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TOPIC: PLAIN LANGUAGE IN DRAFTING LEGISLATION IN NIGERIA:  
THE POSSIBLE BENEFITS.

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## Dedication

To my wife, Agnes and my sons, Daniel and Gabriel.

## CHAPTER 1: INTRODUCTION

### 1.1 Background and hypothesis

The language of Nigerian legislation is difficult to read and understand and neither the legislation nor the existing drafting styles expressly adopts the use of plain language in legislation so legislation are drafted in traditional language which is inherently inaccessible to users. This is in spite of the current era of increasing globalisation and harmonisation of legislation. The application of plain language principles in drafting legislation will definitely not solve all the drafting problems but it is crucial in making sure legislation communicates and is accessible to a wider audience.

The reason for making legislation clear, understandable and accessible is to enhance democracy and the rule of law. Every new legislation changes the body of law. So, it cannot communicate with users in the same style used in other forms of writing or use the same range of tools. It cannot use traditional language as this will make it inaccessible, risk creating doubts and ambiguities and fuel litigation. Legislation should be able to speak directly to the people whose lives it affects.<sup>1</sup> It is communication of a special kind and the means through which citizens are informed of authoritative rules and regulations. Communication is only successful when the object of communication is effectively communicated. Legislation cannot accomplish its task of regulating behaviour unless it can be understood. The most competent version of legislation is that which allows its message to be readily grasped without difficulty or confusion. “This is none other than plain language-language which gets its message across in a straightforward,

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<sup>1</sup> R Sullivan, ‘The Promise of Plain Language Drafting’ (2001)47 *McGill L.J.*97,101.

unentangled way, that lets the message stand out clearly and does not enshroud or enmesh it in convoluted prolixity.”<sup>2</sup>

Legislation in traditional style, the style in use in Nigeria, at best, will be precise which also is a dubious assumption,<sup>3</sup> but is definitely not clear and intelligible. This dissertation looks at the inadequacies of legislation and the process of drafting in Nigeria with two aims first, to prove that plain language is an effective means of communicating the content of legislation. Its object is to communicate effectively with those to whom the legislation is addressed. Secondly, to prove that introducing plain language in legislative drafting in Nigeria will make legislation clearer, understandable and more accessible to users. This goal is worth pursuing as benefits are likely to flow from it.

Presently, there are too many pieces of legislation in Nigeria that are difficult to understand. The problem is, Nigerian legislation were imported in traditional language and because of the use of precedents, they still are drafted in the same language. Legislation can no longer be content to rely on old words, clauses and precedents. Things are changing all over the world and Nigeria should not be left out. It is in the light of the above that this dissertation hypothesises that, plain language looks beyond the meaning of words used to how they are perceived by users, how the information is organised and presented, the organisation of words in sentences, the sentences in legislation, the design and layout as they all affect clarity understanding and accessibility.

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<sup>2</sup> Eagleson, quoted in B Beckink and C Botha, ‘Aspects of Legislative Drafting: Some South African Realities (Or Plain Language is not always Plain Sailing) (2007)28(1) *SLR*34-67,65.

<sup>3</sup> J Kimble, ‘Answering the Critics of Plain Language’ (1994-95)5 *Scribe Journal of Legal Writing*, 51,55.

## 1.2 Scope and methodology

In order to prove the hypothesis, this dissertation relies on Turnbull's '*four-fold strategy*' of the Australian Commonwealth in the paper 'Plain Language and Drafting in General Principle'<sup>4</sup> which include: planning the draft properly; using well known rules of clear writing; avoiding traditional forms of expression if simpler forms can be used; and using aids to understanding which are not merely linguistic, in an attempt to prove that if these principles of plain language, which looks beyond words, are applied in drafting legislation in Nigeria, legislation will be clearer, understandable and accessible. The dissertation also considers benefits which could be reaped from plain language in drafting federal legislation in Nigeria which basically are benefits to users, legislators and government.

This dissertation is limited to drafting of federal legislation in Nigeria as a jurisdiction. An attempt is made to describe the present practice, how application of plain language will affect it and suggestions are made for improvement.

## 1.3 Structure

The dissertation is divided into six chapters. Chapter one being the introductory chapter, covers background and hypothesis, scope and methodology and this structure. Chapter two is the background. It defines the concepts used and discusses the jurisdiction under case study and its main focus is on legislation, legislative drafting, drafter, accessibility, audience, and legislative drafting in Nigeria. Chapter three is the descriptive part. It looks into the concept of plain

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<sup>4</sup> [https://www.opc.gov.au/plain/docs/plain\\_draftin\\_principles.pdf](https://www.opc.gov.au/plain/docs/plain_draftin_principles.pdf)>accessed21/06/16.

language, its object, movements, styles formulated by different experts and the four-fold strategy of the Australian Commonwealth Drafters proffered by Turnbull which is the criteria used in proving the hypothesis. Chapter four is the analysis which takes a deeper look at Turnbull's four-fold strategy and how it will affect drafting legislation in Nigeria. It considers how drafting is done in Nigeria the devices in use, those not in use and what can be done to improve the quality of legislation. Chapter five is a continuation of the analysis and it considers the benefits of plain language drafting in three dimension, benefits to users, legislators and government. Chapter six is the conclusion. It gives summary of the work observations, and recommendations for improving the process of drafting legislation in Nigeria.

## CHAPTER 2: LEGISLATIVE DRAFTING IN NIGERIA

This chapter looks at legislative drafting in Nigeria which is necessary because it is the jurisdiction under case study. But before discussing that, it is imperative to look at some basic concepts.

### 2.1 Legislation

The importance of legislation is aptly captured by Crabbe when he said “Governments need legislation to govern. The governed need well drafted, readable understandable legislation.”<sup>5</sup> As much as legislation is important to the government to be able to maintain a stable society, it is equally important to the governed whose rights and duties are embedded in them.

People see legislation differently. A piece of legislation could be seen as a tool in government’s hand for governance while politicians and administrators will consider it a means to attain their economic, cultural, political and social policies<sup>6</sup> in order to bring development and regulate behaviour in the society.

Crabbe notes that legislation in a narrow or usual sense include “Acts of Parliament, Orders, Regulations, Orders-in-Council, Statutory Instruments and Rules” and in the wider sense, legislation “covers various shades of normative rules and practices of professional, social or

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<sup>5</sup> VCRAC Crabbe, *Crabbe on Legislative Drafting* (2<sup>nd</sup> edn., Lexis Nexis 2008)17.

<sup>6</sup> VCRAC Crabbe, *Legislative Drafting* (Cavendish Publishing 1993)1.

religious groups and societies; customary laws and ways of behaviour; departmental orders and circulars for implementing statutory regulations and rules.”<sup>7</sup>

For the purpose of this dissertation, *legislation* refers to a single law or a collection of laws. It consists of Acts of Parliament and subordinate legislation made under them.

## 2.2 Legislative drafting

*Legislative drafting* is the process by which a legislative proposal is put in bill form ready for presentation to parliament for passage into law. To Xanthaki, it is a process of constructing a text of legislation.<sup>8</sup> To Crabbe, it is the art of translating legislative policy into formally written legal rules or enforceable laws.<sup>9</sup>

Legislative drafting is more than just putting legislative proposals into a legislative form.<sup>10</sup> If that is all it entails, it would hardly require the services of a lawyer let alone one skilled in the art of drafting. Dickerson sees it as “the crystallization and expression in definitive form of a legal right, privilege, function, duty, status or disposition”.<sup>11</sup> This definition embodies the twin aspects of drafting: the conceptual aspect, in which the drafter ascertains and perfects the concepts to be employed in the draft, and the literary aspect, in which the drafter selects the best means of expressing those concepts.<sup>12</sup> Thus, to Dickerson, it is first thinking and second composing.<sup>13</sup>

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<sup>7</sup> Crabbe (n5)2.

<sup>8</sup> H Xanthaki, ‘Legislative Drafting: A New Sub-Discipline of Law is Born’ 57< <http://sas-space.sas.ac.uk/5234/1/1706-2278-1-PB.pdf>>16/07/16.

<sup>9</sup> Crabbe (n5)2.

<sup>10</sup> Legislative Drafting in Hong Kong, <http://www.doj.gov.hk/eng/public/pdf/ldhkv2e.pdf> accessed 19/08/16.

<sup>11</sup> Reed Dickerson, *The Fundamentals of Legal Drafting*, (Little Brown and Company, 1965)3.

<sup>12</sup> *ibid*

<sup>13</sup> *ibid*.

Legislative drafting is part of policy process. Policy is the starting point for government to take a course of action. Every policy passes through the following policy process to be complete: initiation, formulation, implementation, evaluation and decision. When government adopts policy in a given subject area, it has little or no legal effect until implemented. Implementation of policy is done through a number of mechanisms, one of which is legislation.<sup>14</sup> Legislative drafting enables government policy to be translated into legislation through a drafting process which is embedded in the first part of policy formulation stage.<sup>15</sup> Though, embedded in the legislative process, the actual drafting process itself is not part of the legislative process but it does overlap into initiation stage or legislative process.

Legislative drafting commences when instructions are received to draft a piece of legislation and ends when a draft bill is produced. The process it passes through are understanding, analysis, design, composition, and scrutiny and testing.<sup>16</sup> The essence of these formidable legislative process is to ensure legislation, when produced, is effective and capable of carrying out its original intent. To that extent, legislative drafting is the process of translating policy into clear, precise and intelligible legislation.

### 2.3 Drafter

Drafting is the work of the drafter who is a specialist established for this purpose and variously called legislative drafter, parliamentary counsel, legislative draftsman, draftsman, legal

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<sup>14</sup> Crabbe (n5)17.

<sup>15</sup> C Stefanou 'Drafter Drafting and the Policy Process' in C.Stefanou and H.Xanthaki, *Drafting legislation: A Modern Approach*, (Ashgate Publishing, 2008)321,323.

<sup>16</sup> H Xanthaki, *Thornton's legislative Drafting*, (Bloomsbury Professional 2013)145.

draftsman, legal drafter.<sup>17</sup> Depending on the jurisdiction, it takes about 7-10 years of training and practice for a qualified lawyer to achieve full competence as a drafter, capable of tackling any drafting assignment.<sup>18</sup> Lawyers are not trained legislative drafters. Even if versed in legal drafting, it is completely different from legislative drafting.<sup>19</sup>

## 2.4 Object of the drafter in Drafting Legislation

The object of the drafter is firstly, to give legal effect to government policy.<sup>20</sup> Unfortunately, this is a burden the drafter shares with other players in the policy process. The drafter must ensure the bill is drafted to pass and would work as intended when passed.<sup>21</sup> The drafter must demand adequate drafting instructions, consult widely and ask questions. This is where Thornton's model of drafting process<sup>22</sup> comes in handy as instructions must be understood, analysed then a plan is designed from which a draft is composed, scrutinised and tested.

Secondly, the drafter must communicate the legislation in a clear, precise and unambiguous way to the people it will affect, officials who will administer it, lawyers who will apply it and judges who will interpret it.<sup>23</sup> That is why legislative drafting is considered a form of communication.<sup>24</sup>

Drafters have the duty to incorporate all the drafting techniques that will enhance intelligibility.

