suggested collaboration with the Law Societies to import plain language into standard form borrowing contracts.

Standard form consumer contracts continue to be scrutinised for their content and, when considering consumer contract terms pursuant to the ACL provisions, a court must take into account ‘the extent to which the term is transparent.’<sup>14</sup> Loan contracts are also subject to the unfair terms legislation and the implicit requirement for language, which is ‘reasonably plain’, ‘legible’ and ‘presented clearly’.<sup>15</sup> Failure to comply with these requirements may result in significant penalties, and the offence provisions may (and should) instil a healthy dose of caution and circumspection in lawyers engaged to draft commercial documents.

This recent trend of codifying the requirement for plain language drafting means that it is no longer acceptable to rely on long-used and trusted precedents. While the use of precedents remains beneficial, the legalese found in many documents no longer stands up to inspection in light of plain language requirements, and strong drafting skills are needed to remedy unclear, ambiguous or unfair terms.

In Australia, in addition to potential claims against the drafter for negligence, poor drafting may also lead to a finding of unconscionable conduct under the ACL.<sup>16</sup> In *George T Collings (Aust) Pty Ltd v HF Stevenson (Aust) Pty Ltd*<sup>17</sup> the Court considered whether the

<sup>11</sup> *Unfair Terms in Consumer Contracts Regulations 1999* (UK), reg 6.

<sup>12</sup> *Office of Fair Trading v Abbey National plc* [2008] EWHC 875 (Comm) at 103.

<sup>13</sup> Victorian Law Reform Commission, *Plain English and the Law*, Report No 9 (1987).

<sup>14</sup> *Australian Consumer Law*, s 24(2)(a).

<sup>15</sup> *Ibid* s 24(3)(a)–(d). This section states that for a term to be transparent it must be:

- (a) expressed in reasonably plain language; and
- (b) legible; and
- (c) presented clearly; and
- (d) readily available to any party affected by the term.

<sup>16</sup> *Ibid* s 22(1)(c).

<sup>17</sup> [1990] VicSC 620.

consumer was able to understand the contract documents presented by the lender. The Court found that poor drafting style rendered the contract unconscionable because it failed to bring the reader's attention to an insertion in a standard form contract that was contrary to the purpose of the rest of the contract.<sup>18</sup>

Intelligibility of the language in a contract is also a legislative requirement in New South Wales<sup>19</sup> and contracts or contract terms can be set aside if they are found to be unjust.<sup>20</sup> In *Goldsbrough v Ford Credit Australia Ltd*<sup>21</sup> the applicant successfully applied for the setting aside of a guarantee she had provided for a trucking lease entered into by her brother. The Court held that the lease had been written in such legalese that not even the office manager presenting the document had understood it, and ordered that the guarantee be set aside.<sup>22</sup>

Similarly in *Bridge Wholesale Acceptance (Aust) Ltd v GVS Associates Pty Ltd*<sup>23</sup> the Court found that a guarantee by the debtor's stepdaughter to provide a mortgage over her own house had not been understood by her. It ordered the deletion of the relevant clause from the guarantee. In his judgment Waddell CJ reasoned that the clause had not been written in plain language; it comprised one long sentence and would not be intelligible to a lay person.<sup>24</sup>

Even if these cases prompted a hasty revision of the offending contract provisions by their solicitors, it would have been too late for the disappointed litigants. These outcomes could have been avoided if the contract drafter's skills had been well developed. Effective drafting practice necessitates that the drafting journey be properly planned in advance, executed with a clear roadmap in mind and with guide posts regularly checked along the way.

## B Navigating the Law

Perhaps the first challenge for lawyers in the process of drafting intelligible, clear provisions for commercial documents is an even more fundamental task. Before drafting a document, a lawyer must interpret the relevant legislation. In many instances the onset of this journey is fraught with difficulties, brought about not only by the need to avoid pitfalls such as unconscionable<sup>25</sup> or misleading and deceptive conduct,<sup>26</sup> but by the indeterminate language of the

<sup>18</sup> *George T Collings (Aust) Pty Ltd v HF Stevenson (Aust) Pty Ltd* [1990] VicSC 620 [13].

<sup>19</sup> *Contracts Review Act 1980* (NSW), s 9(2)(g).

<sup>20</sup> *Ibid* s 7.

<sup>21</sup> (1989) ASC 55-946.

<sup>22</sup> *Ibid*.

<sup>23</sup> (1991) ASC 56-105.

<sup>24</sup> *Ibid* 14.

<sup>25</sup> *Australian Consumer Law*, pt 2-2.

