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| **institute of advanced legal studies**  school of advanced study  university of london |
| **THE RULE OF LAW AND ACCESSIBILITY OF LEGISLATION**  **THE CONTRIBUTION OF LEGISLATIVE DRAFTERS** |
| **STUDENT NO. 1540254** |
| **LLM 2014-2015** |
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| **LLM Advanced Legislative Studies (ALS)** |

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# ACKNOWLEDGEMENTS

Praise God from whom all blessings flow!

Thanks to Dr Constantin Stefanou and Professor Helen Xanthaki for the knowledge imparted and for your supervision throughout the course. Thanks also, to all guest lecturers for sharing your time and expertise.

Also, thanks to the kind and patient staff at IALS especially the Library Staff, Christian Otta and the barrister at Café Lex.

Special thanks to Chevening Scholarships and the Foreign and Commonwealth Office for funding my studies and making my dream to study law in England a reality.

This dissertation is dedicated to my parents. Thanks for always believing.

# CHAPTER ONE

#### INTRODUCTION

According to Karpen, ‘knowledge of the law is… mandatory in a rule of law-democracy’.[[1]](#footnote-1) Knowledge of the law empowers citizens to ascertain what the law ‘prohibits, permits, or requires’.[[2]](#footnote-2) On the other hand, failure to know the law cripples the ability of citizens to know their rights and obligations and to regulate their affairs with certainty. This provides the perfect opportunity for laws to be used for arbitrary reasons by the powers that be and as Stein observes ‘Abhorrence of arbitrariness is a major theme that runs through…the rule of law’.[[3]](#footnote-3) Lord Renton has described failure to comprehend the law as ‘contempt’ and ‘a disservice to democracy’.[[4]](#footnote-4) He further explained that incomprehensibility of the law ‘weakens the rights of the individual, it eases the way for wrongdoers and it places honest people at the mercy of the bureaucratic state’.[[5]](#footnote-5) Additionally, the Ireland Law Commission in recognising the link between arbitrariness and incomprehensible laws stated that-

The principle of the Rule of Law presupposes that those who are affected by a law should be able to ascertain its meaning and effect. A system of language and law understood by only a few, where only a few have the ability to make authoritative statements about what is and is not permitted under the law, cedes power to those few.[[6]](#footnote-6)

Lord Donaldson also acknowledging the effect of incomprehensible laws noted in **Merkur Island Shipping Corporation v Laughton** that the ability of persons to understand the laws that bind them was necessary for the ‘efficacy and maintenance of the rule of law’.[[7]](#footnote-7)

However, for citizens to understand the law and its implications, legislation must be presented and written in a manner that can be easily comprehended. Legislation, the primary source of law, is the channel through which the regulatory message of the law is communicated.[[8]](#footnote-8) Crabbe refers to legislation, as ‘a means to attain… economic, cultural, political and social policies’.[[9]](#footnote-9) Through legislation rights are conferred and protected[[10]](#footnote-10) and human conduct is regulated[[11]](#footnote-11) and whether we appreciate its impact or not it affects us all.[[12]](#footnote-12) For this reason Xanthaki posits that legislation is a tool for regulation.[[13]](#footnote-13) It is because of the regulatory character of law that legislation needs to be accessible. As stated by Berry-

Since legislation incorporates the norms by which society operates, its availability in an up-to-date, accessible and coherent form is crucial for the orderly and effective functioning of society and in particular for the rule of law.[[14]](#footnote-14)

Accessibility of law and the rule of law were discussed in a 2006 lecture by Lord Bingham.[[15]](#footnote-15) In describing the rule of law, Lord Bingham stated as the first principle that ‘the law must be accessible and so far as possible intelligible, clear and predictable’.[[16]](#footnote-16) Looking at Lord Bingham’s first principle it is clear that access to the law extends beyond physical accessibility. The criteria of ‘intelligible, clear and predictable’ establish that understanding the meaning and implications of the law is a necessary component of accessibility.[[17]](#footnote-17) Understanding the law allows citizens to be certain of what the law is, thus making the law predictable. Lord Bingham offered these three criteria because knowledge of the law is needed to (a) discourage criminal behaviour; (b) claim civil rights and to perform obligations imposed by the law and (c) to successfully conduct trade, investment and business.[[18]](#footnote-18)

Although, legislation is the main tool for regulation, there remains an incessant call for legislation to be accessible because of the complexity in legislation. Take the UK for example, in 1975 it was complexity in legislation that led to the formulation of the Renton Committee on the Preparation of Legislation which terms of reference included ‘With a view to achieving greater simplicity and clarity in statute law, to review the form in which Public Bills are drafted’.[[19]](#footnote-19) Years later in the UK, reducing complexity in legislation is still advocated through projects like the ‘Good Law Initiative’ that was launched with an aim to ensure that laws are necessary, effective, clear, accessible and coherent.[[20]](#footnote-20) This demonstrates that although there has been tremendous improvement in the way laws are drafted, the complexity that resides in legislation today that hinders accessibility is the same complexity that plagued legislation of the past. The only thing that has changed is that the readership of legislation has widened resulting in legislation being used by persons from diverse backgrounds. It is for this reason that advocating for accessibility in laws must continue. Complexity in legislation ‘hurts the rule of law’,[[21]](#footnote-21) as Heaton notes, it ‘hinders economic activity, creating burdens for individuals, businesses and communities. It obstructs good government’.[[22]](#footnote-22)

What then is the role of legislative drafters in this regard? Saliember, declares that drafters ‘have a responsibility’ to draft laws in such a way that the end result is laws that are comprehensible to those they affect.[[23]](#footnote-23) Likewise, the Victorian Law Commission states that drafters fail if they do not draft laws that are clear.[[24]](#footnote-24) However, for drafters this is no easy feat as it is a challenge to draft a law that produces an outcome that correlates with the expectations of the policymaker.[[25]](#footnote-25) Political and social hurdles,[[26]](#footnote-26) the difficulties associated with both language and the subject matter of the legislative proposal, coupled with the ‘fallibility of drafters’[[27]](#footnote-27) limit what drafters can do.[[28]](#footnote-28) As McLeod puts it ‘drafters may be trying to hit moving targets’.[[29]](#footnote-29) However, despite these difficulties, drafting legislation is the specialty of drafters. They have access to tools and techniques that can be used to turn complex policies into laws that are devoid of as much complexity as possible. Therefore, drafters must confront the complexity in legislation and advocate ‘for simplicity in expression and clarity of purpose’. [[30]](#footnote-30)

It is this advocacy to contribute to the rule of law by legislative drafters that this dissertation will address.

#### HYPOTHESIS AND OBJECTIVE

The hypothesis of this dissertation is that legislative drafters can contribute to the rule of law by making legislation accessible. My argument is that drafters who are entrusted with crafting laws can contribute to making legislation accessible based on the choices they make during the drafting process. This dissertation builds on Lord Bingham’s first principle of the rule of law and it is my objective to prove that at each stage of Thornton’s drafting process that drafters can contribute to making legislation intelligent, clear and predictable.

#### METHODOLOGY AND STRUCTURE

The main method of proving my hypothesis is by utilising Thornton’s five stages of the drafting process to demonstrate how at each stage legislative drafters ensure that legislation conforms to Lord Bingham’s first principle, thus contributing to the rule of law. I will also be using literature and case law to support my arguments.

To further contribute to proving my hypothesis I will in Chapter Two show why understanding the law is an important component of the rule of law. This initial discussion is needed in order to demonstrate the need for legislation to be ‘intelligible, clear and predictable’. Following that will be a discussion that drafters are one group of persons who have the responsibility to make legislation accessible. Proving that drafters have a responsibility sets the foundation to discuss how they can discharge this responsibility via the different stages of drafting.

After laying the necessary foundation in Chapter Two, a critical assessment of Thornton’s five stages will commence in Chapter Three with the discussion of stages 1 and 2, namely understanding and analysing the legislative proposal. These two stages will prove that the analysis done in these two initial stages enables drafters to make the appropriate choices in the later stages to make the law comprehensible.

In Chapter Four, there will be a discussion of stage 3, this is the designing the bill stage. In this stage I will prove that an appropriate plan and structure facilitates communication of the regulatory message of the law. I will also discuss how drafters can design a law to facilitate accessibility.

Stage 4, which is the composition and development stage, will be discussed in Chapter Five. Here I prove that drafters have at their disposal the tools and techniques to ensure that the law is drafted in language that promotes intelligibility, clearness and predictability. The tools and techniques that will be discussed are clarity, precision and unambiguity as well as plain language and gender- neutral language.