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<sup>17</sup> KW Patchett, *Legislative Drafting Course*, (RIPA Regent's College, 1992)18.

<sup>18</sup> Experts vary, Driedger says about 10 years while Laws says 7-8 years. See S Laws, 'Drawing the Line' in Stefanou and Xanthaki,(n15)19.

<sup>19</sup> Crabbe (n5)6.

<sup>20</sup> *A Guide to Legislation and Legislative Process in British Columbia*, Part 2, Principles of Legislative Drafting, Office of Legislative Counsel (Ministry of Justice, Province of British Columbia, August 2001)1; I Turnbull, 'Drafting Simple Legislation' (1995)12 *Austl. Tax F.* 247,249; Euan Sutherland, 'Clearer drafting and the Timeshare Act 1992: A Response from Parliamentary Counsel to Cutts' (1993)14 *SLR* 163.

<sup>21</sup> Laws (n18)24.

<sup>22</sup> Xanthaki (n16)141.

<sup>23</sup> *A Guide to Legislation and Legislative Process in British Columbia* (n20) 1.

<sup>24</sup> VCRAC Crabbe, 'A Developing Discipline' (CALC African Conference, Abuja, Nigeria in April 2010).

Both lawyers and non-lawyers prefer legislation to be clear, precise, unambiguous and it is within the confines of the drafter to produce such legislation.

## 2.5 Accessibility of legislation

This refers to two things—the ability of user to have direct physical access to legislation which is outside the scope of this dissertation and the ability to comprehend its content which is the main concern of this dissertation. Accessibility of legislation is part of the rule of law<sup>25</sup> which gives citizens the right to know by which law they are governed. It is a fundamental component of certainty<sup>26</sup> and has an element of fairness as legislation which people must obey should be readily understandable to them.<sup>27</sup> They should be drafted with users in mind rather than the interpreter. Krongold notes that, “when people don’t know the law or misunderstand it, they are less likely to comply or to exercise their rights under it.”<sup>28</sup> If legislation is accessible, it is more likely to be obeyed by the people and the law itself will receive its democratic legitimacy.<sup>29</sup>

## 2.6 Audience of legislation

Identifying the audience of legislation is an important step towards improving its accessibility. Berry notes that identifying the audience enables drafters to “pitch the regulatory message at the right level of users general and legal sophistication.”<sup>30</sup> Xanthaki notes that “knowing the legislative audience is a matter very relevant to democracy, the rule of law, citizens’ rights and of

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<sup>25</sup> Ronan Cormacain, ‘Have the Renton Committee’s Recommendations on Electronic Access to Legislation Been Fulfilled?’ (2013)19(3) EJCLI.

<sup>26</sup> *Black Clawson Ltd V PapierWerke AG* (1975) AC 591.

<sup>27</sup> MM Asprey, *Plain Language for Lawyers* (3<sup>rd</sup> edn. Federation Press 2003)11.

<sup>28</sup> S Krongold, ‘Writing Laws: Making them Easier to Understand’ (1992)24(2) *Ottawa Law Review* 501.

<sup>29</sup> *Merkur Island Shipping Company v Laughton* (1983)2 All ER189 HL.

<sup>30</sup> D Berry, *Modern Legal Drafting: A Guide to Using Clearer Language*, (3<sup>rd</sup> ed., Cambridge 2013)129.

course regulatory and legislative quality.”<sup>31</sup> She was however quick to ask “But is there one audience of legislation? Can a drafter rely on the common notion of the ‘lay person’, the ‘average man on the street’, the ‘user’?”<sup>32</sup>

Audience of legislation vary, from lawyers to non-lawyers and the three categories identified are, lay persons who would read legislation to make it work for them, sophisticated non-lawyers who would use it for professional activities and lawyers and judges who would apply and interpret it.<sup>33</sup> These are all classified by Asprey into two-the primary audience being the general public and the secondary audience being administrators, lawyers and judges.<sup>34</sup>

The greatest challenge is on the drafters who must find a way of addressing these groups simultaneously using a voice that communicates successfully with all of them.<sup>35</sup> Xanthaki notes that, the level of plainness required is currently underestimated and the ‘average person’ currently used as criterion is not right as the right criterion is ‘the least sophisticated person.’<sup>36</sup>

On that, Sullivan says, the audience of legislation means the audience targeted by the legislature or the least experienced.<sup>37</sup> And to Berry, audience of legislation is all who will potentially read the legislation or whose activities it will control.<sup>38</sup> This presupposes the ordinary persons who are persons of ordinary intelligence and education, having reasonable expectation of

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<sup>31</sup> Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing 2014)114.

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

<sup>34</sup> Asprey (n27)

<sup>35</sup> Xanthaki (n31)114.

<sup>36</sup> *ibid.*

<sup>37</sup> Sullivan (n1)188.

<sup>38</sup> Berry (n30)129.

understanding legislation and getting answers to their questions.<sup>39</sup> Murphy notes that “the ordinary people are and should be the intended audience.”<sup>40</sup> This is right because, all persons without exception, are subject to the rule of law therefore, they should be able to navigate around the legislation and understand it.

## 2.7 Legislative drafting in Nigeria

Nigeria has a historical connection to UK. It was colonised by the UK therefore a lot of its legislation and drafting styles were inherited from the UK after colonisation.<sup>41</sup> Nigeria remains strongly influenced by UK more from the extensive range of experience and tradition.<sup>42</sup>

Nigeria is a federal state consisting of federal, state and local governments therefore, drafting is undertaken at all these levels of governments but that is outside the scope of this research. Like most common law jurisdiction, in Nigeria, drafters are employed by the Ministry of Justice (MOJ).<sup>43</sup> MOJ drafts all executive bills and guide government agencies in law-making. The drafting office in MOJ is the Legal Drafting Department headed by a Director who reports directly to the Solicitor General.<sup>44</sup>

Unlike the UK where drafting is centralised, in Nigeria, drafting is decentralised as drafters are also employed in the Directorate of Legal services of the National Assembly (NASS) and the

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<sup>39</sup> B Hunt, *Plain Language in Legislative Drafting: is it really the Answer?* (2001)22 *SLR* 25,27.

<sup>40</sup> D Murphy, *Plain Language in a Legislative Drafting Office* (1995)33 *Clarity*,3.

<sup>41</sup> CO Okwonkwo, *Introduction to Nigerian Law* (Sweet & Maxwell 1980)4.

<sup>42</sup> National Open University of Nigeria, *LED 601: Introduction to Legislative Drafting* (Goshen Print Media 2006)48.

<sup>43</sup> *ibid*4.

<sup>44</sup> SO Ofuani, ‘Organisation of a Legislative Drafting Office’ (2012)1(1) *NIJLD*, 89,93.

private sector (consultants) to draft *member's bills* and *private member's bills*. The drafting office of NASS is the Legal Drafting Department headed by a Director who reports to the Permanent Secretary in charge of the Directorate, who in turn reports to the Clerk to the NASS.

The distinction between *executive*, *member's* and *private member's bills* is essential here to clarify how legislative drafting is done in Nigeria. *Executive bills* are initiated by the executive, and drafted by MOJ. The scope and contents of executive bills are determined by the minister responsible while the details are determined by civil servants.<sup>45</sup> The minister prepares a proposal in form of a cabinet memorandum<sup>46</sup> which is then presented to cabinet for approval after which MOJ is instructed to draft. *Members' bills* on the other hand, are initiated by legislators and are drafted by the drafting office of NASS while *private members' bills* are initiated by interest groups or NGO's and drafted either by NASS or by consultants.<sup>47</sup> Ideally, that is how it should be but in most cases, what really happens with *executive bills* is, the ministry responsible employs a consultant to draft because of their experience and the need to speed up the drafting process.<sup>48</sup> At the time of presenting the cabinet memorandum to the executive, the bill itself is attached and if approved, MOJ is instructed to draft. Drafting instructions are more or less instructions to vet the already drafted legislation.<sup>49</sup> With *members' bills*, the legislator responsible may instruct a consultant to draft which may form the basis of a lay draft presented to NASS as instructions. With *private members' bills*, the interest group seeking to present a bill

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<sup>45</sup> DT Adem, *Understanding Bills* (Lexis Nexis 2013)8.

<sup>46</sup> *ibid.*

<sup>47</sup> Ofuani (n51)93.

<sup>48</sup> Xanthaki (n31)33.

<sup>49</sup> 'Introduction to Legislative Drafting', A Paper presented by the Legal Services Department to the 2013 promotion examination coaching programme, organised by the Federal Ministry of Justice,5.

in most cases produces a bill and because it must be sponsored by a legislator, it is presented through a legislator to NASS as instruction to draft.<sup>50</sup>

The drafting office of NASS, aside from drafting *members'* and *private members' bills* is also responsible for fine tuning all bills. Once a bill is presented to NASS, it becomes the property of NASS whether it is *executives, members'* or *private members' bills*. If a bill is not originally drafted by NASS, it is vetted at this point and if considered unsatisfactory, it is drafted from scratch before it is presented to the various Houses of NASS for passage through the legislative process.

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<sup>50</sup> This was what happened with the *Freedom of Information Act*. See A Obe, 'Nigeria: A Challenging Case', [14<academiccommons.columbia.edu/catalog/ac%3A127024>](http://academiccommons.columbia.edu/catalog/ac%3A127024) accessed 21/08/16.

## CHAPTER 3: PLAIN LANGUAGE

Before the 19th century, legislation in UK and most commonwealth jurisdictions were drafted in unnecessarily wordy and legalistic language which lacked clarity and certainty. This was unintelligible to users, as they suffered from poor arrangements and structure, an inconsistent and elaborate mode of expression, a dense and unhelpful format, obscure language and were generally drafted in artificial and legalistic language.<sup>51</sup>

This style which originated from the UK and now considered traditional is practiced in most commonwealth jurisdictions today. Although it may vary from one jurisdiction to the other, it is often characterised with the use of long convoluted sentences, repetitions, synonyms, foreign expression, excessive use of cross-references, sentences that do not follow standard English usage, archaic words and expressions, pompous language, French and Latin maxims, legal sentences that do not follow standard English usage, unusual use of words, lack of punctuations and explanatory materials. Legislation drafted in this style, in its best form, it is distinguishable from plain language drafting and in its bad form, it is often difficult to read and understand and therefore, unsuitable for use even in parliamentary procedures.<sup>52</sup>

Legislation drafted in this style is thought to be precise though its meaning may not readily be overt to users<sup>53</sup> because, it is drafted to cover all practical and possible scenario and nothing is left for inference. Turnbull notes that “the legal effect of the traditional style, even in its bad

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<sup>51</sup> LED 601(n42)48.

<sup>52</sup> I Turnbull, ‘Legislative Drafting in Plain Language and Statement of General Principle’ (1997)18(1) *SLR* 21,22.

<sup>53</sup> Hunt (n39)32.

forms, is usually very precise<sup>54</sup> in the sense that it gives exact effect to the wishes of the policy-makers.<sup>55</sup> It is intended to have this effect from its terms alone, not from reliance on the courts or some other authority to fill in the details.”<sup>56</sup> It is to counter these trends that experts proposed that legislation should move away from the traditional styles,<sup>57</sup> towards statements of general principles or plain language.<sup>58</sup>

### 3.1 Drafting in general principles

Is popularly known as the European style of drafting.<sup>59</sup> In this style of drafting, the law is deliberately stated in general principles leaving details to be filled by courts, subordinate legislation or other means. Those who advocated for its use include Scarman,<sup>60</sup> Renton Committee and Sir William Dale<sup>61</sup> but not without identifying difficulties encounterable in its use.