<sup>26</sup> *Ibid* s 18.

legislation itself. It may be useful to identify the ‘guide posts’ on the drafting journey as follows:

- 1 Identifying and interpreting the applicable statutes (statutory interpretation).
- 2 Identifying the relevant statutory and commercial provisions for incorporation into the document.
- 3 Using ‘plain language’ to draft the document.
- 4 Checking for legislative compliance (avoiding issues of unconscionability, unfair contract terms or misleading or deceptive conduct).

To illustrate these steps, and some of the associated challenges inherent in the process, we will use the example of a typical consumer contract to provide an overview of the drafting process. If the lawyer depicted in this example did not possess the skills and confidence to effectively complete the drafting task, it is likely that a number of potential practical and legal hazards might arise. A poorly drafted document would fail to adequately protect the client’s legal interests; the client may be liable under one or more statutes for unfair contract terms or unconscionability; and the lawyer may be liable for negligence. A lawyer who possesses well-developed drafting skills is able to avoid all of these potential hazards, preparing a document that complies with all legislative requirements, is clearly and concisely drafted, and reflects the client’s instructions and protects the client’s legal interests.

### 1 *A Drafting Minefield*

The following example highlights the complex issues that can arise in a seemingly innocuous commercial transaction. In practice, lawyers face the challenge of tiptoeing through a minefield of competing interests. The client just wants the job done quickly and effectively, but the lawyer must be mindful both of the client’s business objectives and of the competing legislative provisions, which at times require additional matters to be incorporated into the final document.

The example illustrates the underlying complexity of any commercial contract drafting exercise. Here, Elise, a lawyer, is required to draft a contract for her longstanding client, Bill Jones, to use in his new business, ‘Rent-to-own Enterprises’. Bill will lease furniture and household appliances to consumers on the basis that they may purchase the goods at the end of the rental period. Customers may also return the goods at any time after an initial rental period, should they wish to do so. Bill hopes to make a profit on the leases and requires Elise’s firm to provide him with a simple pro-forma contract which reflects this arrangement.

Elise accesses the firm’s precedents and finds a ‘Consumer Lease Agreement’ which seems to meet the client’s needs. However,

she soon realises that the nature of Bill's proposed business will trigger the provisions of the *National Credit Code*<sup>27</sup> (the Code). The 'rent-to-own' nature of the transaction means the contract will be considered to be a credit contract as defined in the Code.<sup>28</sup> Bill will effectively become a credit provider, the lessee a debtor, and any residual payment at the end of the contract will be a part of the contract amount.<sup>29</sup> Of further concern to Elise is the fact that the Code provides for the passing of property to the debtor,<sup>30</sup> and that Bill effectively becomes a mortgagee over the goods.<sup>31</sup> This means Bill loses ownership of the goods even though the lessee has not yet agreed to buy the goods at the end of the term, and may in fact decide not to do so. Additionally, the Code prevents Bill from repossessing the goods in the event of the lessee's default.<sup>32</sup>

The straightforward lease agreement envisaged by Bill is impossible to deliver; what is required is quite different and far more complex, and the precedent is inappropriate for her task. As Elise researches further, it becomes clear that the Code requires Bill to comply with a number of other legislative requirements, all of which must be reflected in the contract.<sup>33</sup> Further, because the Code imposes significant pre-contractual disclosure requirements on lenders in consumer transactions, Elise must now draft additional documents to ensure Bill's compliance with these legislative requirements.

Only after she has identified all the issues for inclusion in the document can the drafting commence. However, the format of the contract remains problematic. Although it is deemed to be a credit contract, it needs to be reconcilable with Bill's business model, which is based on a rent-to-buy concept. In addition to identifying the content of the contract, Elise must now contemplate its form so that she can produce a document that complies with the legislation, protects the client's legal interests and satisfies his business requirements.

The path, which seemed clear at the start, has become far more difficult to navigate than anticipated. Elise now needs to consider not only the impact of these provisions on Bill's proposed business, but also how to turn these provisions into a clear and legible document which Bill can present to prospective customers. The drafting skills that Elise developed in law school are about to be put to the test.

<sup>27</sup> *The National Credit Code*.

<sup>28</sup> *Ibid* s 5(1).

<sup>29</sup> *Ibid* s 9(4).

<sup>30</sup> *Ibid* s 9(3)(d).

<sup>31</sup> *Ibid* s 9(3)(f).

<sup>32</sup> *Ibid* s 9(3)(g).

<sup>33</sup> *Ibid* ss 85(10)–(11). Breaches of these provisions carry civil and criminal penalties.



### *C Anticipating Legal Practice*

As the above example demonstrates, lawyers may be confounded by ambiguous and imprecise legislation and associated drafting challenges that cannot be resolved by relying on existing precedents. The fact that this source of discontent may be widely acknowledged is of little comfort to the early career lawyer faced with drafting their first 'real' contract. Additionally, failure to apply effective drafting practices can result in unnecessary costs to clients, occasioned by additional billable hours. Consequently, it is important that preparation for the challenges of drafting in legal practice be undertaken as part of the development of students' communication skills within Threshold Learning Outcome 5: Communication and collaboration ('TLO 5').<sup>34</sup>

A pedagogically sound drafting course should equip students to express the intention of the legislature and the courts, practise precision in legal drafting, and protect their future clients' interests. Part III of this article considers the scaffolded approach to teaching legal drafting skills to law students.