In Chapter Six, the last stage of the drafting process, the scrutiny and testing stage, will be discussed. Here, I will prove that though this stage is the last one, it should not be neglected by drafters as it also contributes to accessibility by ensuring that the legislation is fit for purpose.

Chapter Seven contains the conclusion.

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# CHAPTER TWO

#### The Rule of law and the Importance of Accessibility to Legislation

The essence of the rule of law has been expressed by Rt. Hon. Michael Gove, Secretary of State for Justice and Lord Chancellor of the United Kingdom as-

The rule of law is the most precious asset of any civilised society. It is the rule of law which protects the weak from the assault of the strong; which safeguards the private property on which all prosperity depends; which makes sure that when those who hold power abuse it, they can be checked; which protects family life and personal relations from coercion and aggression; which underpins the free speech on which all progress – scientific and cultural – depends; and which guarantees the essential liberty that allows us all as individuals to flourish.[[31]](#footnote-31)

When one considers the above description of the rule of law it is not difficult to see why contributing to the rule of law is important. It is the rule of law that gives citizens the ability to safeguard their rights, regulate their conduct with confidence and participate fully ‘in the economic or social change that is ultimately implemented by legislation’.[[32]](#footnote-32) The rule of law balances the scales between the government and those they govern as the government cannot exercise their powers unfettered. As expressed by Lord Bingham -

[A]ll persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.[[33]](#footnote-33)

It is because of the benefit that the rule of law gives that its viability is threatened where laws are incomprehensible. Laws of this nature foster a breathing ground for inequality, arbitrariness and misuse of power by both the government and judiciary.[[34]](#footnote-34) It is only comprehensible laws that will protect citizens against unfair practices. As Wit J stated in **AG v Joseph**, ‘the law cannot rule if it cannot protect’.[[35]](#footnote-35)

Being governed under laws that are unintelligent, unclear and unpredictable has been described by Lord Simon as living under the ‘Rule of Lottery, not of law’.[[36]](#footnote-36) This means that society would be governed by uncertain laws and the government in essence would be gambling with citizens’ lives. As Barwick CJ in **Watson v Lee** stated ‘To bind the citizen by a law, the terms of which he has no means of knowing, would be a mark of tyranny’.[[37]](#footnote-37) This similar sentiment has been expressed by Xanthaki who remarked that ‘Unclear laws are the worst form of tyranny’.[[38]](#footnote-38) Likewise, Ng notes, ‘If the law is meant to be obeyed other than as an instrument of tyranny, then it must be based on consensus, and to be based on consensus, it must first be understood’.[[39]](#footnote-39) Seidman et al paint a grave picture of how unclear laws affect citizens. The authors write that ‘vaguely or ambiguously’ written laws result in the moral decay of society, stifles ‘development and good governance’ and results in ‘kleptocracy’.[[40]](#footnote-40)

Subjecting citizens to incomprehensible laws is abhorrent and described as tyrannous because whether citizens understand the law or not non-compliance results in punishment. It is because laws are intrusive and binding that citizens must know what the law is so that they can conduct themselves within its confines.[[41]](#footnote-41)When laws are not ‘open and accessible, clear and certain’[[42]](#footnote-42) then there is a great possibility that persons would not comply.[[43]](#footnote-43) For Fuller persons would have no ‘moral obligation to obey’ laws they do not understand and this would result in failure of the legal system.[[44]](#footnote-44) Similarly, Sullivan states that persons must be sure of what the law is for it to be effective.[[45]](#footnote-45) Likewise Murphy notes that ‘Citizens cannot… obey secret rules; if they do not know what the law requires when they deliberate about how to act, they cannot take that requirement into account’.[[46]](#footnote-46) It is for this reason that Lord Diplock in **Black Clawson v Papierwerke Waldhof** stated that-

The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.[[47]](#footnote-47)

Apart from non-compliance, failure to comprehend the law results in failure to exercise one’s rights.[[48]](#footnote-48) This is because incomprehensible laws are the ideal tool to conceal bad policies.[[49]](#footnote-49) When laws are incomprehensible citizens are hindered from not only benefiting from the law but also challenging the laws if their rights are infringed upon. As stated by authors Robinson, Bulkan and Saunders when laws ‘limit fundamental rights and freedoms, they must be precise enough to allow citizens to know what is being prohibited’.[[50]](#footnote-50) It is only laws that are clear and understandable that justifies any intrusion on the rights and freedoms of citizens.[[51]](#footnote-51)

Further, when laws are unclear it presents a problem of interpretation for the courts.[[52]](#footnote-52) The case **R v Bradley**[[53]](#footnote-53) is instructive. This case concerned the Criminal Justice Act 2003 (UK) which contained provisions that were ‘obfuscatory’ and ‘conspicuously unclear...where clarity could have easily been achieved’.[[54]](#footnote-54) According to Rose LJ-

It is in the public interest that the criminal law and its procedures, so far as possible, be clear and straightforward so that all those directly affected…should be readily able to understand it. The public is entitled to know of the difficulties which such legislation creates for all concerned. The point is graphically highlighted in the present case, because the Crown have advanced to this Court a construction of the statute which is completely contrary to that suggested by the Home Office press release on the day the provisions came into force.[[55]](#footnote-55)

The problem with unclear laws is that they prevent access to justice as citizens should be able to have their matter heard without undue difficulty.[[56]](#footnote-56) Unclear statutes will either delay or deny citizens a remedy under the law. For instance, the longer Judges take to decode statutes, the longer the matter takes resulting in excessive cost to citizens.[[57]](#footnote-57)

On the other hand, intelligent and clear laws enable the average person with average intellect to read and understand the law and apply it to their peculiar circumstances.[[58]](#footnote-58) Intelligent and clear laws amount to certainty in the law as citizens would be able to predict the government’s response to their conduct.[[59]](#footnote-59) Laws drafted in conformity with Lord Bingham’s criteria allow citizens to accept and trust the governing rules and institutions.[[60]](#footnote-60) They encourage citizens to participate in decision making which is necessary for democracy and good governance.[[61]](#footnote-61) In essence, laws that are intelligible, clear and predictable are beneficial as it empowers citizens and gives them access to enjoy all that the law affords.

#### Legislative Drafters – Guardians of the Rule of Law

Legislative drafters have been called ‘guardians of the rule of law’,[[62]](#footnote-62) ‘the gatekeeper’,[[63]](#footnote-63) ‘keepers of the statute book’,[[64]](#footnote-64) and ‘advocates’ who must maintain and secure ‘the integrity of the statue book’.[[65]](#footnote-65) These titles are bestowed upon drafters because of their ‘unique position within the legislative process’.[[66]](#footnote-66) For Thornton, it is drafters who play ‘the leading role in the drafting process’.[[67]](#footnote-67) As Ismail states drafters have ‘a significant impact on the interpretation and the implementation of the law’.[[68]](#footnote-68) Marchant, echoed the same sentiment when he declared that drafters ‘play an instrumental role in the development and enactment of laws’.[[69]](#footnote-69) It is because of this unique position that Nzerem and Xanthaki, see drafters as being charged with the responsibility of effectively accomplishing the policy objectives that the government hopes to achieve.[[70]](#footnote-70)

Levert QC however, sees the responsibilities of drafters as multifaceted. For him drafters must maintain ‘the quality, consistency and integrity of the statute book’, execute the government’s objects yet at the same time ensure that the legislation is accessible, ‘both materially and intellectually’.[[71]](#footnote-71) Therefore, the job of drafters is not simply to transcribe the government’s policy into legislative text. To be effective in discharging their responsibilities, drafters must be effective communicators and ensure that the regulatory message in the law is effectively communicated to its intended recipients. As Eagleson notes ‘It cannot be said that an act of language has really occurred unless the message is comprehended; and no law can accomplish its task of regulating behaviour unless it can be understood’.[[72]](#footnote-72)

Scrutton LJ in recognising the responsibilities of drafters remarked in **Roe v Russel** that-

I regret that I cannot order the cost to be paid by the draftsman of the Rent Restriction Acts, and the members of the Legislature who passed them, and are responsible for the obscurity of the Acts.[[73]](#footnote-73)

The Honourable Lord Justice’s remarks might seem harsh but when one considers that the responsibility of drafters is to effectively convey the policies that have ‘legal consequences’ to citizens[[74]](#footnote-74) it is reasonable to understand his frustration. As noted by Krongold it is the drafter who is responsible for making sure that the law is comprehensible.[[75]](#footnote-75) According to Driedger ‘the perfect bill has never been written, and never will be’,[[76]](#footnote-76) however, he did recognize that ‘the most a draftsman can do is try to reduce doubt, ambiguity and foreseeable problems …his success depends upon the extent to which he has done so’.[[77]](#footnote-77) Therefore, it is a ‘key responsibility’ of drafters to ensure that the effect of the law is communicated in a way that can be easily understood by users.[[78]](#footnote-78) Why then is this responsibility thrust upon drafters?