Though this style may result in simpler and clearer legislation since details are excluded, it lacks certainty because it shifts legislative responsibilities to courts or executives. To this end, it is criticised for lacking the clarity required in legislation, for not being as informative as even a legislation drafted in traditional style, for the additional cost on increased exercise of administration and judicial discretion or litigation from uncertainty in the application of the law

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<sup>54</sup> But are they? This is a dubious assumption. See Kimble (n3) 55.

<sup>55</sup> Turnbull (n52)22.

<sup>56</sup> *ibid.*

<sup>57</sup> W Dale, *Legislative Drafting: A New Approach* (1984).

<sup>58</sup> Turnbull (n52)21.

<sup>59</sup> IML Turnbull, 'Clear Legislative Drafting: New Approaches in Australia' (1990)11 *SLR*, 161-183.

<sup>60</sup> DSL Kelly, 'Legislative Drafting and Plain English' (1985-1986)10 *Adel.L Rev.* 426.

<sup>61</sup> Renton Committee, 'The Preparation of Legislation' (1995) Cmnd 6053, 10.12-10-13.

and for being contrary to the doctrine of separation of power which exist under the constitution in most commonwealth jurisdiction.<sup>62</sup>

### 3.2 Plain language

Plain language in legislative drafting, is not a new phenomenon or discipline.<sup>63</sup> It has a long and distinguished history that only is just reaching its peak.<sup>64</sup> As far back as 1600s, Edward VI had wished “superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men may better understand them”<sup>65</sup> and in the same vein, Thomas Jefferson spoke of the style in Act in both UK and America<sup>66</sup> noting that their style “do really render them more perplexed and incomprehensible, not only to common readers, but to lawyers themselves.”

Even though literature abound on plain language, and experts agree to its use in drafting legislation, they still see it differently as there is as yet, no generally acceptable definition of plain language. For example, plain language has been described as modern English, plain English, good professional writing and practice, simplification of legal communication, as well as promoting access to law.<sup>67</sup> To Butt, it is a language that is clear and effective for its audience.<sup>68</sup> Cheek takes it a little further by saying, “A communication is in plain language if it

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<sup>62</sup> Hunt (n39)37-39.

<sup>63</sup> A Watson-Brown, ‘Defining Plain English as an aid to Legal Drafting’ (2009) 30(2) *SLR* 85-96, 86.

<sup>64</sup> Kelly (n60)409.

<sup>65</sup> Ibid; Renton Committee (n61)6; Asprey (n27)27-28.

<sup>66</sup> Kelly (n60)409; Renton Committee (n61)7.

<sup>67</sup> P Butt, *Modern Legal Drafting, A guide to using Clearer Language*, (3<sup>rd</sup> edn., Cambridge University Press 2013)101; DT Adem, *Legislative Drafting in Plain English*, (Lexis Nexis 2010)1; J Barnes, ‘The Continuing Debate about ‘Plain Language’ Legislation: A Law Reform Conundrum’ (2006)27(2)83-132,83.

<sup>68</sup> Butt ibid 102.

meets the needs of its audience-by 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>69</sup>

Experts note that it entails presenting information in a way that the intended audience can read, understand and act upon after a single reading,<sup>70</sup> or as quickly as the subject matter allows.<sup>71</sup> But Krongold points out that this is not a fair test for legislation because legislation requires more effort to read than most prose, therefore plain language principles should be applied in such a way that the law should be just as legally precise as it was before but clearer and inviting to the reader.<sup>72</sup>

It is not a special language. It is ordinary English language presented or expressed directly and clearly to convey the message simply and effectively to the users. Garner notes that plain English should not connote drab and dreary language. That it is typically quite interesting to read, that it is robust and direct-the opposite of gaudy, pretentious language. In his words, “You achieve plain English when you use the simplest, most straight-forward way of expressing an idea. You can still choose interesting words but you will avoid fancy ones that have everyday replacements meaning precisely the same thing.”

Plain language and plain English are always used interchangeably.<sup>73</sup> But Xanthaki notes that

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<sup>69</sup> Annetta Cheek, ‘Defining plain language’, (2010) 64 Clarity

<sup>70</sup> Butt (n67)102; Plain English Campaign [www.plainenglish.co.uk/campaign.html](http://www.plainenglish.co.uk/campaign.html); Plain English Foundation, <https://www.plainenglishfoundation.com/index.php/plainenglish/whatisplainenglish> >accessed 12/08/16.

<sup>71</sup> Adem (n67).

<sup>72</sup> Krongold (n28)509.

<sup>73</sup> Asprey (n27)11.

there is a difference between the two.<sup>74</sup> Plain language reflects language as a method or means of communicating ideas and includes mathematical languages, flow charts and characters, and words.<sup>75</sup> It is a broader term and it is more appropriate for bilingual or multilingual jurisdictions. Plain English is a narrower term.<sup>76</sup> particularly because, English is a language. For purposes of this dissertation however, the two terms will be used interchangeably.

### 3.3 The object of plain language in legislation

The object of plain language is to enhance the communication of legislation to the audience. Craies notes this when he said “Plain English aims to promote uninhibited communication between the drafter, who is a trained lawyer with drafting training and experience, and the user of the legislative text, who can be anything from a senior judge to an illiterate citizen.”<sup>77</sup> The rules used in plain English are designed to make legislation intelligible without changing its meaning. It will not remove all ambiguities but will remove unnecessary ones that clog the draft and make it difficult to read.

### 3.4 Plain language movement

This came about as a result of reactions to the incomprehensibility, remoteness and complexity of traditional legal language.<sup>78</sup> It is all about simplifying legislation and other legal documents and making them easier to read and understand. The rationale behind the movement is that

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<sup>74</sup> H Xanthaki, ‘On Transferability of Legislative Solutions: The Functionality Test’ in Stefanou and Xanthaki (n15)13.

<sup>75</sup> Ibid; Asprey (n27)11.

<sup>76</sup> Xanthaki ibid.

<sup>77</sup> Xanthaki (n31)108; D Greenberg, *Craies on Legislation: A Practitioners` Guide to the Nature, Process, Effect and Interpretation of Legislation* (10<sup>th</sup> edn, Sweet &Maxwell, London 2008)305.

<sup>78</sup> D. Berry, ‘Audience Analysis in the Legislative Drafting Process’ (2000) *Loophole* 61-69.

people generally have the right to be informed, in language that is clear to them, of the benefits they are entitled to and the obligations imposed on them. It is quite an interesting development in countries like Australia, Canada, Netherland, New Zealand, South Africa, Sweden, UK and US. Currently, it is affecting many facets of these societies prominent of which includes education, research, legislation and other legal documents.

### 3.5 Rules for drafting in plain language

Experts who have written on rules of plain language include Wydick, Redish, Mellinkoff, Robert Dick, Asprey, Krongold. The rules for drafting in plain language may have similar features but there are no international standards of infallible tests.<sup>79</sup> It is impossible for experts to agree on an ‘absolute’ plain language drafting style’ because firstly, English language is very flexible so every preposition can be expressed in several ways; secondly, time and efforts drafters are willing and able to devote to keeping their drafting simple vary; thirdly, even among drafters committed to simple drafting, some are better skilled than the others; and lastly the need for a balance between precision and simplicity.<sup>80</sup>

Indeed, there is no hard and fast rule about it. It is enough “if they apply the well-known rules for simple writing and avoid unnecessary obscure or long-winded legal expression in favour of simpler, more familiar expressions.<sup>81</sup> Asprey notes that “Writing in plain language is just writing in clear, straightforward language, with the need of the reader foremost in mind.”<sup>82</sup> She notes further that if the draft will be unclear, confusing, or difficult to users, it must be redrafted to

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<sup>79</sup> Asprey (n27)13.

<sup>80</sup> Turnbull (n52)23.

<sup>81</sup> *ibid.*

<sup>82</sup> Asprey (n27)13.

make it clear, unambiguous, and easy to read.<sup>83</sup> One thing that is certain is that the rules are designed to make legislation easier to understand without changing meaning. Its implication is to make legislation leaner, cleaner and easier to read and understand.<sup>84</sup>

Turnbull in his capacity as the head of OPC, gave a four-fold strategy used by the Australian Commonwealth drafters. This focuses on four aspects of drafting style to achieve clarity in legislation.<sup>85</sup>

First strategy, is to adequately plan the draft. This includes: identifying the main goals and principles early enough, reducing the number and complexity of concepts in the scheme, and constructing the scheme clearly, using diagrams and flow-charts whenever necessary, before beginning to express it in legislative form.

Second strategy involves the use of well-known rules of simple drafting which include using short but well constructed sentences, positive rather than the negative, active voice instead of passive voice, and parallel structures to express similar ideas in a similar form. Then, avoiding jargons, unfamiliar words and double and triple negatives.

Third strategy involves the avoidance of traditional legal forms of expression particularly where simpler expressions can be used in their place and the now traditional habit of constantly referring back from one subsection to the previous one.

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<sup>83</sup> Asprey *ibid*, 12-13.

<sup>84</sup> Turnbull (n52)23; Turnbull (n27)257.

<sup>85</sup> Turnbull (n4).

Fourth strategy emphasises the use of aids to understanding which are not merely linguistic and this includes using graphics, Reader's Guides, examples, purpose clauses, explanatory notes, road map and mathematical formula.

These strategies will be analysed in the next chapter where it is argued that plain language looks beyond words in making legislation clear, precise and unambiguous and that if drafters in Nigeria look beyond words when drafting by adequately planning the draft, carefully selecting words and arranging them in sentences, paragraphs and structure that follows a logical pattern, using all available devices that would aid readability and findability, clarity, understanding and accessibility will be enhanced.

## CHAPTER 4: ANALYSIS: PLAIN LANGUAGE IN DRAFTING LEGISLATION IN NIGERIA

Plain language is almost non-existent in Nigeria. Aside a few articles and books, there is nothing much that can compare to US, UK, Canada, Australia, New Zealand and South Africa where there are established bodies specialised in plain language who conduct researches on how clarity can be enhanced in legislation. One would think since legislation and drafting style used in Nigeria have their origin from the UK, the country would easily adopt to the changes in legislative drafting in the UK.

This may be unconnected with the incessant military intervention Nigeria witnessed which hindered development of legislature because, when they intervene, they suspend the Constitution, dissolve legislature and law-making becomes the sole responsibility of the Supreme Military Council. Given such scenario, it is often difficult for any meaningful development to be undertaken. For instance, as far back as 1966 the then Cabinet Office in Lagos, issued a directive regarding the preparation of Federal legislation under the Federal Military Government to the effect that:

Drafting instructions should set out the requirement in plain language. They should give as fully as possible the purpose and background of the decree and should state what existing legislation affects the subject. They must not take the form of a layman's draft decree. Where a proposal is based on an existing piece of legislation, whether of Nigeria

or United Kingdom or another country, this fact should be stated, and the instructions should refer the draftsman to the legislation.<sup>86</sup>

But till date, drafting instructions are still being issued by way of lay drafts. Perhaps, this is because the directives were issued by the Federal Military Government for the preparation of Federal Decrees which, apparently, is different from Federal legislation under a democratic Federal government. The longest democratic experience Nigeria have witnessed is 1999 to date and as it continues to grow, so also does legislative drafting, contributions of experts, critics and calls for improvement on existing legislation.