### III THE EFFECTIVENESS OF SCAFFOLDED INSTRUCTION IN LEGAL DRAFTING

The following sentence from a legal contract has 516 words and is considered one of the longest sentences in an official document:

In the event that the Purchaser defaults in the payment of any instalment of purchase price, taxes, insurance, interest, or the annual charge described elsewhere herein, or shall default in the performance of any other obligations set forth in this Contract, the Seller may: at his option: (a) Declare immediately due and payable the entire unpaid balance of purchase price, with accrued interest, taxes, and annual charge, and demand full payment thereof, and enforce conveyance of the land by termination of the contract or according to the terms hereof, in which case the Purchaser shall also be liable to the Seller for reasonable attorney's fees for services rendered by any attorney on behalf of the Seller, or (b) sell said land and premises or any part thereof at public auction, in such manner, at such time and place, upon such terms and conditions, and upon such public notice as the Seller may deem best for the interest of all concerned, consisting of advertisement in a newspaper of general circulation in the county or city in which the security property is located at least once a week for Three (3) successive weeks or for such period as applicable law may require and, in case of default of any purchaser, to re-sell with such postponement of sale or resale and upon such public notice thereof as the Seller may determine, and upon

<sup>34</sup> Sally Kift, Mark Israel and Rachael Field, *Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic Standards Statement December 2010* (20 February 2011) Australian Learning and Teaching Council <[http://altc.edu.au/system/files/altc\\_standards\\_LAW\\_110211.pdf](http://altc.edu.au/system/files/altc_standards_LAW_110211.pdf)> 1.

compliance by the Purchaser with the terms of sale, and upon judicial approval as may be required by law, convey said land and premises in fee simple to and at the cost of the Purchaser, who shall not be liable to see to the application of the purchase money; and from the proceeds of the sale: First to pay all proper costs and charges, including but not limited to court costs, advertising expenses, auctioneer's allowance, the expenses, if any required to correct any irregularity in the title, premium for Seller's bond, auditor's fee, attorney's fee, and all other expenses of sale occurred in and about the protection and execution of this contract, and all moneys advanced for taxes, assessments, insurance, and with interest thereon as provided herein, and all taxes due upon said land and premises at time of sale, and to retain as compensation a commission of five percent (5%) on the amount of said sale or sales; SECOND, to pay the whole amount then remaining unpaid of the principal of said contract, and interest thereon to date of payment, whether the same shall be due or not, it being understood and agreed that upon such sale before maturity of the contract the balance thereof shall be immediately due and payable; THIRD, to pay liens of record against the security property according to their priority of lien and to the extent that funds remaining in the hands of the Seller are available; and LAST, to pay the remainder of said proceeds, if any, to the vendor, his heirs, personal representatives, successors or assigns upon the delivery and surrender to the vendee of possession of the land and premises, less costs and excess of obtaining possession.<sup>35</sup>

Legalese and other poor drafting techniques continue to appear in legal documents. The extract above illustrates the difficulty that deciphering legalese poses, even for those with legal training. The sentence is an excellent example of poor drafting. Law teachers should try to ensure that this style of drafting is not replicated when their students become lawyers, but the difficulty lies in making that objective a reality. Wilcox identifies legal drafting as a basic skill that every lawyer needs.<sup>36</sup> Yet, he laments, 'no other skill vital to all lawyers is so much ignored in legal education.'<sup>37</sup> It is therefore essential that this deficiency in legal education be remedied. By implementing a pedagogically effective legal drafting course, law schools can ensure that graduates develop the professional skills necessary for successful legal practice.

To assist in their 'intellectual and social transition from the role of often-passive student to lawyer'<sup>38</sup> law students should be provided with as many opportunities as possible to develop their drafting skills. Then, as lawyers entering practice they will have some understanding of how to draft in plain language, and hopefully will also develop their own unique and effective drafting style.

<sup>35</sup> The Plain English Campaign, *Long Sentences* (8 January 2013) <<http://www.plainenglish.co.uk/examples/long-sentences.html>>.

<sup>36</sup> Jamison Wilcox, 'Teaching Legal Drafting Effectively and Efficiently — By Dispensing with the Myths' (2007) 57(3) *Journal of Legal Education* 448, 448.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid* 449.