Drafters have the requisite skills and expertise to make the necessary choices that result in the greatest level of comprehensibility. According to Horn, ‘the drafter’s expertise is the ability to deploy the English language to write effective legal rules with clarity and force’.[[79]](#footnote-79) From the moment drafters are presented with instructions they make a series of judgments that either contributes to the accessibility or inaccessibility of the future law. Drafters have ‘principal influence on and control’ over the words of the legislation.[[80]](#footnote-80) Additionally, structure of the bill is also within the control of drafters. As Sir Geoffrey Bowman notes ‘the choice of how to structure the draft is generally for the drafter. It involves judgment, and there are no hard and fast rules’.[[81]](#footnote-81) Therefore, drafters can contribute to Lord Bingham’s first principle based on the choices they make. These choices influence the words and structure of the legislation and will be based on the audience that the drafter is communicating with and their need for laws that are ‘simple, accessible, and easy to comply with and not unnecessarily burdensome’.[[82]](#footnote-82) If the appropriate judgments are made then drafters will be well on their way to ensuring that the legislation is accessible. Perhaps this is why Arden LJ posits that ‘the rule of law is very relevant to the task of drafters’.[[83]](#footnote-83)

We will now look at the various judgments that drafters can make to contribute to accessibility in legislation.

# CHAPTER THREE

# THE DRAFTING PROCESS

#### Overview of the Drafting Process

Thornton’s five drafting stages are (i) understanding the legislative proposal, (ii) analysing the legislative proposal, (iii) designing the bill, (iv) composing and developing the bill and (v) scrutinizing and testing the bill. As Miers and Page acknowledge, Thornton’s stages ‘do not so much represent clearly defined divisions but are rather recognisable points along a continuum.’[[84]](#footnote-84) For instance, the drafter never stops understanding or analysing the policy and although scrutiny and testing is the last stage; at each stage drafters scrutinise and test their work.

The stages are the logical sequence of the drafting process that highlights the importance of drafters’ contribution to the rule of law. According to Omal, these stages enable drafters to achieve ‘an effective legislative measure’.[[85]](#footnote-85) Through these stages we witness the many opportunities afforded to drafters to make the law accessible for users. Thornton’s stages prove that drafters are more than scribes; they are legal professionals, who advise, design and compose. The stages demonstrate that the effort of drafters to make laws accessible is not confined to one stage. Therefore, no stage can be seen as more important than the other. Each stage serves a unique purpose that leads to the ultimate goal i.e. accessibility.

We will now look at each stage.

# STAGE 1-Understanding the Legislative Proposal

#### What is the Understanding Stage?

According to MacCormick and Keyes ‘drafting is not just writing words to express ideas. It begins with understanding what is to be expressed’.[[86]](#footnote-86) Therefore, the starting point for producing legislation that is intelligible, clear and predictable must be the drafter understanding the purpose for the new proposed legislation. How much the drafter understands is reflective in the choices that he or she makes in the other stages to ensure accessibility. This stage sets the tone for the entire drafting process because it is here that the drafter will begin to get ‘a feel’ for the policy and its objectives. It is about the drafter understanding what the present law is, how the proposed law will change it,[[87]](#footnote-87) the reasons for those changes and any implications that may derive from this change.[[88]](#footnote-88)

#### How do Drafters Contribute to Accessibility at this Stage?

One of the factors that can hinder the drafter from making the legislation accessible is failure to do proper research to understand the proposal. As stated by Stefanou, ‘a good draft is above all an indication that the drafter has understood well the issues/circumstances involved, as well as what is required of him/her according to the instructions’.[[89]](#footnote-89) If the drafter is not clear on the policy then it will be very difficult for the drafter to make the policy clear to users, thus hindering accessibility from the very beginning. Therefore, the drafter must commence the research and information gathering from the moment drafting instructions is given. It is this stage that will enable the drafter to sift through the issues, setting a firm foundation to draft the law. As posited by Vanterpool, ‘the drafter’s understanding of the proposal is the central focus of this stage in the drafting process, as the quality of the output is directly related to the quality of the input at this stage’.[[90]](#footnote-90) Therefore, drafters must seek to have an ‘accurate and complete’[[91]](#footnote-91) appreciation of the issues so that they can know what problem the new proposed law is being introduced to solve.[[92]](#footnote-92) This requires drafters to exercise due diligence and commit themselves to understanding the objectives of the policy.

A deep understanding of the policy issues will help drafters to immediately recognise any inconsistency in the policy. Further, if the policy deals with an unfamiliar area then drafters should seek clarification from the instructing officer in order to fully understand the proposal.[[93]](#footnote-93) Additionally, drafters should be in consultation with any other person who might be able to help with understanding the policy better.[[94]](#footnote-94) In circumstances where drafting instructions are not in a complete manner[[95]](#footnote-95) the drafter will have to ask for more information from the instructing officer to compensate for lack of instructions. Contributing to the rule of law requires drafters to keep asking questions until all the necessary information is provided.[[96]](#footnote-96) It is only when a complete understanding of the legislative proposal is gained then drafters can successfully manage the other stages.

# STAGE 2-Analyzing the Legislative Proposal

#### What is the Analysis Stage?

One of the main responsibilities of drafters is to subject the legislative proposal to a ‘rigorous intellectual and legal analysis’.[[97]](#footnote-97) Analysing the legislative proposal is an extension of the understanding stage as it builds on what has been understood. With the use of the drafting instructions[[98]](#footnote-98) the drafter will analyse the proposal and ‘identify and evaluate’ any defect and offer solutions to remedy the defect.[[99]](#footnote-99) Without a thorough analysis the strong possibility exists that issues pertinent to making the bill accessible will ‘slip through the net’.[[100]](#footnote-100) This stage also sees the drafter, though not a policy expert, raising questions on the policy to ensure complete understanding as well as the effectiveness of the legislative proposal.[[101]](#footnote-101)

#### How do Drafters Contribute to Accessibility at this Stage?

Drafters contribute to accessibility in this second stage by carrying out an in-depth analysis to ascertain (a) the necessity of the proposal (b) the proposal’s consistency with the existing law, (c) special responsibility areas and (d) the audience of the proposed legislation.

1. **Necessity**

According to Marcello drafters should commence their work by asking ‘How can I avoid drafting this bill?’[[102]](#footnote-102) If they proceed to drafting without considering and suggesting other effective methods to give effect to the legislative proposal then they would have failed to discharge their duties.[[103]](#footnote-103) Drafters would have failed because one of the causes of complexity in legislation is unnecessary legislation.[[104]](#footnote-104)

An unnecessary law has no practical value. It is simply a burden on the economy and society[[105]](#footnote-105) and adds volume to the statute book which contributes to inaccessibility.[[106]](#footnote-106) Therefore, drafters must consider any new law as forming part of the statute book and any addition must be one that fulfils a purpose that can only be solved through legislation. [[107]](#footnote-107) Because laws are intrusive and restrictive, they need to be necessary. An unnecessary law possesses the same regulatory nature as a necessary one. Therefore, drafters must rigorously scrutinise the legislative proposal to ensure that legislating is the best option. If a law is not necessary then it represents a policy that has not been properly thought out and although drafters are often cautioned not to get involved in policy, this is one of the areas where they should offer advice.[[108]](#footnote-108)

1. **Existing Legal Framework**

Analysis of the existing legal framework enables the drafter to determine whether the new legislation will conflict with existing laws.[[109]](#footnote-109) This is necessary because any new law affects existing laws.[[110]](#footnote-110) As explained by Driedger, the drafter must regard ‘a statute as one fragment of a much greater whole, and any new law must be in harmony with existing law’.[[111]](#footnote-111) Cherkewich further explains that when drafters ensure the compatibility and coherence between new laws and existing ones, they are in essence protecting the law from harm. For her this is one of the areas where the competency of the drafter is judged.[[112]](#footnote-112)

Knowledge of the current law will enable drafters to know how to alter the law, how provisions in the current law and proposed law will co-exist and whether there should be transitional provisions.[[113]](#footnote-113) This allows for a smooth insertion of the proposed law into the statute books, which promotes consistency and certainty in the law.[[114]](#footnote-114) This contributes to the rule of law by allowing the law to be interpreted and used ‘fairly and consistently’.[[115]](#footnote-115) Additionally, failure to examine the present legal landscape will prevent the drafter from understanding the inadequacies of the current law. This hinders the drafter from truly understanding the legislative proposal and finding the best solution to remedy the mischief.[[116]](#footnote-116)

1. **Special Responsibility Areas**

Another area that drafters must analyse is what Thornton calls the special responsibility areas. Drafters as well as instructing officers must consider whether the legislative proposal conforms to the legal and constitutional system.[[117]](#footnote-117) This is a necessary step because although the drafter’s job is not to ‘pontificate’ on the merits of the government’s proposal, they have a professional duty to critically scrutinise the proposal to see what effect it will have on the state and citizens’ rights.[[118]](#footnote-118) Some of these special responsibility areas include (a) proposals affecting personal rights, (b) proposals affecting property rights, (c) proposals inconsistent with international obligations and (d) proposals for retrospective legislation.