This chapter looks at the development in legislative drafting in Australia, particularly Turnbull's four-fold strategy streamlined in the previous chapter and is geared toward proving that if applied in Nigeria, it will make legislation clearer understandable and accessible. The focus is on drafting federal legislation, style in use, how it is done and suggestion for improvement. An effort is made to deemphasise reliance on words alone because, plain language looks beyond the meaning of words used to how they are perceived by users, how the information is organised and presented, the organisation of words in sentences, the sentences in legislation, the design and layout as they all affect readability and understanding.<sup>87</sup>

#### 4.1 First strategy: adequately plan the draft

Before planning, drafting instructions must have been received and going by Thornton's drafting

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<sup>86</sup> Cabinet Office, 'Procedure for the Preparation of Federal Legislation under the Federal Military Government' (Lagos, May 1966) para 5(5), in Xanthaki(n31)32.

<sup>87</sup> Asprey (n27)13,93-94.

process,<sup>88</sup> this is still within the first two stages which are understanding and analysis. Every good draft begins with a plan<sup>89</sup> and every good plan begins with understanding and analysis of instructions. This goes to the root of the policy because, failure to properly translate policy into appropriate legislation adversely affects the policy.<sup>90</sup> Thus, the nature drafting instructions are presented determines the end product. It determines whether the policy will be properly understood, analysed and ultimately translated into legislation having the desired regulatory effect. The more inadequate the drafting instructions the more the need to plan the draft as this is an opportunity to mend inefficiencies of the stage by filling in the gaps of the instructions.

Planning makes identifying the main goals and principles possible which is crucial to the existence of the legislation, and serve as the link between problems identified, government policies and the means chosen to address them.<sup>91</sup> Compiling the scheme marks the end of the second stage<sup>92</sup> and the beginning of the third of design. Using diagrams and flow-charts before beginning to draft helps reduce complexity of the concepts in the scheme and enhance clear scheme. Because it serves as a quick reference summary, it helps make clear a process before drafting it which is of immense benefit to both the drafter and users.<sup>93</sup>

Planning is difficult in Nigeria for two reasons first, drafting is decentralised therefore, less efforts is dedicated to planning the draft as the consultant producing the first draft knows it is not the final copy while the drafting office believe their work is to edit. Second, the use of lay drafts.

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<sup>88</sup> Xanthaki (16)141.

<sup>89</sup> Asprey (n27)92.

<sup>90</sup> VCRAC Crabbe, 'The Role of the Parliamentary Counsel in Legislative Drafting' 13 <[www.unitar.org/opg/dfm](http://www.unitar.org/opg/dfm)> accessed 16/08/16.

<sup>91</sup> M Mousmouti, 'Effectiveness as an aid to Legislative Drafting' (2014)2 *Loophole*, 18.

<sup>92</sup> Xanthaki (n31)39.

<sup>93</sup> Krongold (n28)513.

This practice is insufficient because, it misleads drafters,<sup>94</sup> confuses the role of the instructor and the drafter and raises difficulties of construction.<sup>95</sup> They distort policy and drafting processes as drafting is undertaken long before the drafting offices are instructed to draft. To be sufficient, drafting instructions must contain sufficient background information, principal object of the legislation, means to achieve them, legal implications, difficulties envisaged.<sup>96</sup> These are all lacking when lay drafts are used which makes it difficult to adequately plan the draft. Perhaps that explains why most Nigerian legislation are not effective and often need to be amended almost immediately they are passed.<sup>97</sup> Legislation will be much more efficient if more time is dedicated to the planning stage. The time is actually invested not wasted because, the quality of the end product is enhanced.<sup>98</sup>

The scheme is formulated from instructions, so good drafting instructions with all the necessary materials attached would enhance the quality of the scheme and ensure the subject matter covered by the legislation is logical and coherent. Because the scheme provides a logical blueprint of the bill and a constant referent point, it creates the framework within which to organise the detailed rules, establish the general structure of the bill, itemise important matters that must be covered while also establishing their order and relationship. This obviates the need to have to link scattered provisions by say, the use of cross-references. Indeed it is an important step in ensuring legislation communicates to users. Planning the draft and developing a scheme are simply good drafting practice which are not unique to plain language drafting but essential

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<sup>94</sup> Xanthaki (n31)34.

<sup>95</sup> Xanthaki, *ibid* 147.

<sup>96</sup> D. Elliott, 'Getting Better Instructions for Legislative Drafting', Just Language Conference, Pre-Legislative Clinic on writing laws, 21 October 1992, Victoria, British Columbia, 8-9; Xanthaki (16)148-150; Xanthaki (n31)27-28.

<sup>97</sup> For example the *Electoral Act* which has been amended or repealed and re-enacted several times since 1999.

<sup>98</sup> Asprey (n27)40.

for plain language drafting.<sup>99</sup>

## 4.2 Second strategy: use well-known rules of simple drafting

Nigerian legislation uses traditional language. For example, section 39(1) of *Public Procurement Act 2007* provides that “Notwithstanding the provisions of this Act, the Bureau may issue Certificate of No Objection upon conditions hereinafter prescribed.” The trend in most jurisdiction is to simplify legislation by drafting in plain language. Rules of simple drafting are all geared towards simplifying legislation and this part proves that if applied to drafting legislation in Nigeria, clarity, understanding and accessibility will be greatly enhanced. The well-known rules of simple drafting are classified here as styles to use, styles to avoid and styles to use with care.

### 4.2.1 Styles to use

#### 4.2.1.1 Precise expression

Words are the tools used in drafting and by nature, they lack the precision of mathematical symbol.<sup>100</sup> Using them can go wrong at any point. “They can either suffer from disagreements on the referents attributed to them by users in which case they are ambiguous, or from disrupted weak boundaries in which case they are vague. Both diseases are frequent, and destructive.”<sup>101</sup>

But are greatly reduced when precise expressions are used.

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<sup>99</sup> *ibid* 92.

<sup>100</sup> See per Justice Clerk in *Boyce Motor Line Inc. v. United State* 342 U.S. 37 (1952); per Lord Dilhorne in *Black-Clawson International limited v. Papierwerke Waldhof Aschaffenburg AG* (1975) AC 591.

<sup>101</sup> Xanthaki (n31)90.

#### 4.2.1.2 Familiar words

Unfamiliar words and jargons should be avoided. This does not mean familiar words should take precedence over precise words rather, words in common usage should be preferred over those users will find difficult to understand without help. Such words are avoided even if they are not difficult, the fact that they are not used in everyday speech is enough.<sup>102</sup> That is the reason why plain language is criticised for not being dignified enough. It is the search for dignity that leads drafters away from simplicity and clarity into pomposity.<sup>103</sup> It is advised that

<i>Instead of</i>	<i>Use</i>
Accomplish	Do
Discontinue	Stop
Elucidate	explain
Modification	change
purchase	Buy
Strategized	Plan

#### 4.2.1.3 Short sentences

Long sentences are tiring for users, and require extra time and care with punctuations and other aspects of structure. Besides, ideas expressed in long sentences can get lost in flurry of words. The mind process information in short clauses and can only handle few at a time so, if they are piled up in a sentence or embedded in each other, it becomes difficult

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<sup>102</sup> Asprey (n27)14.

<sup>103</sup> *ibid* 90.

for the users to understand at first reading.<sup>104</sup> Experts do not agree on the precise average sentence length but it seem, 20-25 words per sentence is okay.<sup>105</sup> Adem captures the link between sentence length and comprehensibility when he said, when drafters exceed this limit, particularly with complicated materials, they should check the sentence carefully as its structure may be unduly complex. He notes, “it is this complexity and not the length of the sentence that leads to incomprehensibility.”<sup>106</sup>

#### 4.2.1.4 Clear expression

The language used must be clear and simple for both primary and secondary users to understand. The more complex the subject-matter, the more difficult the conceptualization work, but because the subject matter of legislation is complex does not mean it must be drafted in complex language. No area of legislation is too complex to be simplified. Plain language helps to clarify complex concepts.<sup>107</sup>

#### 4.2.1.5 Economy of words

Legislation in plain language economizes words,<sup>108</sup> ensures sentence structure is as tight<sup>109</sup> as possible using words that are necessary and proper as “Proper words in proper places make the

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<sup>104</sup> *ibid* 106.

<sup>105</sup> The Law Reform Commission of Victoria, Report No.9 ‘Plain English and the Law: Guidelines for Drafting in Plain English’33; Wydick suggests less than 25 words. See RC Wydick, *Plain English for Lawyers* (5<sup>th</sup> edn. Carolina Academics Press 1998)36; Asprey thinks it is counterproductive to specify a length. Asprey (n27)106.

<sup>106</sup> Adem (n67)39.

<sup>107</sup> P Butt, ‘Modern Legal Drafting’ (2002)23(1)*SLR* 12-23,19.

<sup>108</sup> Wydick (n105)9-24.

<sup>109</sup> Xanthaki (n74)13.

true definition of style.”<sup>110</sup> It avoids unnecessary words because they lead to absurdity, ambiguity or confusion.

#### *4.2.1.6 Present tense*

Legislation speaks at the moment it is being read. Adem notes that “Because legislation is meant to be of continuing application, it must be written and construed as if it is speaking when it is being read.”<sup>111</sup> Unless there is any special reason for using any other tense, plain language recommends present tense.

#### *4.2.1.7 Active voice:*

Aside being clearer and shorter, active voice makes clear the identity of the legal subject. Hence, it is preferred over the passive voice which usually is longer, hides the identity of the legal subject and creates difficulty of understanding. So, unless it is deliberate like “when the thing done or to be done is important and the doer or the identity of the doer is unknown or immaterial,”<sup>112</sup> it is better to use the active voice.

#### *4.2.1.8 Consistent expressions:*

Legislative drafting does not allow the kind of elegance used in other kind of writing therefore, different words cannot be used to refer to the same idea or different ideas to refer to the same words as this will confuse users by giving the impression a different meaning is intended.

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<sup>110</sup> Crabbe (n24)4.

<sup>111</sup> Adem (n67)37.

<sup>112</sup> *ibid* 38.

#### 4.2.1.9 Gender neutral language (GNL)

It is now traditional to use sexist language in legislation because it creates inequality in gender. The trend in many jurisdictions is, unless a provision applies to one gender only, it should be avoided. GNL is now used in New South Wales, New Zealand, Australia, UN, and ILO, Canada, South Africa, US, and UK.<sup>113</sup> Sexist language was used in the UK until 2007 when a change to GNL was made.<sup>114</sup> In Nigeria however, section 14 of the *Interpretation Act*<sup>115</sup> provides that, “In an enactment.... Words importing the masculine gender include females.” So, legislation are still drafted in sexist language. Though the drafting offices try to omit gender sensitive words, there is often so little they can do when it is not adopted as policy objective. This practice is criticized because it requires users of legislation in sexist language to have recourse to another legislation before they are aware that reference to masculine gender means both genders. As Thornton rightly notes, “how many of lay readers and users of legislation have heard of, or indeed read the interpretation laws?”<sup>116</sup>

#### 4.2.2 Styles to avoid

##### 4.2.2.1 Legalese

These are specialized language of lawyers.<sup>117</sup> They are words or expressions used to add legal touch to drafts. They are acquired and learned in the course of training as lawyers and is only

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<sup>113</sup> Xanthaki (n31)105.