### *A Training Law Students to Drop the Legalese: How to Get It Right*

Having proposed that plain language drafting is an essential skill in legal practice, it remains to determine what ‘plain language’ means. Using plain language does not mean that legal documents should be dull and boring; plain language means language that is precise, clear and concise. Using plain language in legal documents does not mean they must be ‘dumbed down.’<sup>39</sup> Rather, it means that the language should be ‘straightforward and user-friendly.’<sup>40</sup> Asprey describes plain language writing as ‘just writing in clear, straightforward language, with the needs of the reader foremost in mind.’<sup>41</sup> She asserts that:

there are no hard-and-fast rules. There are no international standards or infallible tests. The main thing to remember is that if what you have written could be unclear or confusing for your reader, or difficult to read or use, you should rewrite it so that it becomes clear, unambiguous and easy to read and use.<sup>42</sup>

Similarly, Cheek sees plain language as using ‘language, structure and design so clearly and effectively that the audience has the best possible chance of readily finding what they need, understanding it, and using it.’<sup>43</sup>

Beginning as early as the 1940s,<sup>44</sup> the Plain Language Movement<sup>45</sup> gained momentum in the UK, and in the USA in the 1970s. This was followed closely by Australia in the 1980s, with the publication of *Plain English and the Law*,<sup>46</sup> a Report of the Law Reform Commission of Victoria. Today the movement continues to develop and strengthen; it has gained recognition and support in many countries, English-speaking and non-English speaking. Indeed, in 2010 the USA introduced the *Plain Writing Act of 2010*, which requires federal agencies to ‘enhance citizen access to Government information and services by establishing that Government documents issued to the public must be written clearly.’<sup>47</sup>

<sup>39</sup> Kali Jensen, ‘The Plain English Movement’s Shifting Goals’ (2010) 13(3) *Journal of Gender, Race and Justice* 807, 816.

<sup>40</sup> *Ibid* 817.

<sup>41</sup> Michèle M Asprey, *Plain Language for Lawyers* (Federation Press, 2006) 13.

<sup>42</sup> *Ibid*.

<sup>43</sup> Annetta Cheek, ‘Defining Plain Language’ (2010) 64 *Clarity* 5, 5.

<sup>44</sup> Sir Ernest Arthur Gowers, *The Complete Plain Words* (Methuen, 1949).

<sup>45</sup> Originally known as the Plain English Movement, ‘English’ was replaced by ‘Language’ when the movement gained recognition in non-English speaking countries. As a result the concept of ‘plain language drafting’ is now capable of universal adoption.

<sup>46</sup> Victorian Law Reform Commission, above n 13.

<sup>47</sup> Extracted from the long title of the *Plain Writing Act of 2010* (USA).

Since the advent of the Plain Language Movement much has been written on the benefits of drafting using plain language, yet the opportunities for formal instruction on how to develop drafting skills are limited. Most lawyers only really begin to learn how to draft when they enter practice; until then their energies have largely been devoted to more academic pursuits, and most law school assessment tasks require the production of a research paper rather than a drafted legal document. Indeed, as Castles and Hewitt point out:

[T]he traditional law degree is focussed on assisting students in the acquisition of academic or doctrinal knowledge (since 1992 prescribed by the ‘Priestly 11’ areas of knowledge). Less attention has been paid in most law degrees to the specific teaching of professional skills.<sup>48</sup>

Once in practice, however, newly admitted lawyers are likely to be exposed to a myriad of drafting techniques and from this exposure they will gradually develop and hone their own drafting style. But if left untutored, the lawyer is in danger of falling into one or more of the pitfalls of poor drafting. Using poor structure, poor grammar, legalese, archaic words and long sentences (to name but a few) will all result in an overly complex and incomprehensible document. It is therefore imperative that students are aware of the dangers of poor drafting and learn to draft effectively from as early as possible; preferably from their first semester at law school.

### *B A Scaffolded Approach to Teaching the Skill of Legal Drafting*

If one looks at the development of legal skills as they would the development of their physical musculature it is easy to see that skills, like muscles, do not miraculously materialise fully developed. Both skills and muscles require exercise to become strong and effective and it is important to choose an appropriate starting point for their development. Asprey observes that skills develop with practice and for those drafting in plain language, a natural and individual drafting style will develop and emerge over time.<sup>49</sup>

Adopting a scaffolded and experiential teaching approach allows students to build and then flex their drafting muscles, incrementally developing their confidence, skills and individual drafting style in the low-risk environment that law school provides. Coe considers that the incremental challenges provided by scaffolded teaching helps to diminish the feelings of intimidation often experienced by students

<sup>48</sup> Margaret Castles and Anne Hewitt, ‘Can a Law School Help Develop Skilled Legal Professionals? Situational Learning to the Rescue!’ (2011) 36(2) *Alternative Law Journal* 90, 90.