Analysing the above areas is necessary if the drafter is to make the law accessible. If the rights of citizens are going to be affected by the legislative proposal then it is important that they be aware of it. For example, let us consider a case where the drafter is given instructions to draft a retrospective law as it relates to a criminal offence. There is a strong presumption against criminal laws that are retrospective because they create uncertainty and instability in the law.[[119]](#footnote-119) Persons should not be punished for an offence ‘that was not an offence at the time the conduct was committed’.[[120]](#footnote-120) When laws are unpredictable it erodes the confidence in the legal system, as at the time of the committal of the offence persons would have thought their conduct was permissible. It is because of the disadvantageous position that retrospective legislation puts citizens in that it is inconsistent with the rule of law.[[121]](#footnote-121) Lord Bingham in listing predictability[[122]](#footnote-122) as necessary for accessibility stated that-

Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for something which was not criminal when you did it, and you cannot be punished more severely than you could have been punished at the time of the offence.[[123]](#footnote-123)

However, if Parliament’s intention is that the law should be retrospective then that intention should be made in ‘very clear’, unambiguous words.[[124]](#footnote-124) This duty to make the intention clear falls in the lap of the drafter. As Turatsinze observes, when drafters fail to clearly state that the law is to apply retrospectively, the courts will assume that the law is not to have that effect. Therefore, it is the drafter’s job to ‘ensure that the retrospective intent is clearly, precisely and unambiguously expressed’.[[125]](#footnote-125) Similarly, Linde J in the case **Whipples v Houser** acknowledged that the problems with retrospective laws lies with the drafter who has possibly failed to give ‘adequate attention to the policy choices involved’.[[126]](#footnote-126)

Therefore, subjecting the law to proper scrutiny must not be overlooked by drafters. Failure to consider the policy choices will hinder them from effectively contributing to the rule of law.[[127]](#footnote-127) As guardians of the rule of law they must raise these special responsibility issues. If after receiving advice the policymaker still decides to go ahead with the proposal, the drafter must draft the law clearly so that citizens can know what the law is and how it affects them.

1. **The Audience**

Analysing the audience of legislation is necessary because that is the intended target for which the drafter is making the law accessible. It is the audience that enables drafters to choose the right techniques and tools to make the law comprehensible to its eventual users. Both Berry and Bertlin acknowledge that for any legislation to be effective it must be communicated to those it will affect.[[128]](#footnote-128) Therefore, according to Berry drafters ‘need to understand how readers might think and feel as they interact with documents. They must anticipate what their readers need and expect’.[[129]](#footnote-129) Anything less from the drafter results in failure.[[130]](#footnote-130)

Therefore, drafters must ensure that users understand the substance of the proposed law to induce the required regulatory behaviour. As stated by Xanthaki there must be ‘cooperation and positive action’ from those to whom the message was directed.[[131]](#footnote-131) To identify the audience with ‘precision and accuracy’,[[132]](#footnote-132) drafters must interpret the instructions [[133]](#footnote-133) and if necessary consult the instructing officer to get a better analysis of the law’s intended audience.[[134]](#footnote-134) Reaching out to the instructing officer for assistance will ensure that the regulatory message is conveyed effectively as they would be familiar with the policy.[[135]](#footnote-135)

Identifying the audience of legislation is not always easy because as noted by Tanner QC ‘We no longer live in an age where learning is a privilege enjoyed by a handful of citizens like judges and lawyers’.[[136]](#footnote-136) Therefore, the notion that the law is not read by the ‘ordinary man’ is a fallacy. Giving weight to this reality is research conducted by the National Archives about users of UK legislation website ‘legislation.gov.uk’ where it was found that not only was legislation read by legal professionals but also lay persons and non-legal professionals.[[137]](#footnote-137)

However, while legislation should be accessible to everyone, the government’s policy often time is intended for a particular section of society. Therefore, Greenberg’s suggestion to drafters is that they ‘determine the nature of [their] primary target audience and the facilities likely to be available to them in applying and construing the legislation’.[[138]](#footnote-138) Similarly, the Renton Committee, suggested that the needs of the ‘ultimate users should always have priority’.[[139]](#footnote-139) Who then are the primary or ultimate users?

Thornton recognised that the audience consists of ‘lawmakers, the persons who are concerned with or affected by the law and members of the judiciary’.[[140]](#footnote-140) However, he suggests that drafters should adopt the style that is most suitable for those affected by the law in order for there to be effective communication.[[141]](#footnote-141) These persons have been described by Horn as the primary users of legislation; the ones whose behaviour the law seeks to change.[[142]](#footnote-142) Horn identifies a second audience that he calls the official interpreters. These persons are concerned with the administration, implementation and adjudication of the statute.[[143]](#footnote-143) For Ngirinshuti, the ‘different groups are to be addressed simultaneously’.[[144]](#footnote-144) Similarly, Sir Geoffrey Bowman states that drafters must find a way to balance the competing interests of their diverse audience.[[145]](#footnote-145) Making a bill work for all users is a difficult task. However, considering the binding[[146]](#footnote-146) and life transforming nature of law, all categories of users need to be certain of the regulatory message.

# CHAPTER FOUR

# STAGE 3-Designing the Bill

#### What is the Design Stage?

After understanding and analysing the legislative proposal drafters are now ready to design the bill. It is here that drafters envision how to communicate the regulatory message. As Horn notes, drafters designing the law is their way of preparing a blueprint that is a response to the policy.[[147]](#footnote-147)This stage in the drafting process is aptly placed because drafters cannot properly design a law that they do not understand. It is only when they have clarity about what is wanted then they can confidently devise a plan and design a suitable structure that embodies the policymaker’s vision.

For Crabbe the design of the bill ‘represents Counsel’s mental picture of how well the Act of Parliament would look in structure and quality, in substance and in form’.[[148]](#footnote-148) It is an outline of the method which the drafter will use to give effect to the objectives of the legislative proposal. Along with preparing an outline the drafter will also create the structure of the bill and contemplate how the bill should be organised to properly give effect to the policy. Designing the bill comprises the overall arrangement of the bill as well as the organisation of its internal aspects for example the clauses and schedules.[[149]](#footnote-149) It is a combination of how the drafter will communicate the substance of the proposal as well as architectural planning. Therefore, it is an important step that should not be ignored as the cohesion of the bill is dependent on it.[[150]](#footnote-150)

#### Importance of Design to Accessibility

Designing the law is pivotal to the drafter making the bill comprehensible as ‘poor design and layout’ is one of the causes for inaccessible legislation.[[151]](#footnote-151) Without a proper design before drafting, the legislation would be done in a haphazard manner, without any logic to the placement of clauses. Illogical structure obstructs comprehensibility and causes the substance of the regulatory message to be lost on the intended audience.[[152]](#footnote-152) Engle has described ‘good design’ as ‘the essence of a well drafted Bill’.[[153]](#footnote-153) A good design is needed because, even if the drafter employs the best linguistic techniques to make the law comprehensible, the legislation would still be inaccessible because the words would be hanging from a disorganised frame. Thus, if the regulatory message is to be successfully communicated then not only must the words be clear but they must also be presented in a clear manner.