<sup>114</sup> D Greenberg, ‘The Techniques of Gender-Neutral Drafting’ in Stefanou and Xanthaki (n15)63-76,65-66.

<sup>115</sup> Cap.I23 LFN 2004.

<sup>116</sup> Xanthaki, (16)80.

<sup>117</sup> <http://www.wisegeek.com/what-it-legalese.htm>>30/08/16.

natural for drafters to use them. Their use was encouraged by factors which include first, the misconception that clients delight in jargon and foreign languages or words, second, the fact that drafters were once paid according to the number of words used in an instrument, rather than the job. Legalese are unnecessary because, aside ‘legal smell’, they add little or no legal substance.<sup>118</sup> They should be avoided because “they give a false sense of precision and sometimes obscure a dangerous gap in analysis.”<sup>119</sup> Identifying them is necessary because the drafter then knows the form they take and what to avoid. Common forms of legalese include:

- *Double or triple synonyms*

These are examples of the use of unnecessary words—two, three or more—where one can serve. For example, *null and void*, *cease and desist*, *give, devise and bequeath*. This form is caused by the mixed linguistic history of legal language.<sup>120</sup> The use of double or triple synonyms is now traditional as most of the words are assimilated into English language and need no explanation.

- *Compound construction*

It is also traditional to use group of words or expression when one word would do. This should be avoided. So,

<i>Instead of</i>	<i>why not</i>
as a consequence of	because of
by virtue of the fact that	because
enter into an agreement	agree; contract

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<sup>118</sup> RC Wydick ‘Plain English Lawyers’ (1978) 66(4) *Cal L. Rev.* 727,739.

<sup>119</sup> *ibid.*

<sup>120</sup> *ibid.*

for the purpose of	to; for
in connection with	about
within the meaning of	under

- *Foreign languages*

Originally, legislation was drafted in Latin and French hence, a lot of Latin and French terms are still used in legislation drafted in English language. Many words like *juror*, *robbery*, *conviction*, *infant*, *pardon* and *damages* have assimilated into English language and cause no problem of understanding.<sup>121</sup> But words like *mandamus*, *certiorari* and *habeas corpus subpoena*, *estoppel*, etc. are still in use in spite of being difficult to understand because of their technical meanings and the believe that they lack suitable replacements. The use of foreign expressions, no doubt, affects effective communication and should be avoided.

- *archaic words*

They are considered traditional now because they are no longer in general use. They are unnecessary, superfluous, cumbersome and further complicates the language of legislation. They can be avoided. So,

<i>Instead of</i>	<i>why not</i>
aforementioned	this; that; named earlier
execution	Sign

<sup>121</sup> Law Reform Commission of Victoria (n105)20; [www.Oxforddictionaries.com/words/archaic-words](http://www.Oxforddictionaries.com/words/archaic-words)>30/08/16.

Hereinabove	Above
lessee	Tenant
Same	it; that
save	Except

#### 4.2.2.2 Precedents

Legal practice and profession in Nigeria depends greatly on the use of precedence and so does legislative drafting. There is heavy reliance on ancient clauses rather than risking the use of original language because precedents, saves time, serve as source of ideas and ensure consistency.<sup>122</sup> Precedents should be avoided for three reasons. Firstly, most precedents which now form part of Nigerian legislation are common law transplanted in language that is now traditional. Secondly, most of the early legislation were written by humble court clerks rather than skilled drafters. Thirdly, most of the precedents used by consultants are mere transplants from other jurisdiction without ascertaining their effectiveness.

#### 4.2.3 Styles to use with care

##### 4.2.3.1 Acronym and abbreviation

They should be used with care because, they are inherently ambiguous and legislation must always speak in clear language. Although, they can safely be used to facilitate communication where they are legislatively defined, it is advised that only acronyms that are in common usage and familiar, like USA, ECOWAS, UN, HIV/AIDS, should be used in legislation.

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<sup>122</sup> Xanthaki (n16)166.

#### *4.2.3.2 Enumerations*

It should be used with care particularly where it is a series of nouns for two reasons first, rarely will the list be complete and the longer they are, the more the reader thinks items not included are deliberately excluded. Secondly, to solve this problem, the drafter normally adds general expressions following a shorter enumeration which gives the reader the impression general terms are limited to the implied category described in the preceding enumeration.

#### *4.2.3.3 References*

References should be used with care for two reasons first, legislation can be changed at any time and second, it is designed to allow incorporation of subsequent amendments that is why references should not be made to the “preceding” or the “following” section, unless absolutely necessary as the use of such words may create confusion when amendments are to be incorporated.

#### *4.2.3.4 Provisos*

They complicate sentence structure and must be used with care or avoided. It is advised that, depending on the function a proviso performs in a sentence, it may be better to use ‘but’ or ‘except that’ or better still, present the provision as a separate subsection.<sup>123</sup>

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<sup>123</sup> *ibid* 88.

#### 4.2.3.5 Negatives

Positive statements are more intelligible than negative ones. Avoiding negatives is not a straight forward thing because sometimes legislation set out prohibitions and restrictions. But the use of two or more negatives in a sentence should definitely trigger a consideration of an alternative drafting approach. When a draft has multiple negatives, it is better to identify each negative term and pair as many of them as possible to turn them into positives.

#### 4.2.3.6 Numbers

Numbers have traditionally been expressed in words because figurative expression were considered to be abbreviations but there is no reason to avoid figures like 1, 2, 3, 4; 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>. It is becoming increasingly common to use figures in numbers, dates, money, percentages, citations, chapters and section numbers.

#### 4.2.3.7 Paragraphing

A paragraph should be constructed in such a way that would hold the readers interest therefore, the theme of a paragraph must be one that can be stated, developed and closed within a unit of writing long enough to hold the reader's interest but short enough to be read and understood as a unit. Murphy suggests "having one main topic sentence and perhaps several supporting sentences, plus a final sentence leading the reader to the next paragraph."<sup>124</sup> To achieve clarity and accessibility, short paragraphs must be used with each dealing with a single, unified topic. Lengthy, complex, or technical discussions should be presented in a series of related paragraphs.

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<sup>124</sup> Asprey (n27)100.

#### 4.2.3.8 Punctuations

Traditionally, punctuation was not used in legislative drafting. Even as recent as 1980s Lord Esher MR noted that “In an Act of Parliament there are no such things as brackets any more than there are such things as stops.”<sup>125</sup> But their importance in legislation has long been settled.<sup>126</sup> Dickerson notes that “punctuation is a tool that the draftsman can ill afford to neglect. He should master it and use it as a finishing device together with other typographical aids in carrying meaning. But he should not rely solely on it to do what arrangement of words can do.”<sup>127</sup> Driedger notes that “Punctuation should be used to convey meaning.... Punctuation, judiciously used, will guide the reader through the sentence, help him sort out its element and subconsciously prevent him from going astray.”<sup>128</sup> Bennion also notes that “Modern draftsmen of public general Act take great care with punctuation, and it undoubtedly forms part of the Act as inscribed in the royal assent copy and thereafter published by authority.”<sup>129</sup> Legislation is neutral, therefore, punctuating legislation should be simple, justified and uniformed and as Thornton advise, “punctuation must always serve a purpose; punctuation that does not, should be avoided.”<sup>130</sup> Much as the meaning of a provision is not dependent on its punctuation, punctuation constitutes an element of the legislative sentence but it should not be allowed to determine meaning of provisions.

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<sup>125</sup> *Duke of Devonshire v O'Connor* (1980)24 QB468,478.

<sup>126</sup> Section 3(1) *Interpretation Act* Cap.123 LFN, 2004 which provides that “Punctuation forms part of an enactment, and regard shall be had to it accordingly in construing the enactment.”

<sup>127</sup> Dickerson (n11)117.

<sup>128</sup> EA Driedger, *The Composition of Legislation* (2nd edn. Queen’s Printer and Controller of Stationery 1957)83.

<sup>129</sup> F. Bennion, *Bennion on Statutes Law* (2nd edn. Longman 1983)87.

<sup>130</sup> GC Thornton, *Legislative Drafting* (4th edn. Butterworths 1996)35.

#### 4.2.3.9 Capitalization

The trend is to capitalize less. Thornton notes that, “The modern trend is to reduce the instances where capitals are used and the trend seems likely to continue.”<sup>131</sup> In some instances, the use of capital letters is universal as they are used to begin a new sentence, identify proper nouns and for titles of individual offices of importance. Some jurisdictions have modified and adopted standards for capitalization.<sup>132</sup> It is advised that, there should always be consistency of practice and excessive capitalization should be avoided in order not to confuse users.

### 4.3 Third strategy: avoid traditional legal forms of expression

Particularly where simpler expressions can be used in their place. A few expressions in common usage in Nigeria which are now considered traditional are listed below with their suggested replacement. It is argued that if such expressions are replaced with simpler form, clarity, understandability and accessibility of legislation will be enhanced.

<i>Instead of saying</i>	<i>why not</i>
An application made by a corporation under subsection (1)	The application
Notwithstanding anything to the contrary contained in the XYZ Act	Despite the XYZ Act
An appointment shall not be called in question on the ground that	An appointment is not invalid merely because
A person who has attained the age of 18 years	A person who is 18 or over
Section 5 of this Act (or the more modern version “section 5 above”)	Section 5

<sup>131</sup> *ibid* 8.

<sup>132</sup> See Chapter 3 1984 edition of Style Manual of the US Government Printing Office.

Notwithstanding any law to the contrary <sup>133</sup>	Despite
This law shall come into operation on	This law comes into operation on
Within a reasonable time <sup>134</sup>	Within X day or within Y hours
The provisions of section 1	Section 1
It shall be lawful <sup>135</sup>	May

Other expressions in common usage which should be avoided because they are superfluous include:

- Unless the context otherwise requires
- Subject to any provision of any Act to the contrary
- It is hereby declared that
- As the case may be
- “and/or”<sup>136</sup>
- From time to time
- Including but not limited to

If these traditional forms of expressions are avoided, legislation will be clearer, understandable and more accessible.

#### 4.4 Fourth strategy: use aids to understanding which are not merely linguistic

Traditionally, words were the only tools used in drafting so even where words were inadequate, they were still used which always ended up confusing rather than assisting users. Plain language

<sup>133</sup> See section 5 (2) of the *Advance Fee Fraud and Other Fraud Related Offences Act 2006*.

<sup>134</sup> See sections 5 and 47 of the *Public Procurement Act 2007*; section 9 (2) *National Tobacco Control Act, 2015*.

<sup>135</sup> Crabbe (n12)78.