<sup>49</sup> Asprey, above n 41.

who are faced with a new and challenging task.<sup>50</sup> By encouraging students to build their skills, scaffolded teaching presents students with ‘a sequence of training tasks with attainable learning goals ... that [allow them] to gain feedback about their performance and provides ... the opportunities for gradual refinement through repetition.’<sup>51</sup>

A course that effectively develops students’ legal drafting skills should require completion of a number of scaffolded drafting exercises, each one more challenging than the last. Throughout the course, students should receive feedback and the opportunity to engage in self and peer-critique. Finally, at the end of the course, having completed the series of drafting exercises, the students should have gained the skills necessary to competently draft a legal document unaided. The key to success lies in the teacher providing a supportive yet challenging environment in which students are encouraged to exercise autonomy and to safely explore and develop their own drafting style. While students are encouraged to imagine themselves as practising lawyers, the safety of the classroom allows students to make typical novice drafting mistakes, and to learn from those mistakes, without having to assume the responsibility that comes with practice.

Tilley et al describe scaffolded teaching as an ‘instructional technique whereby collaboration ... and knowledge are combined to facilitate learning.’<sup>52</sup> Scaffolding allows the student to become more involved in the process of learning by encouraging autonomy and accountability and providing an individualised learning experience. Employers find it desirable for law graduates come to them with some of the skills required to actually practice law; bridging the gap between law school and legal practice through scaffolded legal skills instruction provides a benefit to students, their educators and employers alike.

Legal skills instruction, particularly drafting instruction, cannot be taught solely through traditional didactic teaching methods. Adopting an experiential teaching method using scaffolded drafting exercises allows students to put themselves in the position of practising lawyers. Experiential learning allows students to engage

<sup>50</sup> Cynthia D Coe, ‘Scaffolded Writing as a Tool for Critical Thinking: Teaching Beginning Students How to Write Arguments’ (2011) 34(1) *Teaching Philosophy* 33, 34.

<sup>51</sup> Ibid quoting K Anders Ericsson, ‘The Acquisition of Expert Performance: An Introduction to Some of the Issues’ in K Anders Ericsson (ed), *The Road to Excellence: The Acquisition of Expert Performance in the Arts and Sciences, Sports and Games* (Lawrence Earlbaum, 1996) 1, 33.

<sup>52</sup> Donna Scott Tilley et al, ‘Promoting Clinical Competence: Using Scaffolded Instruction for Practice-Based Learning’ (2007) 23(5) *Journal of Professional Nursing* 285, 286.

in ‘real life’ exercises.<sup>53</sup> Students are able to experience what it is like to draft increasingly complex legal documents and correspondence in an environment where they have complete control over what the document contains and how their thoughts are presented and expressed. In this regard, Hewitt recognises that students ‘learn more effectively when their activities take place within a practice context’<sup>54</sup> thus enabling them to become better prepared for their future careers as lawyers.

The Australian Council for Educational Research also recognises that experiential learning assists students to develop an ‘awareness of the workplace and how it relates to their academic learning.’<sup>55</sup> Mitchell et al believe that, in addition to achieving a number of graduate attributes,<sup>56</sup> experiential learning enables students to become better prepared for their future careers by ‘promoting the acquisition of work-related knowledge and participation in activities that contribute to professional experience and employability skills.’<sup>57</sup> David Kolb’s experiential learning cycle comprises four distinct phases of learning and offers a way of ‘structuring and sequencing learning to improve the effectiveness of learning from experience.’<sup>58</sup> Kolb’s model consists of the following stages: concrete experience, reflective observation, abstract conceptualisation and active experimentation.<sup>59</sup>

Wolski identifies that the learning experience can begin at any stage of Kolb’s model but must then proceed sequentially through the other stages.<sup>60</sup> She suggests that, for skills teaching, an appropriate starting point is the abstract conceptualisation stage where students are provided with some initial theoretical instruction relevant to the particular skill.<sup>61</sup> The learning experience should then progress through the other stages, enabling students to engage in, reflect upon and repeat exercises which simulate real-life situations,

<sup>53</sup> While usually associated with studies that involve hands-on involvement, experiential learning is not confined to work experience, internships or placements. It can incorporate any exercise (real or simulated) where students are given the ability to develop the skills required to succeed in their chosen field of employment.

<sup>54</sup> Anne Hewitt, ‘Producing Skilled Legal Graduates: Avoiding the Madness in a Situational Learning Methodology’ (2008) 17 (1) *Griffith Law Review* 87, 89.

<sup>55</sup> Australian Council for Educational Research (ACER), *Engaging Students for Success: Australasian Student Engagement Report Australasian Survey of Student Engagement* (2009) 35.

<sup>56</sup> Andrew Mitchell et al, ‘Education in the Field: A Case Study of Experiential Learning in International Law’ (2011) 19 *Legal Education Review* 69, 81.