Structure is important to accessibility because it allows the words of the bill to be laid out in a manner that gives readers better insight into the purpose and objectives of the legislation. As stated by Butt ‘Structure and form are crucial to an effective, readable legal document’.[[154]](#footnote-154) Likewise, Seidman et al recognised that it is the structure of the bill that ‘carries the primary burden’ to ensure accessibility, which should be designed logically to make usability easier for its audience.[[155]](#footnote-155) According to Thornton ‘The principal purpose is to design a structure that facilitates communication of the content at the same time as it achieves the objects of the instructions’.[[156]](#footnote-156) In similar vein Voermans opines that ‘Legislation is first of all, a channel of symbolic communication’.[[157]](#footnote-157) For both Voermans and Xanthaki, structure is instrumental to the accessibility of the legislation[[158]](#footnote-158) because it is one of the things that users rely on to comprehend the law.[[159]](#footnote-159) Therefore, drafters must develop a structure that can enable the policy message to go forth with clarity, thus paving the way for accessibility.[[160]](#footnote-160)

#### How do Drafters Contribute to Accessibility at this Stage?

A good place for drafters to begin their contribution at this stage is to consider the audience of the new legislation. Communicating with the audience is dependent on how ‘clearly articulated and logical’ the architecture of the bill is.[[161]](#footnote-161) Krongold posits that ‘an act should be organized so that readers can find their way around it easily’.[[162]](#footnote-162) This is why analysis of the audience cannot be stressed enough. It is the audience that will enable the drafter to prioritise the provisions within the legislative text to ensure that ‘the prime message’ of the policy does not escape users.[[163]](#footnote-163) Identifying the audience enables the drafter to rid the bill of anything that can potentially distract the audience from grasping the regulatory message.[[164]](#footnote-164) This requires drafters to design a law that is simple yet effective enough to achieve the objectives of the new law.[[165]](#footnote-165) Simplicity is essential as it is the most effective way to convey the regulatory message to the various audiences.

Sir Geoffrey Bowman, advices that drafters should not give readers too much detail at the beginning of the legislation but rather ease them into complex provisions by stating the basic information first.[[166]](#footnote-166) Seidman et al, advised that the bill’s structure must ‘reflect its logic’ showing the correlation between the different provisions.[[167]](#footnote-167) Likewise Butt agrees that the bill should be ordered logically from the reader’s perspective and should be in a manner that is both ‘sensible and comprehensible to the reader’.[[168]](#footnote-168) Burrows and Carter note that ‘The illogical ordering of sections not only impedes understanding: it can mean that any overall statutory scheme is lost’.[[169]](#footnote-169) All of these views point to the fact that a logical and simple structure ensures that the important concepts are not hidden or overshadowed by provisions that are secondary.[[170]](#footnote-170) It also ensures that the text is easily digestible for users. Therefore, the most important information should be placed first and this is determined from ‘the reader’s point of view’.[[171]](#footnote-171) As stated by Asprey,

[I]n a statue, the most important thing is what it is about-not when it commences, who administers it, what other legislation is affected by it…the main purpose of laws is to regulate behaviour, and so that is the point of view that we should take when assessing the relative importance of different parts of Acts.[[172]](#footnote-172)

The opinions of the above writers on how a bill should be ordered are based on the guidelines laid down by Lord Thring. Though laid down many decades ago they are still instructive for drafters of the 21st century. Lord Thring’s guidelines are as follows-

1. Provisions declaring the law should be separated from, and take precedence of [sic] provisions relating to the administration of the law.
2. The simpler proposition should precede the more complex and in an ascending scale of propositions the less [sic] should come before the greater.
3. Principal provisions should be separated from subordinate provisions.
4. (a) Local or exceptional provisions, (b) temporary provisions and (c) provisions relating to repeal of Acts should be separated from the other enactments, and placed by themselves under separate headings.
5. Procedure and matters of detail should be set apart by themselves and should not, except under very special circumstances, find any place in the body of the Act.[[173]](#footnote-173)

For Thornton, drafters must design a structure that allows the regulatory message to be transmitted successfully to its audience as well as give effect to the instructions.[[174]](#footnote-174) Thornton, like Lord Thring recommends that the important provisions should be stated first. Namely, the law should be first, followed by the provisions that administer the law. Procedural steps should be written in a logical manner i.e. in the way they occur. General provisions should go before those that are specific and permanent provisions should be placed before the temporary.[[175]](#footnote-175) Likewise, Seidman et al suggest that general functions should take precedence over particular functions and exceptions and permanent provisions should be placed before transitional or temporary ones.[[176]](#footnote-176) Placing the primary message closer to the front ensures that the audience grasp the important aspect of the legislation.[[177]](#footnote-177)

Apart from Lord Thring’s time honoured structure, Xanthaki, proposes a layered approach which she argues may better serve the variety of readers of legislation. The layered approach is where the bill is divided into three parts with each part speaking to the different users of legislation as identified by the research conducted by the National Archives. It differs from Lord Thring’s approach as the act will be tailored to the needs of each user. It is argued that this approach will promote effective communication of the policy message.[[178]](#footnote-178) The first part of the bill targets lay users and will be written in a clear manner to easily convey the main regulatory message to enable these users to comply with the law and enjoy new rights under the law. The second part of the bill targets non legal professionals who need to access the legislation because of their work. In this part further detail is given about the policy and the language is technical yet approachable. The third part of the bill targets those who will interpret the law. It deals with issues of legislative interpretation, issues of procedure and issues of application. Although each stage targets a different audience the language in each will not be overly technical giving all users access.[[179]](#footnote-179)

#### Tools to Enhance the Design of the Bill

One of the tools to enhance overall comprehensibility of the bill is the drafter making use of headings and dividing the legislation into parts. The decision to use headings and divide the bill into parts is dependent on whether the drafter believes that it will make the bill accessible to its audience.[[180]](#footnote-180) Kobba asserts that structure can enhance accessibility if the drafter divides the bill into parts allowing the ‘key features of the law’ to be given prominence.[[181]](#footnote-181) Separating the bill into parts by grouping similar clauses under their own heading allows the drafter to show the reasoning behind the bill, enhances the coherence of the bill and shows how each part is connected.[[182]](#footnote-182) It also helps with navigability as readers can look at the heading and decide if a particular part is relevant to them. The use of headings is especially useful if it’s a large bill as users will be able to have ‘a mental picture of the statute’ without having to remember all the details.[[183]](#footnote-183)

To further enhance structure and accessibility the drafter must contemplate whether schedules are needed as they are a useful tool for effective communication.[[184]](#footnote-184) According to Aitken, they can ‘improve the design and flow of a document’.[[185]](#footnote-185) Schedules are the ideal place for ‘lists and other complex or lengthy material’[[186]](#footnote-186) which can make the body of the legislation untidy and disorganised.[[187]](#footnote-187) Overall, schedules are useful as they simplify the structure of the bill and aid in clarity by freeing up the legislation.[[188]](#footnote-188) Further, if the bill concerns textual amendments the drafter might want to consider using Keeling Schedules to make the textual amendments accessible. Textual amendments only ‘set out the changes being made to the law’ and not how the law will look after the changes have been made.[[189]](#footnote-189) This leaves users at a disadvantage to fully understand the implications of the changes being made to existing law; users would need to see how the law looks after the amendments. The Keeling Schedule combines these two important qualities and helps the drafter in making the law accessible.[[190]](#footnote-190)

Whatever structure and tools the drafter chooses to design the law, it is important to remember, that in making legislation accessible the audience must be the focus. This means that whether a traditional or layered approach is used or whether headings or schedules are used should depend on whether it enables the message to clearly and accurately reach the audience. That is the drafter’s mandate and if carried out effectively he or she would have contributed to the rule of law.