<sup>136</sup> It is described as a ‘bastard conjunction’. Per Simmon LC in *Bonitto v Fuerst Bros Co Ltd* (1944) AC 75; In *Stein v O’Hanlon* (1965) AC 890,904, Lord Reid notes that the expression is not yet part of English language.

drafters put themselves in users' shoes. They think of their drafts, what it means to users, users reaction and how they can make legislation easier, understandable and accessible.<sup>137</sup> Today, the trend is to use all devices available in drafting legislation provided they convey information more intelligently and intelligibly. Aids to understanding are devices like explanatory materials and finding aids which are not merely linguistic but are equally useful in enhancing clarity and accessibility of legislation. They include:

#### 4.4.1 Explanatory materials

These are devices used to give users information that will help in understanding the effect of a piece of legislation, its future intentions and factual background giving rise to it. They include:

- *Explanatory memorandum*

This is not new to Nigerian legislation. What is, is making it very comprehensive dealing with each section in succession and sometimes containing the financial, legal and policy implication and other relevant information like the object, reason and the salient features of the bill all in a non-technical language so that the reader who may not be well-versed in the subject matter of the legislation or in the technical language of the drafter can understand the legislation by merely reading the explanatory memorandum.<sup>138</sup> That is the style adopted in Australia and Uganda. The style in Nigeria is just a brief note in a few lines which really does not say much to users. On the explanatory memorandum to the

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<sup>137</sup> Asprey (n27)14.

<sup>138</sup> DT Adem *Legislative Drafting: Mathematics & Other Devices* (Lexis Nexis 2013)94.

*Anti Homosexuality Bill, 2009* (Uganda), Adem advised that it is exhaustive, apt and very useful so it should be adopted in Nigeria.<sup>139</sup>

- *Explanatory notes*

These notes which draws the attention of users to important matters discussed in different parts of legislation can be useful in legislative drafting in Nigeria particularly in very long legislation like *Petroleum Industry Bill*, in making it more accessible to users. It should however be used sparingly to avoid interrupting the text.<sup>140</sup>

- *Examples*

Aside the Penal and Criminal Codes where examples were used to explain provisions, examples are hardly ever used in Nigerian. It is a growing trend in UK, Canada and Australia more because it gives the users ideas regarding meaning of particular provision. Elliott<sup>141</sup> notes that “examples illustrate ideas. The texts we write have ideas behind them—our ideas about how the text will or should be interpreted. If those ideas are not, or are inadequately, conveyed to the readers of the text there is a lack of communication.” He notes further that “One way of making sure we get our ideas across is to help readers with examples. Examples then can be seen as some of the thoughts that the writer has for interpreting the text.” Because of its importance, Elliott advise that it should be used even

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<sup>139</sup> *ibid* 98.

<sup>140</sup> Turnbull (n59)161.

<sup>141</sup> D Elliott, ‘Using Examples in Legislation’ (Revised, November 1996).  
[www.davidelliott.ca/papers/usingexamples.doc](http://www.davidelliott.ca/papers/usingexamples.doc) >accessed12/08/16.

more in legislation.<sup>142</sup> Its use in drafting legislation in Nigeria will no doubt, enhance the clarity, understanding and accessibility of legislation.

- *Explanatory footnotes and endnotes*

These are not in use in Nigeria but can be useful as explanatory materials because they give users information about provisions which enables them to make sense of footnoted or endnoted provisions. They are interesting innovations in legislative drafting and can be used in Nigeria for technical details such as the numbers of amending legislation, cross-references or to refer to matters related to the content of footnoted or endnoted provisions. This will reduce unnecessary words and make legislation clearer, understandable and more accessible.

- *Purpose clause*

In modern interpretation of legislation, courts adopt a purposive approach which takes into account the ordinary meaning of words, context, subject matter, scope, purpose and general background of the Act.<sup>143</sup> Inserting a purpose clause in Nigerian legislation will facilitate interpretation of ambiguous provisions by revealing legislature's original intent which invariably overrides any interpretation to the contrary.<sup>144</sup>

- *Definition*

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<sup>142</sup> *ibid.*

<sup>143</sup> *Pepper v. Hart* (1993) 1 All ER 42, 50.

<sup>144</sup> In *Namaimo (City) v Ranscal Tracking Ltd* (2000) SC 13 where the Supreme Court of Canada relied heavily on the purpose of the legislation in construing it.

It is widely used in Nigeria. Aside its use in defining complex concepts, it can be used to provide new interpretations for words and expressions that even override judicial decisions where narrow interpretations are given. In order not to add to the problem of construction, it must first be ascertained whether definition is needed to remove ambiguity, vagueness or achieve meaning that delimits, extends or narrows the commonly accepted meaning of words or expressions. The problem with its use in Nigeria is in its placement in legislation as it is usually placed at the end of the legislation. See for example, *FCT Internal Revenue Act 2015* which has 86 section and definition is section 85. Plain language experts advocate for placement of definition at the beginning for easy location<sup>145</sup> and accessibility.

#### 4.4.2 *Finding aids*

Using finding aids in legislation is indeed an indication of drafting with users in mind. Drafting with the user in mind brings out creativity in drafting and encourages new innovations that ensure intended information reach users in a way that is clear, precise and unambiguous. If the following finding aids which are widely used in UK, US, Australia, Canada and New Zealand are introduced in Nigeria, legislation will be clearer and more accessible.

- *Section headings*

Section headings are widely used in Nigeria however, there is no clear definition of style as both marginal and shoulder notes are used interchangeably thus, creating inconsistency of uses which has the effect of making legislation unpredictable, confusing users and causing unnecessary interpretation problems. If properly used, section headings function

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<sup>145</sup> Turnbull (n59)161.

as descriptive label-individually they indicate the content of a section and collectively in arrangement of sections they indicate the content of legislation-they are good tool for making legislation more accessible.

- *Road-map clause*

This is useful in long legislation to enable users find their way round the legislation as it describes the organisation and specific provisions of a legislation.<sup>146</sup> It is not in use in Nigerian but if used, it aids users in finding particular provisions and give them directions for specific matters in legislation. Thus it will enhance accessibility of legislation.

- *Readers guide*

Also not in use in Nigerian. Using it will indeed aid users find their way and understand the contents of long and complex legislation. For example, it was used in *Social Security Bill, 1990* (Australia) where it was thought necessary because the bill had over 800 pages long.<sup>147</sup> Indeed, it will be useful in drafting long bills like the *Petroleum Industry Bill* which spans through several hundreds of pages.

- *Indexes*

Indexes aid users to trace items or information in lengthy legislation which present problem of access. Because, they offer a more extensive and alphabetical listing of subjects, they enable users to find quickly the references they are looking for. This device is useful for drafting long legislation and will enhance accessibility.

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<sup>146</sup> Turnbull (n59); Adem (n138)104.

<sup>147</sup> Turnbull *ibid*.

#### 4.4.3 Graphics

Graphics convey meaning. Using them in Nigeria will give users ideas as well as guide them in complex legislation. As Elliott notes “It is easy to get lost in a series of complex provisions. An explanatory line diagram can help paint the big picture so that readers can find a road map out of the confusion.”<sup>148</sup> The commonly used graphics include, maps, charts, tables and pictures. These devices are in great use in Australia, Canada, New Zealand, South Africa, UK and US. Maps and charts are rarely used in legislation in Nigeria. Tables are mostly used in schedules<sup>149</sup> but they can also be used within the provision of a section, clause or paragraph.<sup>150</sup> Pictures signs are mostly used in traffic legislation. In *Road Traffic (Traffic Lights) (Federal Capital Territory, Abuja) Order* where picture signs is used, clarity, understanding and accessibility is enhanced.

#### 4.4.4 Mathematical formula

Mathematical formulae are now being used in legislation and are indeed a welcome innovation when they convey information to users more clearly than conventional written forms.<sup>151</sup> Mathematical formula is well known for its clarity, brevity, accuracy and precision. The essence of using it in legislation is to convey the intended information to users in a way that is more clear, precise and accurate than the writing form. Butt notes that when properly used, it can replace

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<sup>148</sup> Elliott, D.C. ‘Tax Drafting Conference Tools for Simplifying Complex Legislation’ 27-29 November, 1996 Auckland, New Zealand 4.

<sup>149</sup> See the second schedule of the *Pension Reforms Act 2014*.

<sup>150</sup> <http://www.pco.parliament.govt.nz/clear-drafting#other-drafting-tools>.

<sup>151</sup> D Elliott, ‘Using Plain English in Statutes’ (Clarity’s submission to the Hansard Society for Parliamentary Government, June 1992)15.

words-reducing length, aiding comprehension and preventing ambiguity.<sup>152</sup> It is widely used in Australia and UK<sup>153</sup> and nothing stops Nigeria from following suit since they are tested and trusted in these advanced jurisdictions and even encouraged by judges.<sup>154</sup> Besides, it is now traditional not to. So, using clauses to express calculations by directing users to take a series of steps instead of just stating a formula and making algebraic formulas “user-friendly” by using words instead of the traditional a, b, c, symbols will reduce the rate of ‘mathematics attack,’<sup>155</sup> make mathematical formula more attractive to users and legislation more accessible.<sup>156</sup> Achieving this is quite possible because, as Espasinghe notes, the language of mathematics can be effectively adapted to suite the requirements of legislative drafting.<sup>157</sup> But Adem warns that if its use would not be in conformity with plain language for clarity, precision, and ease of communication, it should not be used.<sup>158</sup>

#### 4.4.5 Structure

An orderly structure is an invaluable aid to clarity, understanding and accessibility. No wonder, plain language drafting looks beyond words used and what they mean to organisation of the words in sentences, sentences in the legislation and the design and layout of the legislation itself. The combination of all these things govern how effective the legislation will communicate its content to user and help them use it.<sup>159</sup> If structure is properly planned and follows logical

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<sup>152</sup> Butt (n67)159.

<sup>153</sup> *ibid* 16

<sup>154</sup> *London Regional Transport v Wimpey Group Services Ltd* (1987)53 P&CR 356.

<sup>155</sup> Elliott (n148)5.

<sup>156</sup> Turnbull (n4).

<sup>157</sup> <http://ft.lk/2011/10/08/mathematical-language-can-language-legal-drafting-icta-chairman-prof-espasinghe>

<sup>158</sup> Adem (n138)66.

<sup>159</sup> *ibid* 94.

sequence, drafting will flow better and readability and comprehensibility will be enhanced.<sup>160</sup> It is impossible for a draft legislation which lacks orderly structure to be, in any way, simple or elegant. Experts agree that legislation in simplest words and arranged in short sentences will still be difficult to understand if its provisions are not properly arranged.<sup>161</sup> A well planned structure improves intelligibility of the legislation which invariably enhances communication.<sup>162</sup>

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<sup>160</sup> A Fluckiger ‘The Ambiguous Principle of Clarity of Law’ in A Wagner and S Cacciaguidi-Fahy (ed) *Obscurity and Clarity in Law* (Ashgate 2008)16.

<sup>161</sup> Asprey (n27); Butt (n67); Sullivan (n1)212.

<sup>162</sup> Fluckiger (n160)16.