<sup>57</sup> *Ibid* 79.

<sup>58</sup> Graham Gibbs, *Learning by Doing: A Guide to Teaching and Learning Methods* (Further Education Unit, Oxford Polytechnic, 1988) 6.

<sup>59</sup> David Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Englewood Cliffs, 1984) 20-21.

<sup>60</sup> Bobette Wolski, ‘Integrating Skills Teaching and Learning’ (2002) 52 *Journal of Legal Education* 287, 292.

<sup>61</sup> *Ibid*.

thereby encouraging them to develop ‘a “reflexive” relationship between theory and practice.’<sup>62</sup> While the methodology of skills teaching is ‘grounded in experiential learning theory’,<sup>63</sup> the coupling of scaffolded instruction with experiential learning enhances the development of legal drafting skills. The discussion below explores ways of effectively using a scaffolded approach to development of legal drafting skills.

### 1 *Crawl Before You Walk*

To successfully develop the skills required to practise law (particularly the written communication skills required by TLO5), students need to build confidence in their abilities as drafters. A scaffolded teaching model works well because the initial drafting tasks that students are required to complete are set at quite a low level of difficulty. Students are given the opportunity to ‘get the feel’ of drafting using plain language, without the stress of completing a task that requires extensive formatting or a detailed analysis of the law (that is, a less complex task than the example explored in Part II of this article).

A good initial task to ease students into the world of drafting is to have them draft a simple letter of demand. A letter, rather than a more formal legal document, is a useful starting point because students generally have some awareness of the style, structure and level of formality adopted in written correspondence. Having a familiar structure to work with gives students the ability to relax into the drafting task and focus on the language of the document rather than its form. Providing some level of familiarity and security encourages students to ‘move back and forth between opposing modes of reflection and action and feeling and thinking’,<sup>64</sup> thus facilitating active learning.

Once the letter drafting task is completed, similar tasks can be set to encourage students to build their confidence as drafters. Another useful early task is drafting a special condition for insertion into a standard form of contract. Students adopt the style and formatting of the standard contract for their condition, which will assist them to produce a clause that is certain, clear and concise. Again, by providing the guidelines for the special condition’s basic structure, students can focus on the use of plain language to properly reflect the legal intention of the document.

By starting with some non-threatening and relatively simple drafting tasks, students are encouraged to become familiar with

<sup>62</sup> Ibid 293.

<sup>63</sup> Ibid 292.

<sup>64</sup> Alice Kolb and David Kolb, ‘Learning Styles and Learning Spaces: Enhancing Experiential Learning in Higher Education’ (2005) 4(2) *Academy of Management Learning and Education* 193, 194.

the process of using plain language to communicate with others. Once they demonstrate that they are relatively comfortable with this process, the difficulty of the drafting tasks should increase. Students should also gain experience in undertaking a critical analysis of existing documents; in practice they will be come across innumerable precedent documents, some of which will require extensive redrafting.

## 2 *Walk Before You Run*

Redrafting an existing document can be difficult, especially if the original document was drafted using poor structure, obsolete terms and legalese. Words such as ‘heretofore’, ‘hereinafter’, ‘herewith’, ‘thenceforth’, ‘aforesaid’, ‘abovementioned’ and ‘herein provided’ litter old (and unfortunately some new) legal precedents as autumn leaves litter the ground, sometimes turning redrafting into a mammoth task. It can be more time-consuming to redraft a document than to start over. The drafter is required to undertake the same amount of research with a redrafted document as with a new one to ensure that all traces of legalese are removed, that legislative requirements are observed and that the redrafted document meets the objective of protecting the client’s interests and conveying the appropriate message clearly and concisely to the intended audience.

Failure to pay close attention to detail can, as occurred in *George T Collings (Aust) Pty Ltd v HF Stevenson (Aust) Pty Ltd*,<sup>65</sup> result in the court finding that one of the parties to a transaction has acted unconscionably. And while it may not seem critically important, poor grammar and punctuation can be costly for the parties and the lawyer who prepared the document. The Canadian cases of *AMJ Campbell Inc v Kord Products Inc*<sup>66</sup> and *Rogers Cable Communications Inc v Aliant Telecom Inc*<sup>67</sup> illustrate the importance of proper punctuation in contract drafting. In both cases, the placement of a comma led to litigation, and it had the potential to increase the amount payable under the terms of the contract by a significant amount.<sup>68</sup> For the lawyers responsible for the drafting error, an unfavourable finding by the court could realistically mean a negligence suit being brought against them. This is a situation all lawyers wish to avoid.

When attempting a redrafting task, students should be mindful of why the original document says what it does: the information was included in the original document for a reason. Perhaps a provision was included in response to a particular court decision or legislative provision. If so, the student must check to see that the legislation

<sup>65</sup> [1990] VicSC 620.