# CHAPTER FIVE

# STAGE 4-Composition and Development of the Bill

#### What is the Composition and Development Stage?

Drafters have been described by Sir Stephen Laws ‘as the creator of the text [with] the most intimate and comprehensive understanding of it’.[[191]](#footnote-191) As creator they are in charge of selecting the appropriate words and tools to give effect to the government’s policy objective. This is the stage where drafters take the knowledge gained from studying the legislative proposal and clothes the structure designed in stage three. As Dosey puts it ‘it is time to put pen to paper’.[[192]](#footnote-192)

All the preparatory work done in the previous stages to ensure accessibility is for this moment. It is what has been done in those stages that will enable drafters to choose the right words to make the policy message comprehensible. As observed by Thornton drafters at this stage will convert ‘what is comprehensible and clear to the drafter to the shape and form most easily and unequivocally comprehensible to the reader’.[[193]](#footnote-193) However, this stage does not see the drafter working in isolation. Rather, drafters develop the bill in consultation with the instructing officer and adjust the bill based on their feedback.[[194]](#footnote-194)

#### ***How do Drafters Contribute to Accessibility at this Stage?***

In the same way that a comprehensive understanding, thorough analysis and appropriate structure can make the law accessible, the language chosen by the drafter also contributes to accessibility. In fact much of the complaint of legislation being inaccessible is due to it being drafted in obscure language that hides the regulatory message. When the regulatory message is clouded in unclear words it is a hindrance for all users including Judges. For example, Lord Donaldson in **Merkur Island Shipping Corporation** experienced considerable difficulty in trying to interpret laws that were unclear. He stated that-

The judges of this court are all skilled lawyers of very considerable experience, yet it has taken us hours to ascertain what is and what is not 'offside', even with the assistance of highly qualified counsel. This cannot be right.[[195]](#footnote-195)

Therefore, if it is difficult for Judges to understand legislation drafted in obscure language how much more difficult would it be for users that are not legally trained? Remedying this dilemma requires drafters to choose the right techniques and tools that promote simplicity, clarity and precision. This is necessary to ensure that both the primary users and the official interpreters[[196]](#footnote-196) understand and apply the law with consistency and certainty. Not drafting laws with simplicity, clarity and precision will ‘result in deficient application, enforcement and compliance problems, and unduly restrictive interpretation’.[[197]](#footnote-197)

The tools at the disposal of drafters are clarity, precision and unambiguity and they are complemented by the techniques of plain language and gender- neutral language.

#### Drafting Tools for Accessibility-Clarity, Precision and Unambiguity

In the **Merkur Island Shipping** **Corporation** case Lord Diplock acknowledged the need for clarity in legislation when he stated that ‘Absence of clarity is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it’.[[198]](#footnote-198) Clarity is one of the ‘essential elements of accessibility’ that makes legislation comprehensible for users[[199]](#footnote-199) and it refers to ‘clearness or lucidity as to perception or understanding; freedom from indistinctness or ambiguity’.[[200]](#footnote-200) By striving for clarity the drafter will state the law in a manner suitable for the target audience. Generally, drafters should use ordinary language unless the legislation deals with a technical area that requires its own special vocabulary.[[201]](#footnote-201)

Precision means the ‘exactness of expression or detail’.[[202]](#footnote-202) Drafters achieve precision when the words in the law reflect exactly the behaviour that the policymaker wanted to ‘forbid, authorize or require’.[[203]](#footnote-203) This requires drafters to state the law ‘precisely and unequivocally as possible’.[[204]](#footnote-204) The importance of precision was described by Lord Bridge as follows-

The courts’ traditional approach to construction, giving primacy to the ordinary, grammatical meaning of statutory language, is reflected in the parliamentary draftsman’s technique of using language with the utmost precision to express the legislative intent of his political masters and it remains the golden rule of construction that a statute means exactly what it says and does not mean what it does not say.[[205]](#footnote-205)

Based on Lord Bridge’s pronouncement, precision is a worthy goal to pursue as the court when seeking to decipher the intention of Parliament will first consider the words used in the statute. If the law is not drafted accurately then the court can ascribe a different meaning to the law than what Parliament intended.[[206]](#footnote-206) This does not bode well for predictability and is at variance with accessibility. With precision citizens will know ‘where the boundaries of legality’ lie[[207]](#footnote-207) and this gives them confidence when regulating their conduct.[[208]](#footnote-208) This is why the preparatory stages (stage 1 and stage 2) are important because if drafters do not have a sound understanding of what the policymaker wants then they will fail to accurately communicate the policy message to users.[[209]](#footnote-209)

It is often thought that if drafters pursues clarity then precision may be sacrificed or vice versa. As Vanterpool observes, the policymaker would prefer a law to be precise even if it is not clear so as to avoid a misinterpretation by the courts.[[210]](#footnote-210) However, the Law Reform Commission of Victoria does not agree that any sacrifice has to be made and argues that-

[P]recision and clarity are not competing goals. Precision is desirable in order to minimise the risk of uncertainty and of consequent disputes. But a document which is precise without being clear is as dangerous in that respect as one which is clear without being precise. In its true sense, precision is incompatible with a *lack* of clarity.[[211]](#footnote-211)

Likewise, Greenberg states-

In reality the requirements of certainty and clarity do not conflict. If the meaning of a law is not sufficiently clear for it to be possible to assume that the same meaning will be ascribed to it by each of its likely readers, the law cannot be said to be in a state of certainty.[[212]](#footnote-212)

Further, as Dorsey notes ‘a clear draft is an accurate draft… clear writing ensures that the draft, if enacted into law, carries out the client’s policy effectively’.[[213]](#footnote-213) Therefore, both clarity and precision are needed if the intention of the drafter is to communicate effectively. Forsaking one for the other according to Thornton will cause complexity which is ‘a definite step along the way to obscurity’.[[214]](#footnote-214) Therefore, drafters must aim to draft simply yet precisely to ensure comprehensibility.

In addition to clarity and precision, to make the law accessible drafters must pursue unambiguity and avoid drafting with vagueness. This is made possible when the law is composed with clarity and precision. Where the words in the legislation are ambiguous and vague it will cause users to be uncertain as to what the law is.[[215]](#footnote-215) And uncertainty lowers the chances of achieving compliance. As Raz states, ‘An ambiguous, vague, obscure or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it’.[[216]](#footnote-216) Ambiguity exists when more than one meaning can be ascribed to a word or condition.[[217]](#footnote-217) Ambiguity is undesirable because it can lead to a misconstruing of the legislative message[[218]](#footnote-218) as the users will be uncertain as to what the law is.

Vagueness on the other hand will cause citizens to be unsure of ‘how far the law extends’, [[219]](#footnote-219) this leaves the law open for ‘any meaning’ to be ascribed to it.[[220]](#footnote-220) Although, both ambiguity and vagueness can lead to difficulties in interpretation of the law, vagueness is sometimes used deliberately to allow administrative authorities to fill in the gaps.[[221]](#footnote-221) However, generally speaking uncertainty whether caused by ambiguity or vagueness should be avoided if possible but at the same time drafters should not be too overzealous in preventing vagueness by being too precise. Over-precision will cause drafters to be longwinded[[222]](#footnote-222) resulting in legislation that is cluttered and uncertain.[[223]](#footnote-223) This ultimately will obstruct the communication of the regulatory message to readers.[[224]](#footnote-224) Facilitating accessibility would then require drafters to consider the subject matter of the proposal and consider how best the needs of the policy maker as well as the users can be accommodated.[[225]](#footnote-225)

To ensure the bill conforms to Lord Bingham’s criteria of accessibility all three goals must be pursued. They are linked together and as Majambere observes they cannot be separated when drafting.[[226]](#footnote-226) Bekink and Botha posit ‘clarity implies both simplicity and precision’.[[227]](#footnote-227) Kabba states unambiguity is a ‘part of clarity as they share the same characteristics’.[[228]](#footnote-228) Stefanou notes that ‘any draft bill that lacks clarity and precision will inevitably be challenged in court for vagueness’.[[229]](#footnote-229) All three tools allow users to understand and apply the law appropriately and confidently.[[230]](#footnote-230) When laws are drafted with clarity, precision and unambiguity not only will they be comprehensible but the same message will be effectively communicated to all users.[[231]](#footnote-231)

#### Techniques for Achieving Clarity, Precision and Unambiguity

#### Plain Language

1. **What is Plain Language?**

Cormacain who carried out a case study on plain language using the Business Tenancies Order (Northern Ireland) concluded that ‘plain language promotes clarity’.[[232]](#footnote-232) However, plain language also promotes precision and unambiguity.[[233]](#footnote-233) It has been described by Greenberg ‘as part of the core tools of good drafting’.[[234]](#footnote-234)Eagleson states that plain language is ‘The most competent version of language and legal drafting…which enables the message to be grasped readily, without difficulty and confusion’.[[235]](#footnote-235) For Watson-Brown plain language is necessary for effective communication which only occurs when the regulatory message is in a manner that those affected by the law will reasonably understand the law and its intended result.[[236]](#footnote-236)

Plain language according to Stefanou is ‘about the use of language which is clear and conveys its message without unnecessary complexity’.[[237]](#footnote-237) For Bekink and Botha plain language is ‘legal communication that is clear, understandable, accessible, and also user-friendly’.[[238]](#footnote-238) Butt states, to draft using plain language is to apply ‘the same techniques that good writers use in normal prose’ when composing and developing the bill.[[239]](#footnote-239) Whatever definition is ascribed to plain language, at its core it is simply drafting in a manner that accommodates the users of the legislation.[[240]](#footnote-240) It includes structure and any other tool used to enhance comprehensibility.[[241]](#footnote-241) As Mico, states-

Plain language combines content and format to create documents that can be understood by anybody. It is the language of the law and a bridge between the audience and the legislation. It is an approach which helps readers to understand what they are reading.[[242]](#footnote-242)

Similarly, Eagleson opines that plain language is not confined to a particular form of drafting because plain language is audience based. [[243]](#footnote-243) Utilising plain language requires drafters to consider the audience then decide what structure, language or supplementary tool would make the law accessible for its users.