## CHAPTER 5: (ANALYSIS CONT.) BENEFITS OF PLAIN LANGUAGE IN LEGISLATIVE DRAFTING

The use of plain language in Legislative Drafting has been criticized for sacrificing certainty and precision, for being a simplified and restrictive language created only to benefit drafters and users who are unsophisticated and uneducated, for being unsafe since it lacks the certainty of meaning settled by judicial scrutiny, for being too expensive and time-consuming and recently, for lacking any hard evidence to prove that it improves comprehension.<sup>163</sup> Critics, as Kimble notes, are healthy for a movement to “correct errors, tamper excesses, and prompt the kind of reflection that deepen understanding.”<sup>164</sup> Kimble as well as other plain language advocates have responded to these criticism and it is not the focus of this dissertation. The truth is, critics cannot deny that benefits abound when legislation are drafted in Plain language neither can they argue that legislation that binds and regulates the society ought to be obscure or incomprehensible.<sup>165</sup> The benefits of plain language will be discussed in the following order: benefits to users, legislators and government. The essence is to point its benefits to these 3 groups and to encourage the Nigerian government to consider adopting plain language as a policy measure.

### 5.1 Benefits to users

First, it enhances the communication of legislation to users. As earlier noted, users vary from

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<sup>163</sup> Xanthaki (n74)13-15; Kimble (n3)51-85; Plain language and Legislation  
<<http://www.gov.scot/resource/doc/93488/0022476.pdf>>accessed24/07/16;  
<http://www.plainenglish.co.uk/campaigning/past-campaigns/legal/drafting-in-plain-english.html>  
<accessed24/07/16

<sup>164</sup> Kimble ibid, 51.

<sup>165</sup> <http://www.lawfoundation.net.au/ljf/app/&id=/2FD34F71BE2A0155CA25714C001739DA>>accessed24/07/16

non-lawyers to lawyers and judges and legislation must strike a balance to be able communicate its content to all as all without exception, are subject to the rule of law. When legislation is in plain language, the information it conveys become clear and accessible to both lawyers and non-lawyers. It becomes easy to read and understand<sup>166</sup> and the likelihood of misunderstanding is reduced. Legislation in plain language gives users a better chance of understanding the legislation that binds them. Legislation alone may not give them all they need to understand it but if its language is plain and intelligible, they are able to find quick answers to simple problems that fall within the provisions of the legislation.<sup>167</sup> This does not mean legislation will be turned into a one stop shop<sup>168</sup> or that users who are non-lawyers will not need the services of lawyers. Legislation are inherently complex and require legal knowledge and interpretation therefore, non-lawyers will always need lawyers to explain the consequences of materials<sup>169</sup> and as Butt notes, “Readers must beware of assuming that because they can understand the text they can understand the legal issues that arise from the text.”<sup>170</sup> But the fact still remains that plain language communicates legislation better as legislation are easier to read and understand than those drafted in traditional style and this has been proved by way of research, by experts.<sup>171</sup>

Secondly, it saves cost. When information contained in a legislation is clear and accessible to users it reduces the need for legal advice and litigation. Legislation drafted in traditional style imposes unnecessary costs on users as an interpreter is often needed. However, as legislation in plain language is clear and accessible to those directly affected by it and they are able to identify

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<sup>166</sup> P Butt, ‘Legalese versus Plain Language’ (2001)35 *Amicus Curia* 28,31.

<sup>167</sup> D Coshott, ‘Living in the past: the Critics of Plain Language’ (2014)16 *EJLR* 541,550.

<sup>168</sup> *ibid* 552.

<sup>169</sup> *ibid*; Butt (n67)104.

<sup>170</sup> *ibid*.

<sup>171</sup> *ibid* 209.

their rights and duties, compliance is enhanced and the legislation itself is effective. Xanthaki notes that plain English serves efficiency because it ensures legislation are easier and faster to read and because they are written in straightforward, direct, precise, clear and intelligible language, queries are reduced.<sup>172</sup> Similarly, Butts notes that “plain language increases the ‘efficiency’ with which readers assimilate and understand legal documents. With increased efficiency comes cost savings.”

Thirdly, it saves time. Legislation in plain language saves a lot of time because, by making language simpler, it reduces the amount of time spent reading it. Ordinarily, users would have to read legislation in traditional style several times to determine its meaning. Aside the fact that legislation in plain language takes less time to read and understand, lawyers spends less time explaining its content to users.<sup>173</sup> This is an advantage to both the lawyers and the non-lawyers. Butts notes that documents drafted in plain language are easier to read and understand and saves time for both lawyers and non-lawyers as well.<sup>174</sup> A good example is the study by the Law Reform Commission of Victoria where lawyers were made to read counterpart versions of the same legislation, one in plain language and the other in traditional language, the time taken to understand the plain language version was between one-third to one-half less than the time taken to understand the traditional version.<sup>175</sup> Another example is the 1980 study by Document Design Center of the American Institute for Research in Washington where a plain language version of administrative rule was found to be quicker to work with than the original rule when those who used it to answer a set of questions did 102% better and finished in more than half the time it

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<sup>172</sup> Xanthaki (n74)13.

<sup>173</sup> Plain Language.gov<<http://www.plainlanguage.gov/whyPL/benefits/>> accessed25/07/16.

<sup>174</sup> Butt (n166)31.

<sup>175</sup> *ibid*; Butt (n67)108; Asprey (n27)38-39; Kimble (n3)63; lawfoundation.net (n165)6.

took those who used the original version.<sup>176</sup>

Lastly, judges prefer plain language. Research conducted in this area<sup>177</sup> shows that legislation in traditional language is usually unclear and difficult to understand by judges. For example, As far back as 1975 when the Renton report was published, it included 10 pages of cases from the 1950s-1960s where judges had found legislation their decisions were supposed to base on, too difficult to understand.<sup>178</sup> In 2007, Justice Openshaw overseeing the trial of 3 alleged ‘cyber-terrorist’ said, “The trouble is I don’t understand the language. I don’t really understand what a website is.” An expert had to explain to the judge such terms as ‘broadband’, ‘dial-up’ and ‘browser’.<sup>179</sup> Indeed, the need for legislation to be made clearer, understandable and more accessible has for long been hammered by judges. In 1983 Lord Diplock said “absence of clarity in legislation is destructive of the rule; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it. There need be no greater motivation for the use of plain language than to strive for clarity in the law for the benefit of all.” Recently, Lord Justice Clarke called for the *Consumer Credit Act* (UK) to be simplified to make it understandable to borrowers it was designed to protect. Even though some conservative judges are not enthusiastic about plain language legislation,<sup>180</sup> a lot of them in UK, US and Australia clearly condemn drafting in convoluted and unclear language.<sup>181</sup>

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<sup>176</sup> Asprey (n34)38-39.

<sup>177</sup> lawfoundation.net (n165).

<sup>178</sup> M Cutts ‘How to make laws easier to read and understand,’ <www.clearest.co.uk >accessed25/07/16.

<sup>179</sup> *ibid*; per Mackinnon LJ’s complain about the *Trade Marks Act 1938* in *Bismag Ltd v Amblins Ltd* (1940)1Ch 667,687.

<sup>180</sup> lawfoundation.net (n187).

<sup>181</sup> *ibid*.

## 5.2 Benefits to Legislators

The legislature is always pressed for time because, as the number and complexity of legislation increases, there is often insufficient time to consider wordings in great detail.<sup>182</sup> Knapp notes, “If parliament is trying to settle both policy and wording at the same time this can lead to unsatisfactory results” It is long established that plain language saves user’s time as legislation in plain language are usually plain, clear and in intelligible language. They are easy for legislators to read and takes less effort for them to understand. Besides, because of the use of explanatory and finding aids and because the structure is logical and follows a chronological order, and arrangement, it is easy for legislators to find their way around the legislation and a great deal of time is saved. No wonder the Australian federal parliamentarians strongly supports the use of readers’ guide and explanatory notes and believe plain language style has made legislation much easier to understand.<sup>183</sup> In contrast, a poorly drafted legislation or one in traditional style waste legislator’s time in debates and perhaps that explains why, in Nigeria, legislators are most willing to let bills pass without proper scrutiny which ends up clogging the statute book and confusing users.

Another point is, plain language exposes errors in drafting<sup>184</sup> whether of syntax or errors in the choice of word.<sup>185</sup> Legislation in traditional language on the other hand, tend to hide inconsistencies and ambiguities as errors are more difficult to find in dense convoluted prose.<sup>186</sup>

When legislation is wordy, excessively long, impersonal, pompous, unclear and dull, it becomes

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<sup>182</sup> V Knapp ‘Law in Practice’ in A Brazier, (ed) *Parliament, Politics and Law Making: Issues and Developments in Legislative Process* (Hansard Society 2004) 101,105.

<sup>183</sup> Barnes (n67) 113.

<sup>184</sup> Xanthaki (n74) 13.

<sup>185</sup> *ibid.*

<sup>186</sup> Butt (166)32; Butt (n67)110.

really difficult for legislators to determine during legislative scrutiny or debate whether words or phrases have been dropped, legal concepts are inappropriately phrased, punctuation are omitted or improperly placed. But errors of this nature are more easily noticed when short sentences, short paragraphs, simple expressions and words with common and everyday meanings are used. So, even when such errors are missed by drafters, legislators can discern them during legislative scrutiny or debate.

### 5.3 Benefits to government

Plain language enhances compliance and the government can benefit from this as government has the responsibility to communicate legislation to its citizens whose rights and duties are embedded in them. Failure of government to communicate legislation effectively put users at some risk and greatly risk non-compliance and the effectiveness of government programme is affected. Indeed, having users comply with legislation is by far, better, cheaper, and less time consuming than having to take action against them for non-compliance. Palfrey opines that government policy translated to legislation in plain language, articulates government's goals more clearly and costs government less because both government officials and the public will be more likely to understand the policy's provisions and import.<sup>187</sup>

Again, legislation in plain language reduces queries and the likelihood of litigation over meaning.<sup>188</sup> As a result, cost is reduced and government would benefit from the reduced cost of complying with legislation and so is the need for interpretation. A case in point is the first plain

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<sup>187</sup> *ibid* 70.

<sup>188</sup> *ibid* 111.

language regulation, an FCC regulation on operating ham radios. Before this regulation was issued, there were five staff taking calls and responding to letters on FCC's requirements for operating ham radios. A few months after FCC regulation was issued, queries from the public dropped that all five staff were transferred to other jobs.<sup>189</sup>This illustrates that plain language, save the government administrative time and cost as government officials as well as judges can focus on other important issues rather answering queries or wasting time on interpretation.<sup>190</sup> Such time and cost can then be dedicated toward more useful ventures.

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<sup>189</sup> Plain Language.gov, (n173).

<sup>190</sup> Wydick (105)4; Asprey (n27)36.

## CHAPTER 6: CONCLUSION

### 6.1 Summary

This dissertation is an attempt to prove that plain language makes legislation clearer, understandable and more accessible and because it does, it should be used in drafting legislation in Nigeria.

The dissertation successfully uses Turnbull's four-fold strategy of planning the draft properly; using well known rules of clear writing; avoiding traditional forms of expression if simpler forms can be used; and using aids to understanding which are not merely linguistic. It is preferred over other styles of plain language because, it does not rely on words alone. It looks beyond the meaning of words used to how they are perceived by users, how the information is organised and presented, the organisation of words in sentences, the sentences in legislation, the design and layout as they all affect readability, understanding and accessibility.