<sup>66</sup> (2003) 63 O.R. (3d) 375.

<sup>67</sup> Telecom Decision CRTC 2006-45.

<sup>68</sup> In AMJ’s case the difference was approximately CAN\$759,000.00. In Rogers’ case the difference was approximately CAN\$1,000,000.00.



remains current, or in the case of a decision, whether it has been overturned. If the legislation has been amended or the decision overturned, the contractual provision may now be obsolete or require significant amendment to ensure that it complies with current law.<sup>69</sup> The primary aim of the student should be to use plain language to clearly convey the appropriate message to the intended audience, not to simplify the meaning of the document. Students should be aware that if the nature of the transaction necessitates the inclusion of certain technical language or requires a detailed explanation of how the terms of an agreement are to operate, then so be it. They must appreciate that plain language does not mean simplistic language and that ‘clarity may not be consistent with brevity.’<sup>70</sup>

A final point here: redrafting requires strict adherence to the ‘golden rule’ of drafting. Never alter the language of a document unless you also intend to change the meaning.<sup>71</sup> It goes without saying that understanding the meaning of the original document is vitally important. If the drafter does not understand the message being conveyed, it may be more appropriate to abandon the precedent altogether and draft a new document from scratch rather than running the risk of creating a document that fails to deliver the appropriate message.

### 3 *The Sprinting Phase*

Although it is rare for a lawyer to draft a lengthy document without the benefit of a precedent, the ability to construct a legal document from beginning to end is a valuable skill. Precedents are used to enhance efficiency and save clients money,<sup>72</sup> but they may not always address a particular client’s needs, as we have seen. A good lawyer can also produce a document from scratch containing concise, precise and effective legal language which satisfies the objectives of protecting the client’s interests, conveying the appropriate message to the intended audience and avoiding disputes between the parties about the document’s meaning. When drafting without a precedent, the drafter becomes more conscious of the document’s potential audience, its structure, the organisation of its contents, any appropriate technical definitions, and the essential topics which must be addressed.

In commercial legal practice lawyers often need to draft specific conditions for inclusion in clients’ contracts. For example a client purchasing real estate may require certain special conditions to be

<sup>69</sup> Ros Macdonald and Denise McGill, *Drafting* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2008) 19.

<sup>70</sup> *Ibid* 18.

<sup>71</sup> *Ibid* 19.

<sup>72</sup> Jonathan Todres, ‘Beyond the Case Method: Teaching Transactional Law Skills in the Classroom’ (2009) 37(2) *Journal of Law, Medicine & Ethics* 375, 377.

drafted for inclusion in the standard land contract. The standard contract form contains the conditions usually applicable to a transaction for the sale of land but each transaction has its own peculiarities. This is where the skill of ‘free-form’<sup>73</sup> drafting is put to the test. In their scaffolded skills instruction students are encouraged to embark on a number of these tasks to test the development of their skills. Good lawyers need to be able to understand the law and to translate that law into legal documents that are clearly and easily understood by lawyers and non-lawyers alike. While there will never be a perfectly drafted document, the more practice students have with both re-drafting and free-form drafting, the more feedback they receive, and the more self-reflection and peer review they engage in, the better equipped they will be for practice.

### C *Looking at the Big Picture*

Castles et al pinpoint the ‘predominant view’, which they say is ‘that the contextualisation and actualisation of the theory of law in its practical operation is the preferable pedagogical approach to law teaching.’<sup>74</sup> Teaching students to ‘think ex ante about clients’ issues or legal matters is important to producing graduates who will excel in practice.<sup>75</sup> Drafting legal documents demands precision and drafting exercises expose students to the ‘complexities involved in taking an idea and translating it to a written document.’<sup>76</sup> Using scaffolded experiential instruction to teach legal drafting, providing constructive feedback and encouraging self-reflection and peer-review allows students to develop the ability to analyse a client’s individual needs and produce certain, clear and concise legal documents.

Students and early career lawyers may make the mistake of assuming that some transactions are the same, when in fact each transaction is unique. Clients seek legal advice for a variety of reasons and a good lawyer is able to recognise what the client is trying to achieve and which of the client’s interests most require protection in the particular circumstances. Highlighting the multi-dimensional nature of many legal transactions, Johnstone recognises the need to teach students ‘in context that law operates in a complex society.’<sup>77</sup>

The ability to recognise the underlying complexity of a seemingly simple transaction is fundamental to drafting an effective legal

<sup>73</sup> This is a term adopted by Tammy Johnson to describe drafting without the aid of precedents.

<sup>74</sup> Margaret Castles et al, ‘Using Simulated Practice to Teach Legal Theory: How and Why Skills and Group Work Can Be Incorporated in an Academic Law Curriculum’ (2009) 26(2) *University of Tasmania Law Review* 120, 126.