While there are no fixed rules to plain language drafting, several guidelines have been offered over the years.[[244]](#footnote-244) These guidelines are to make the law ‘leaner and cleaner, and …easier to read and understand’.[[245]](#footnote-245) One of the guidelines is to use short sentences as opposed to ‘long convoluted sentences’.[[246]](#footnote-246) For Berry, short sentences are appealing and they enhance comprehension while long and complex sentences are difficult to remember.[[247]](#footnote-247) This results in users losing interest as it takes longer for them to understand the regulatory message. As stated by Aitken, ‘legal writing should be an effective communication of the author’s meaning to the reader without undue concentration or effort by the latter’.[[248]](#footnote-248) Similarly, Burrows and Carter find long sentences to be grammatically inelegant, making the provision ‘ungainly and difficult to understand’.[[249]](#footnote-249) Drafters are also advised to avoid using technical language,[[250]](#footnote-250) archaic language and legalese words[[251]](#footnote-251) and non-English expressions.[[252]](#footnote-252) Abandoning these expressions is necessary because lay users will have difficulty understanding them and ‘they only have value when used between professionals’.[[253]](#footnote-253)

1. **Tools to Complement Plain Language**

Drafting legislation is different from other writings as drafters cannot employ the same literary techniques such as repetition or colourful language to make the law comprehensible to users.[[254]](#footnote-254) However, to the advantage of drafters there are useful supplementary tools available to enhance accessibility. These tools are especially useful where the bill deals with a technical and complex subject[[255]](#footnote-255) or where the bill is lengthy.[[256]](#footnote-256) As expressed by Thornton ‘The complexity of much of the material that the legislative drafter is compelled to distil and communicate is unavoidable.’[[257]](#footnote-257) Equally, Elliot notes that ‘some provisions are tough to write. Despite our best efforts they may not be easy to understand.’[[258]](#footnote-258) As explained by the Irish Law Commission, while every statute should be drafted clearly not all can be converted to layman terms especially those situations where technical words and jargons form part of the vernacular of a specific group. Trying to reduce these words to plain language might cause them to lose their effectiveness.[[259]](#footnote-259)

The use of supplementary tools allows drafters to explain the purpose and operation of complex provisions as well as aid users in navigating the act. Therefore, encountering complex subject matters is an opportunity for the drafter to be creative and make use of supplementary tools to enhance communication. Complex provisions are simply the opportunity to make the law easier to understand.[[260]](#footnote-260)

Countries like Australia and New Zealand have embraced and encouraged their drafters to use supplementary tools to aid interpretation. For example, New Zealand encourages the use of tables, examples and formulas,[[261]](#footnote-261) ‘explanatory notes, flow-charts…graphs, diagrams… and in longer Acts indexes of key words and phrases’.[[262]](#footnote-262) Australian drafters are encouraged to use ‘purpose clauses, preambles…definitions, and explanatory provisions’[[263]](#footnote-263) in order to ‘establish context, relevance and meaning’.[[264]](#footnote-264) They also advocate the use headings, good cross referencing and signposting.[[265]](#footnote-265) A practical example of the use of supplementary tools to enhance accessibility was the rewrite of the Income Tax Act (1936) of Australia. The aim of this rewrite ‘was to replace the layers of obscurity and uncertainty in the law with simple, clear and unambiguous provisions’.[[266]](#footnote-266) Some of the supplementary aids used were ‘guides to the structure of the law, notes with illustrations of the application of sections’, cross-references, diagrams and flow charts.[[267]](#footnote-267)

However, while supplementary aids are useful drafters should not allow them to distract users or overshadow the regulatory message. Therefore, if they are seen to be useful yet a hindrance then it might be best if they are placed in explanatory notes, schedules or appendices. As cautioned by Thornton ‘the desire to communicate successfully must not be permitted to cloud the fact that the actual text of the statute is and should always be recognised as being in a special and powerful position.’[[268]](#footnote-268) For instance, the Consumer Credit Act 1974 (UK) contained several descriptive examples explaining new terminologies but they were placed in Schedule 2 of the Act.[[269]](#footnote-269) Placing these examples in the body of the legislation would have been a distraction and also affected the structure and layout of the legislation. Therefore, drafters must consider what effect these tools would have on the overall presentation of the legislation and then decide on their placement. As Ross and Green cautions, ‘The inclusion of explanatory provisions can be justified only if they are effectual-that is, only if they actually help readers’ understanding’.[[270]](#footnote-270)

#### Gender- Neutral Language

Gender- neutral language is used by drafters to achieve accuracy as ‘it aims to promote gender specificity in the pronoun used when drafting legislation’.[[271]](#footnote-271) Like plain language, it promotes precision, clarity and unambiguity.[[272]](#footnote-272) Where drafters utilize gender-neutral language the words used will include both sexes-treating men and women equally. Therefore, the male pronoun will not be used to refer to both men and women.[[273]](#footnote-273) The use of gender- neutral language promotes certainty because there will be no doubt that the law refers to both men and women and this promotes the rule of law.[[274]](#footnote-274)

To achieve a gender- neutral legislation there are several techniques at the drafter’s disposal. Some suggested by Greenberg are repetition of the gender-neutral noun, omission of pronoun, reorganising the sentence from the active to the passive voice, using the relative pronoun and using alternative gender- neutral pronouns.[[275]](#footnote-275) The drafter can also use gender-neutral nouns for example ‘person’, ‘individual’,[[276]](#footnote-276) ‘ambulance worker’[[277]](#footnote-277) or ‘chairperson’.[[278]](#footnote-278) Also both pronouns (his or her, he or she, he/she or s/he) can be used where the provision refers to both sexes.[[279]](#footnote-279) Others include using the plural noun or singular noun followed by ‘they’ rather than singular pronouns ‘he’ or ‘she’; or replacing the noun with a letter.[[280]](#footnote-280)

These techniques are not suitable in all contexts and in the UK some of these techniques have been frowned upon for instance, using a letter in place of a noun. This technique is said to ‘decrease readability… because it does not reflect how people normally speak or write’ and it gives users the additional work of replacing the noun being referred to.[[281]](#footnote-281) Another technique that is not favoured is the repetition of nouns in place of pronouns because it ‘may produce a clumsy sentence’.[[282]](#footnote-282) As noted by Greenberg-

[R]epetition is also necessarily the one that tends to produce the longest drafts, and those that are the most dissonant for the reader. In the traditional use of repetition…to avoid ambiguity in a sentence with two actors, we have always accepted dissonance as the reasonable price of clarity, reminding ourselves that we are writing the law not poetry and that certainty must always be preferred to elegance or brevity.[[283]](#footnote-283)

Utilizing gender- neutral language as noted above can cause the text to lose its simplicity and elegance.[[284]](#footnote-284) However, the goal as Greenberg notes is not to write poetry but to effectively communicate the law to its audience.[[285]](#footnote-285) Therefore, drafters may have to forego simplicity and elegance to ensure that there is certainty in the law which is achieved through gender- neutral language.[[286]](#footnote-286) At the end of the day the rule of law requires that the audience who might comprise both genders understand that the law applies to them equally.