The dissertation looks at plain language from the planning stage noting that if legislation are adequately planned and suitable schemes drawn, most complexities found in Nigerian legislation will be greatly reduced. If plain language is intended, the legislation must be adequately planned, its words carefully chosen, avoiding unnecessary words and legalese, then properly expressed in sentences, paragraphs and structure, using useful devices that will ensure clarity, precision, unambiguity and enhance effectiveness, efficiency and ultimately efficacy.

The dissertation gives a background of the concepts used and considers legislative drafting in Nigeria being the jurisdiction under case study. Then proceeds to look at plain language, the subject matter, and the styles used in making legislation plain, clear and accessible. This, paved way for Turnbull's four-fold strategy thereby laying foundation for the analysis in chapter four which, in fact, is a consideration of plain language styles. It identifies the present drafting style in Nigeria noting other contemporary styles in juxtaposition. Useful devices are adduced in an attempt to prove that plain language does not depend on words alone in making legislation clear, precise and unambiguous and that if these broader principles of plain language drafting are applied in drafting legislation in Nigeria, they will not only make legislation clearer, understandable and accessible but would be of immense benefit to the country.

It was observed that firstly, because of Nigeria's historical connection to UK, a lot of its legislation and drafting styles were inherited from the UK long before plain language was introduced in UK and because those legislation were in traditional style, subsequent drafting continued in the same style even after independence. Secondly, plain language movement, in spite of making much progress all over the world, is yet to be introduced in Nigeria therefore, legislation are still drafted in traditional style which also does not comply with GNL. Thirdly, there is a heavy reliance on precedents which themselves are defective. Fourthly, most of the contemporary explanatory materials, finding aids and useful devices are not in use in Nigeria. Fifthly, that Nigerians do not read legislation because they are inherently difficult so drafting them in plain language will increase the readers list. Lastly, since legislation are hardly ever tested in Nigeria, if plain language is used in drafting, they will be clearer and more accessible.

## 6.2 Recommendation

The following can and should be done to improve this practices as that will have a positive effect on the quality and effectiveness of Nigerian legislation.

- *Allow drafters adequate time to draft without pressure*

Drafters in Nigeria draft under immense time constraint with ‘half-baked instructions’<sup>191</sup> though this is a common drafting problem<sup>192</sup> more because, time frame for settling legislative programme is short and there is often pressure on both the ministry responsible and the drafter to produce a draft. The drafter is allowed little or no time to properly understand and analyse drafting instruction, plan the draft, or subject it to proper scrutiny and testing. The end result is the use of lay drafts and over dependence on precedence. Drafting in plain language requires skills. It is not something that comes easily or naturally. It requires the ability to think clearly and absorb the most complicated subject matters and present information in a way that is clear and accessible to users. The end product may seem easy to write, the reality is that, it is much more difficult to simplify than to complicate when drafting. In Kimble’s words “writing simply and directly only looks easy. It takes skills and work and fair time to compose.”

- *Plain Language movement should be intensified and its principles introduced in legislation.*

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<sup>191</sup> Krongold (n28)501.

<sup>192</sup> Elliott (n96); Kimble (n3)81.

Plain language movement all over the world is being intensified and in some places, it has evolved to become a product, a business, an industry, or a professional service.<sup>193</sup> Presently, very little is being done about plain language in Nigeria. In contrast, plain language movements in US, UK, Australia, Canada, New Zealand, Sweden and South Africa, are very success and more is still being done on daily basis to improve the clarity and accessibility of legislation. Indeed, there is the need to reposition plain language in the eyes of government, legislators, decision makers, law firms, law faculties and law schools to show them that with plain language, legislation will satisfy and delight a wider range of users. A radical approach may be required to bring this into fruition. The legislature can even legislate to entrench it in the system as other jurisdictions have done.<sup>194</sup> This will indeed assist legal profession in Nigeria to overcome its present justifiable inertia. This ‘solid jolt’<sup>195</sup> will certainly make Faculties of Law, Nigerian Law School, Nigerian Bar Association and other legal bodies to initiate and organise effective action to improve the clarity of legislation.

Indeed, just paying a little more attention to styles used in drafting and designing legislation will make them clearer. Some of the plain language styles that should be given more attention include, first, front loading legislation, in other words, information key to the subject matter and important to users should come first before less important ones.<sup>196</sup> This allows users to meet important materials up-front and does aid accessibility.<sup>197</sup> Asprey notes that “it is important to set out the substantive provisions of the law preferably from the onset or beginning, so that they

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<sup>193</sup> ‘Plain Language: Beyond a ‘movement’ Repositioning clear communication in the minds of decision-makers’ <http://www.plainlanguage.gov/whatisPL/definition/balmford.cfm2>.

<sup>194</sup> See *Plain Writing Act 2010* (US).

<sup>195</sup> R Dickerson ‘Should Plain Language be Legislated?’

<http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=3142&context=facpub><accessed12/08/16.

<sup>196</sup> H Thring *Practical Legislation* (2<sup>nd</sup>edn, John Murray, 1902)29; Butts (n76)130.

<sup>197</sup> C Hand, ‘Drafting with the user in mind-a look at legislation in 1982-83’ (1983) SLR 166,167.

should not be hidden among administrative and procedural aspects of law. Organizing draft in that manner necessitates drafters looking at things from user's perspective."<sup>198</sup> An aspect of this was used in the *National Assembly Service Act 2014* making the legislation more accessible. Secondly, using short sections to increase the use of section headings and using subsection headings. This is necessary because section headings as is used does not cover all the matters that fall within the sections they are attached.<sup>199</sup> Thirdly, using questions in section headings will enhance accessibility and usability of legislation because, users who go to legislation with questions in mind will find the same questions as section headings and answers to their questions in the sections.<sup>200</sup> Fourthly, placing definition at the beginning of the legislation rather than the end as is practiced will be more visible to user's and easier to find.<sup>201</sup>

- Adopt GNL

GNL, a tool for accuracy, promotes gender specificity, alleviates criticisms associated with legal language as being sexist, and eliminates the incomprehensible and verbose language that plague much legislation in various jurisdiction.<sup>202</sup> GNL should be used in Nigeria because sexist language offends sensitivities of many.<sup>203</sup> Legislation should treat everybody equally without sacrificing clarity, precision or unambiguity for simplicity, elegance or eloquence.<sup>204</sup> As Khadija notes, if the tool to achieve this is by using GNL, then it must be used. It is better to be inelegant than uncertain.<sup>205</sup>

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<sup>198</sup> Asprey (n27)92-95; Butt (n67)129.

<sup>199</sup> FAR Bennion, *Statute Law* (2<sup>nd</sup> rev. edn Oyez Longman 1983)48.

<sup>200</sup> Krongold (n28)495,501,502,511; D Elliott (n151)18.

<sup>201</sup> Turnbull (n59)161.

<sup>202</sup> K Kabba 'Gender-Neutral Language an Essential Language Tool to Serve Precision, Clarity and Unambiguity' in Xanthaki (n15)54.

<sup>203</sup> Xanthaki (n16)80.

<sup>204</sup> Kabba (n202)56

<sup>205</sup> *ibid*

- *Consistency in the use of section headings*

Section headings should be accurate. The practice in Nigeria where both *shoulder notes* and *marginal notes* are used interchangeably, confuses users therefore, a style that is more certain, and consistent should be adopted. Shoulder notes should be preferred because *marginal notes* are dying from practice,<sup>206</sup> they are more accessible since they are usually in bold print and more visible and users come in contact with them first before the section, allowing users to have a general idea of contents of sections before reading.<sup>207</sup>

- *Plain language rewrite*

Rewrite projects should be undertaken to redraft legislation in traditional style in plain language. Most jurisdiction have embarked on such project for example, the UK tax law rewrite which has been ongoing since 1996 and has produced some legislation.<sup>208</sup> Canada worked on their *Employment Insurance Act*.<sup>209</sup> Similar projects are handled in Australia, New Zealand, Sweden, and US.<sup>210</sup> However, in undertaking such projects, non-drafters who will produce legislation that lack precision should be avoided. Experts used should work with drafters of the original legislation and consult widely in order to reduce inconsistencies. This will also check the possibility of a repeat of Cutt's *Clearer Timeshare Act* rewrite experience which was criticised by the original drafter of the *Timeshare Act 1992* for altering the meaning of the original Act.<sup>211</sup>

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<sup>206</sup> Xanthaki (16)218.

<sup>207</sup> G Wright 'Marginal Notes-the bare fact' <<http://ilaws.com.au/cms/images/marginal.pdf>> accessed 13/04/16.

<sup>208</sup> Some of the laws that have been passed include: the *Capital Allowances Act 2001* (C.2), *Income Tax (Earnings and Pensions) Act 2003* (C.1) and *Income Tax (Trading and other Income) Act 2005* (C.5). See Plain Language and Legislation- Office of the Scottish parliamentary counsel.

<sup>209</sup> Sullivan (n1)128.

<sup>210</sup> Kimble (n3)56-59.

<sup>211</sup> Sutherland (n20)163.

- *Using intelligent tools*

Computer aid consistency and serves as research machinery because of its accuracy, speed, storage, diligence, versatility and endurance. Having a data base system in the drafting office with all the necessary intelligent tools will save time, enhance productivity and encourage professionalism. The changes recorded in drafting all over the world are due to introduction of intelligent tools in legislative drafting. Now, preparation of bill is faster and drafting is better than before. Although, countries like Netherland, Belgium, Canada, Australia, US and UK are more advanced, having developed software that assist drafting, many others, Nigeria inclusive, are still lagging behind. We are in technology era and it should be used in the legislative drafting process to improve efficiency.<sup>212</sup>

- *Testing of legislation*

Drafting is done under immense pressure and time constraint so testing is luxury that cannot be afforded. Besides, testing of legislation is expensive and always not budgeted for. Plain language recommend testing whenever possible<sup>213</sup> as any kind of testing is better than none and no matter how expensive, it will pay for itself many times over.<sup>214</sup> Kimble Notes, “Even a very modest program of spot-testing would have the great virtue for allowing for self-evaluation.”

### 6.3 Conclusion

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<sup>212</sup> Kimble (n3)81.

<sup>213</sup> *ibid* 68; Barnes (n67) 116.

<sup>214</sup> Kimble (n3)81.

Legislative drafting is not an easy task as it entails translate policy into legislation in words that can easily be understood and accessible to lawyers and non-lawyers. That is why drafters cannot rely only on words but must employ every possible device to breach this gap in communication. Plain language involves much more than plain words and short sentences. It makes words clearer, employs the use of explanatory materials to give ideas, finding aids to guide users, diagrams to convey meanings, and intelligent tools to enhance the drafter's work. A combined use of these devises in legislative drafting in Nigeria will definitely make legislation clearer, understandable and more accessible. Indeed, the hypothesis is proved as the case for using plain language is overwhelming. It is as precise as the traditional style and by far easier to read and understand<sup>215</sup> and its benefits greatly outweigh any pitfall that lie in the path of its adoption.<sup>216</sup>

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<sup>215</sup> Turnbull (n20) 259.

<sup>216</sup> Butt (n166)32.

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