<sup>75</sup> Todres, above n 72, 376.

<sup>76</sup> *Ibid* 377.

<sup>77</sup> Richard Johnstone, ‘Rethinking the Teaching of Law’ (1992) 3(1) *Legal Education Review* 17, 25.

document. The drafter should at all times be conscious of *by whom* and *for what purpose* the document is required. Drafting students should be taught to understand their audience; it is often inappropriate to include technical or legal jargon in a contract that will usually be read by laypeople. Where appropriate, a definitions section should be included in the document to provide clarity to the reader. The document must minimise the potential for misunderstanding; it must convey the appropriate message to the intended audience, accurately reflect any applicable legislative requirements and be certain, clear and concise.

### D *The Importance of Feedback and Reflection*

When students see that their skills are developing and that they are making real progress with their set tasks, this tangible evidence of success encourages greater effort.<sup>78</sup> The opportunity for reflection on completed tasks coupled with regular, detailed and constructive feedback stimulates the development of students' drafting skills. Langer believes that providing feedback to students is a critical teaching strategy that improves student learning.<sup>79</sup> Without adequate feedback, students are in danger of remaining ignorant of their mistakes and going on to develop a drafting style that is inappropriate for effective legal practice.

An effective method of giving feedback 'must proactively account for the psychological factors that can thwart students' development of expertise.'<sup>80</sup> Any assistance the teacher provides to the student is a reciprocal process and the teacher should pay close attention to the student's response.<sup>81</sup> An alert teacher can gain valuable insight from the student's response the student's perception of the relevance and difficulty of the task just completed, enabling the teacher to reflect on the effectiveness of completed tasks or to modify planned future tasks. This enables the teacher to set tasks that have an appropriate level of difficulty and best meet the students' needs. Drafting tasks should increase in difficulty as the semester progresses, so if the student's response to feedback indicates that the task was overly easy (or difficult) then an adjustment of planned future tasks is appropriate.

In addition to obtaining teacher feedback, engaging in peer review and self-critique is another way for students to gain insight

<sup>78</sup> Philip Langer, 'The Use of Feedback in Education: A Complex Instructional Strategy' (2011) 109(3) *Psychological Reports* 775, 778 citing E.D. Gagne, C. Yekovich and F.R. Yekovich, *The cognitive psychology of school learning* (Harper Collins, 2nd ed, 1993).

<sup>79</sup> *Ibid* 775.

<sup>80</sup> Sheila Rodriguez, 'Using Feedback Theory to Help Novice Legal Writers Develop Expertise' (2009) 86(2) *University of Detroit Mercy Law Review* 207, 211.

<sup>81</sup> Langer, above n 78, 778.

into their drafting efforts. Dewey recognised that in experiential learning, the combination of experience and reflection creates meaning from the experience and fosters continued learning.<sup>82</sup> Similarly, Burnard argues that reflection is an essential component of experiential learning. He describes experiential learning as ‘learning by doing, which involves reflection.’<sup>83</sup> Having students review each other’s work exposes them to different drafting styles and provides a mechanism through which they can reflect upon their own efforts and critique their own work. The ability to self-critique is a valuable skill in itself because it allows the drafter to objectively review a document before its final submission. Self-critique gives the drafter the opportunity to determine whether they have made any of the common drafting mistakes or, more importantly, whether the message being conveyed adequately addresses all legal issues (including statutory requirements) and is certain, clear and concise.

#### IV CONCLUSION

This article responds to the difficulty that lawyers sometimes face in maintaining the balance between protecting their clients’ legal interests and translating complex legislative provisions into plain language that conveys the appropriate message to the intended audience. Using the example of a consumer credit contract transaction, Part II highlighted common drafting challenges. With these difficulties in mind, Part III discussed the theory of teaching legal skills, with a particular focus on teaching the skill of legal drafting, suggesting that a scaffolded experiential approach to skills development is an effective way to nurture the development of students’ legal drafting skills.

Turning law into legal advice using plain language requires skill. Developing the skills necessary to create a legal document that is certain, clear and concise requires awareness, practice and mentoring, all of which should begin with the implementation of scaffolded drafting exercises in law school.

Drafting legal documents in the low-risk environment that law school offers allows students to build confidence as drafters, better preparing them for the challenges encountered in legal practice. Creating an experiential learning environment where students engage in scaffolded drafting exercises encourages them to cultivate an efficient drafting style which will hold them in good stead as practising lawyers.

<sup>82</sup> John Dewey, *Experience and Education* (Collier-Macmillan Books, 1938) 45.

<sup>83</sup> John Fowler, ‘Experiential Learning and Its Facilitation’ (2008) 28 *Nurse Education Today* 427, 428 quoting Philip Burnard, *Experiential Learning in Action* (Avebury, 1991).