# CHAPTER SIX

# STAGE 5-SCRUTINY AND TESTING OF THE BILL

#### What is the Scrutiny and Testing stage?

The scrutiny and testing stage is the final stage in the drafting process. This stage like the others is relevant to the work of drafters who bear the burden of ensuring that the bill is in order.[[287]](#footnote-287) Drafters are not perfect and mistakes are bound to be made and issues overlooked. While perfection is an unattainable goal, nothing should stop drafters from trying. Contributing to the rule of law by making legislation accessible requires the drafter to give a hundred percent right down to the very end. Therefore, this stage should form part of the research and editing needed to produce an effective legislation.[[288]](#footnote-288) It is a critical stage that contributes to the ‘effectiveness and efficiency’[[289]](#footnote-289) of the law and for this reason it is said to be ‘synonymous with good practices, adherence to standards, regulations and the rule of law’.[[290]](#footnote-290)

Drafters at this stage must take a critical and objective look at their work.[[291]](#footnote-291) They must start at the beginning and ensure that the bill accurately represents the drafting instructions and that the structure and language chosen to convey the regulatory message is appropriate to achieve the desired results.[[292]](#footnote-292) Although during the analysis stage the drafter would have scrutinised the legislative proposal, Thornton recommends that the drafter once again ensures that the bill is compatible with the existing law, both domestic and international.[[293]](#footnote-293)

Achieving optimum results at this stage requires collaboration. This revisionary work[[294]](#footnote-294)must involve along with the drafter, colleagues of the drafting department,[[295]](#footnote-295) the instructing officer and if possible interest groups, experts and focus group testing.[[296]](#footnote-296) For example, Australia’s Corporation Law rewrite benefited from focus group testing to get feedback on the design, structure and text of the act.[[297]](#footnote-297) Also, in Canada, a copy of each draft bill is checked by more than one drafter and the instructing Ministry. Additionally, the draft is sent to an editing unit which checks all drafts for ‘consistency, punctuation, numbering, cross-referencing, grammar, structure and spelling and also clarity of idea expression’.[[298]](#footnote-298) Collaboration is necessary because having a second pair of eyes look over the bill enables the drafter to see whether the choices made to give effect to the policy were suitable.[[299]](#footnote-299)

#### How do Drafters Contribute to Accessibility at this stage?

Making the law accessible is dependent on every stage of the drafting process. Therefore, every opportunity allowed to scrutinise and test the bill should be taken. Scrutiny and testing ensures that the legislation can have the desired effect of ‘achieving social change’ after the drafter has made all the appropriate judgements leading to this final stage.[[300]](#footnote-300) As stated by Vanterpool,

[T]he intention of there being a stage five in the drafting process, which is solely dedicated for further evaluation of the legislation product, is, for Thornton, a deliberate and crucial stage in achieving quality in the final legislative draft.[[301]](#footnote-301)

Scrutiny and testing help drafters to consider whether the bill does justice to the instructions of the government as well as does justice to the audience of the bill. Because through scrutiny and testing the bill would be ‘properly, seriously and systematically checked’[[302]](#footnote-302) the drafter would be able to access whether the choices made during the drafting process achieve accessibility. For example, comments from the experts and interest and focus groups would be able to give the drafter valuable feedback as to whether the structure and word choices amounts to comprehensibility.

When issues are discovered it is here that they are clarified and gaps filled. For this reason, thoroughly scrutinising and testing the bill is considered one of the most effective ways of not only making the legislation accessible but also improving the overall quality of legislation.[[303]](#footnote-303) Without proper scrutiny and testing drafters will miss their opportunity to contribute effectively to the rule of law and the quality of the law. As Tanner states ‘Every piece has to be right from the central components right through to the smallest detail. A small error in the detail can have catastrophic consequences’.[[304]](#footnote-304) Communicating the law is not easy, it is very complex and there are plenty opportunities for mistakes to be made.[[305]](#footnote-305) Therefore, it is important that drafters give this stage as much priority as the other four stages.[[306]](#footnote-306)

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# CHAPTER SEVEN

# CONCLUSION

The objective of this dissertation was to prove that legislative drafters can make a significant contribution to the rule of law by making legislation accessible. This dissertation was built on Lord Bingham’s first principle of the rule of law, namely that ‘the law must be accessible and so far as possible intelligible, clear and predictable’.[[307]](#footnote-307) The methodology used was Thornton’s five stages of drafting. The research has proven that drafters contribute to accessibility of legislation from the moment that they receive their instructions and it continues even after the bill has been drafted. Contributing to the rule of law requires the drafter to build a solid foundation before the legislation is prepared. Drafters must have a comprehensive understanding of the proposal, thoroughly analyse the proposal and design an appropriate structure that carries the regulatory message. It is only until the proper foundation is in place then drafters are equipped to compose and develop the law. Here drafters must chose to pursue clarity, precision and unambiguity. Finally, after the draft is completed drafters must now revise all the work done to ensure that the legislation will be effective.

Critically examining the contribution of drafters in making laws accessible has highlighted the importance of the audience of the legislation. The analysis of the audience has proved to be the defining point in accessibility because, when designing the law, the drafter must consider how to arrange the structure of the legislation in a manner that the regulatory message is given prominence and facilitates navigation with ease. When it comes to composing and developing the bill, the audience continues to be the focus. The techniques of clarity, precision and unambiguity are used to make the law comprehensible and predictable for the audience of the legislation. Additionally, it is the audience that makes the use of plain language and gender- neutral language relevant. The final stage, scrutiny and testing, shows that the drafter’s consideration of the audience continues with the drafter ensuring that the choices made are appropriate to ensure comprehensibility for the audience.

Drafting legislation with the audience in mind is not an easy task. As Sir Stephen Laws has noted, drafters have the daunting task of making the legislation equally accessible to its various audiences.[[308]](#footnote-308) However, despite the difficulty this is what contributing to the rule of law requires from drafters as it is the only way to successfully communicate the regulatory message of the law. Communicating the law to the various audiences requires considerable conscientious effort. The choices that drafters have to make to ensure accessibility should not depend on luck. It should come from a place of understanding the usefulness of the techniques and tools that are available. Drafters have to understand the importance of structure, ‘language and syntax’ to effectively communicate the law so that it is comprehensible to those whose lives will be regulated by the law as well as those who must interpret it.[[309]](#footnote-309)

Drafting legislation transcends the actual drafting and has been described by Crabbe as ‘concentrated intellectual labour’,[[310]](#footnote-310) the Renton Committee called it ‘a high degree of intellectual penetration’.[[311]](#footnote-311) As Xanthaki rightly observes the drafter’s task is mainly ‘principled and conceptual analysis’ of the legislative proposal that involves the drafter determining the viability of the proposal and then setting out how best to give legal effect to the wishes of the policymaker.[[312]](#footnote-312) This means that drafters have to decide on ‘the appropriate rule or convention that delivers the desired results’.[[313]](#footnote-313) This requires drafters not only to know of the right solutions but to apply them intelligently. As the Renton Committee recognised ‘the quality of our legislation depends largely on the quality of our draftsmen’.[[314]](#footnote-314) This quality comprises a combination of technical skills as well as academic understanding. As Crabbe puts it drafters should possess-

[A] facility in the use of the language of legislative instruments. Experience in legal practice is desirable. So is an interest in drafting, a mastery of the use of the relevant language, a systematic mind and orderliness in the formation of thoughts, the ability to pay meticulous attention to detail and to work with accuracy under pressure.[[315]](#footnote-315)

The importance of both drafters and the work that they do highlights the need for training to hone the skills needed to draft for the rule of law. If drafters are going to be efficient in their unique position within the legislative process then they must be equipped.[[316]](#footnote-316) As Markman recognises there is a need for ‘capable legislative counsel’.[[317]](#footnote-317) To this end both academic training as well as experience that comes from on the job training is needed. Academic training allows drafters to understand the importance of the rule of law and accessibility and exposes them to the techniques and tools that they can use to enhance accessibility. It arouses the interest and desire of drafters to contribute to the rule of law. While this is good, it is only the experience gained on the job that allows drafters to encounter real life scenarios and put into practice what has been learned and refine their skills.[[318]](#footnote-318) This combination sets drafters on their way to significantly contribute to the rule of law.

Finally, when drafters are equipped to make laws accessible they not only contribute to the rule of law but they also contribute to the effectiveness of the law, which is synonymous with quality of the law.[[319]](#footnote-319) When laws are intelligible, clear and predictable then the behaviour of the recipients of the law are more likely to reflect the regulatory intention of the policymaker.[[320]](#footnote-320) Therefore, the same judgments that drafters make to ensure that the legislative proposal conforms to Lord Bingham’s first principle also leads to effectiveness. Additionally, accessible laws are needed for good governance as it contributes to transparency and accountability.[[321]](#footnote-321) When citizens can access the legislation then government can be said to be transparent in their dealings allowing citizens to hold them accountable-safeguarding against the ‘kleptocracy’ that Seidman et al alluded to.[[322]](#footnote-322) As Greenberg opines ‘the rule of law matters enormously to society… and legislation is its backbone’.[[323]](#footnote-323) Therefore, those who draft laws must contribute effectively to ensuring that citizens have access to legislation.

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